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Challenges of Protecting Constitutional and Human Rights Against Anti-Terrorism Legislation (Comparative Study between The British and The Egyptian Regimes)

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Under the supervision of Professor Aileen Kavanagh

DECLARATION

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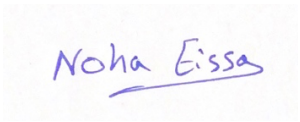
Signature: 

SUMMARY

The aim of this thesis is to compare, contrast and analyze the tension between freedom of expression and national security in the United Kingdom (the "UK") and Egypt. In particular, it examines the ways in which the UK and Egypt strike a balance between freedom of expression and national security in counter-terrorism law, specifically in relation to encouragement, incitement and glorification of terrorism. My central research question is: how can we respect freedom of expression, whilst ensuring that we also protect national security? In short, how can we protect rights whilst effectively countering terrorism?

The thesis adopts a comparative methodology to examine two regimes which have different legal systems and are at different stages of democratic development. The UK is a common law system and an established democracy, while Egypt is a civil law country in transition from tyranny to democracy. I am seeking to identify the issues facing each regime based on the scale and nature of the risks threatening it.

I aim to articulate the best approaches for balancing freedom of expression and national security based on constitutional law principles, i.e. the rule of law, the separation of powers and judicial review. I have delved into the study of constitutional law principles in pursuit of clear definitions of the boundaries limiting the distribution of powers between the branches of the state. I argue that one way of maintaining the rule of law while countering terrorism is to provide strong mechanisms of horizontal accountability within the state.[1] 'Horizontal accountability (…) refers to the capacity of state institutions to check abuses by other public agencies and branches of government'.[2] In this thesis, I outline legitimate ways

[1] On horizontal accountability, see Larry Diamond, Marc F. Plattner and Andreas Schedler, 'introduction' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 3; Christopher G. Reddick, Tansu Demir, and Bruce Perlman, 'Horizontal, Vertical, and Hybrid: An Empirical Look at the Forms of Accountability' (2020) 52(9) Administration & Society 1416-18; Thomas Schillemans, 'Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies' (2011) 43(4) Administration & Society 390; Chales D. Kenney, 'Horizontal Accountability: Concepts and Conflicts' in Scott Mainwaring and Christopher Welna, *Democratic Accountability in Latin America* (Oxford University Press 2003) 55-68.

[2] Larry Diamond, Marc F. Plattner and Andreas Schedler, 'introduction' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 3.

of balancing liberty and security, as appropriate to both a developed democracy like the UK and a country in transition to democracy like Egypt.

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To the soul of my dear grand-fathers and grand-mothers

Zakaria Abdelsalam, Fathy Farahat,

Halima Ismail and Soad Khattab

LIST OF ABBREVIATIONS

African Charter	African Charter on Human and People's Rights
African Commission	African Commission on Human and People's Rights
African Court	African Court on Human and Peoples' Rights
African Protocol	Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights
Anti-Terrorism Law	The Egyptian Anti-Terrorism Law no. 94 of 2015
Arab Charter	Arab Charter of Human Rights of 2004
Arab Convention	Arab Convention on The Suppression of Terrorism of 1998
Arab Court	Arab Human Rights Court
ATCSA	The UK Anti-Terrorism, Crime and Security Act 2001
CAJ	The Egyptian Court of Administrative Judiciary
CC	The Egyptian Court of Cassation
CECPT	Council of Europe Convention on the Prevention of Terrorism
CHRLA	Center for Human Rights Legal Aid
CONTEST	The United Kingdom's Strategy for Countering Terrorism
CRA 2005	The UK Constitutional Reform Act 2005
Criminal Code	The Egyptian Criminal Law no. 97 of 1992
CSOs	Civil society organizations
CTC	The United Nations Counter-Terrorism Committee
ECHR	European Convention on Human rights
ECtHR	European Court of Human Rights
Emergency Law	The Egyptian Emergency Law no. 162 of 1985

EIJ	Egyptian Islamic Jihad Group
EU	European Union
FJP	Freedom and Justice Party
FOIA	The UK Freedom of Information Act 2000
HAC	The UK Home Affairs Committee
HRA	The UK Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
IG	Islamic Group or Al-Jama'a Al-Islamiyya
Internal Regulations	The Egyptian Internal Regulations of the House of Representatives
ISC	The UK Intelligence and Security Committee
JCHR	The UK Joint Committee on Human Rights
Law 70	The Egyptian Law no. 70 of 2017 in relation to Civil Society Organizations
Law 84	The Egyptian Law no. 84 of 2000 in relation to Civil Society Organizations
Law 149	The Egyptian Law no. 149 of 2019 in relation to Civil Society Organizations
Law 153	The Egyptian Law no. 153 of 1999 in relation to Civil Society Organizations
MB	Muslim Brotherhood Group
MoJ	The Egyptian Ministry of Justice
NDP	The Egyptian National Democratic Party
NGOs	Non-governmental organizations
NSC	The Egyptian National Security Council

Penal Code	The Egyptian Penal Code no. 58 of 1937
PKK	Kurdistan Workers' Party
Press Law	The Egyptian Press Law no. 180 of 2018
PTA	The UK Prevention of Terrorism Act 2005
SCAF	The Egyptian Supreme Council of the Armed Forces
SCC	The Egyptian Supreme Constitutional Court
SCCT	The Egyptian Supreme Council for Countering Terrorism and Extremism
SCMR	The Egyptian Supreme Council for Media Regulation
SJC	The Egyptian Supreme Judicial Council
SSA	The UK Security Service Act 1989
SSCHR	The Egyptian Supreme Standing Committee for Human Rights
TA 2000	The UK Terrorism Act 2000
TA 2006	The UK Terrorism Act 2006
TERR	The European Union Special Committee on Terrorism
TPIMs	The UK Terrorism Prevention and Investigation Measures
UMS	United Media Services Company
UNHRC	The United Nations Human Rights Committee
UPR	The United Nations Universal Periodic Review

TABLE OF CONTENTS

DECLARATION……..……1

SUMMARY……..……..……...2

ACKNOWLEDGEMENTS……....……..…….…..4

LIST OF ABBREVIATIONS……..…….…...6

TABLE OF CONTENTS……...……..9

1. CHAPTER ONE: INTRODUCTION…….…..…….….14

1.1. Introduction……...…..14

1.2. Overview and Chapter Outline……..……...……..…..…18

1.3. Methodology……..……...……...…22

2. CHAPTER TWO: CRIMINALIZING ENCOURAGEMENT AND INCITEMENT OF TERRORISM AND ITS EFFECT ON FREEDOM OF EXPRESSION IN THE UK……..……..……31

2.1. Introduction……...……..31

2.2. The General Framework for The Limitation of Freedom of Expression……35

2.2.1. First condition: the restriction must be ‘prescribed by law’…….....36

2.2.2. Second condition: the restriction must have a 'legitimate aim'…….38

2.2.3. Third condition: the restriction must be 'necessary in a democratic society'……...……39

2.3. Encouragement of Terrorism…….……..48

2.3.1. Definition of terrorism…….……...…48

2.3.2. Encouragement of terrorism in the Terrorism Act 2006……53

2.3.3. Glorification of terrorism as example of indirect encouragement of terrorism……...……..……...…….57

2.3.4. Differentiation between encouragement, glorification, and incitement of terrorism……..……..59

2.3.5. The government's direction towards preventive counter-terrorism policy and the issuance of the CONTEST strategy……..……..60

2.4. Assessment of The Encouragement and Glorification of Terrorism Offences in The Context of Protection of Freedom of Expression……...62

2.4.1. Are the offences prescribed by law?.....62

2.4.2. Do the offences have legitimate aim?.....66

2.4.3. Are the offences necessary in a democratic society?.....66

2.5. Conclusion……...……...…73

3. CHAPTER THREE: CRIMINALIZING ENCOURAGEMENT AND INCITEMENT OF TERRORISM AND ITS EFFECT ON FREEDOM OF EXPRESSION IN EGYPT……..……...……...…76

3.1. Introduction……...…...……...……76

3.2. Historical Background of The Egyptian Constitutions…….....78

3.2.1. The Arab Spring in Egypt (25th of January 2011)……..……80

3.2.2. The revolution of the 30th of June 2013……...……...88

3.2.3. The Constitution of 2014……..…...……...91

3.3. Protection of Freedom of Expression in The Egyptian Regime……..98

3.4. Encouragement and Incitement of Terrorism under The Anti-Terrorism Law……..……...101

3.4.1. Encouragement and incitement of terrorism….…….…..102

3.4.2. Opposing arguments in relation to the Anti-Terrorism Law…….……..108

3.5. Egypt's Efforts to Protect Freedom of Expression in Light of The Anti-Terrorism Law……112

3.6. Conclusion……..…….....114

4. CHAPTER FOUR: NATIONAL SECURITY AND FUNDAMENTAL CONSTITUTIONAL LAW PRINCIPLES IN THE UNITED KINGDOM AND EGYPT……...…….116

4.1. Introduction……...…116

4.2. What Does National Security Mean?.....117

4.2.1. National security in the UK……..……122

4.2.2. National security in Egypt……..……...125

4.3. Constitutional Law Principles……...……130

4.3.1. The rule of law…….……130

4.3.2. Separation of powers……..…….....137

4.3.3. Judicial review…….…….……147

4.3.4. Case study from the UK on the controversy of state secrecy in national security cases……..……160

4.4. Conclusion……...…..…...164

5. CHAPTER FIVE: HORIZONTAL ACCOUNTABILITY ARCHITECTURE IN THE UNITED KINGDOM……...…….166

5.1. Introduction……...……166

5.2. Horizontal Accountability…….167

5.3. Parliament……...……...…….……..169

5.3.1. Intelligence and Security Committee (ISC)……..……171

5.3.2. Joint Committee on Human Rights (JCHR)……..……173

5.4. Courts……176

5.5. International Community and International Organizations……..…184

5.5.1. European Union (EU)…….……...…184

5.5.2. The European Court of Human Rights (ECtHR)……..185

5.5.3. UN Universal Periodic Review (UPR)……..…191

5.5.4. UN Special Rapporteur…….……192

5.5.5. UN Counter-Terrorism Committee (CTC)……..…....193

5.6. Independent Terror 'Watchdogs'……..….194

5.6.1. The Independent Reviewer…….……..194

5.6.2. Media…….……...…199

5.6.3. Public Inquiries…….…...…….201

5.7. Conclusion……...…….....202

6. CHAPTER SIX: HORIZONTAL ACCOUNTABILITY ARCHITECTURE IN EGYPT……....204

6.1. Introduction……...……204

6.2. The Judiciary……...……..205

6.3. The Military……...……220

6.4. The Parliament……...……...224

6.5. Political Parties…….…...……..226

6.6. Civil Society and Non-Governmental Organizations……....229

6.7. Media…….……...…….…236

6.8. International Organizations and International Community……...…241

6.9. Conclusion……...……..……...246

7. CHAPTER SEVEN: COMPARATIVE CONCLUSIONS……...……..249

7.1. Introduction……...……249

7.2. Judicial Influence in the UK and Egypt……..……251

7.3. The Comparative Advantage of a Parliamentary Human Rights Committee……..259

7.4. The Independent Reviewer of Counter-Terrorism Legislation……..266

7.5. Galvanizing the Influence of International Law…….....268

7.6. Deradicalization and Rehabilitation of Terrorists…….....280

7.7. Proposals for Law Reform…….285

7.8. Conclusion……..…….....291

BIBLIOGRAPHY……..……..….295

CHAPTER ONE

INTRODUCTION

1.1. Introduction

Freedom of expression is fundamentally important in any democratic society.[3] Protecting freedom of expression is required to create a safe environment for everybody to express themselves in political, religious, cultural and other matters. Freedom of expression should be guaranteed to all, including unpopular minorities and opposition groups critical of the government.[4] However, freedom of expression is not an absolute right, given that its effect not only extends to the speaker, but also to the whole community. As a qualified right, it can be restricted to avoid harming others or harming the society.[5]

The balance between human rights and national security is a recurring problem at both national and international levels. Counter-terrorism measures put pressure on human rights. Accordingly, the issue of balancing between human rights and national security grabs global attention. Fiona De Londras observed that the language used in the UN Security Council counter-terrorism resolutions gradually became more decisive in committing states to respect human rights while fighting terrorism.[6] Initially, the UN Security Council resolutions in relation to counter-terrorism measures used softer language. For example, in 2001 the resolution no. 1373 provided that the measures taken by states should be 'in conformity with (…) international standards of human rights'.[7] While in 2005, the language used in the resolution no. 1624 was more straightforward which provided that the measures taken by states should 'comply with all of their obligations under (…) international human

[3] David Harris and others, *Law of The European Convention on Human Rights* (4th edn, Oxford University Press 2018) 592.
[4] ibid.
[5] Case no 44 of 7 J (Egyptian Supreme Constitutional Court).
[6] Fiona De Londras, *The Practice and Problems of Transnational Counterterrorism* (Cambridge University Press 2022) 83-84.
[7] Security Council Resolution 1373 (2001) para 3(f).

rights law'.[8] The latter resolution was issued in relation to criminalizing incitement of terrorism. Despite the UN Security Council's calls to respect human rights, its guidelines are usually characterized by generality with no sufficient guidance on practical mechanism to guarantee the respect of human rights in such instances.[9]

Since the events of 11th of September, the UK's approach towards terrorism has taken new shape. The new era of counter-terrorism in the UK has intensified the use of force, while broadening police powers and relying on preventative measures.[10] This includes the introduction of new inchoate offences and expanded security measures against terrorist suspects.[11] The emergence of the offence of encouragement of terrorism is a product of such preventative policy, which in turn imposes risks on human rights, especially freedom of expression.[12] The trend of trying to prevent terrorism in new and robust ways is not exclusive in the UK. It has been a global concern for most of the countries and international organizations.[13] In this sense, the response of the Arab states, including Egypt, to the growing terrorist threat coincides with that of western countries.[14] Therefore, this approach necessarily raises a concern about potential abuse of power by governments in the fight against terrorism. As Kent Roach and others have argued, '[t]he intensity of the global concern about terrorism is matched by the complexity of devising a proportionate response to it'.[15]

It is worth emphasizing that the primary focus of this thesis is the Egyptian case study. While the comparative analysis of the UK's counter-terrorism policies is used as a reference point. I claim that Egypt is in a state of 'transitional constitutionalism' since the

[8] Security Council Resolution 1624 (2005) para 4.
[9] Londras (n 6) 83-84.
[10] Helen Fenwick, 'Editorial: Counter-terror strategies, human rights and the roles of technology' (2011) 25(3) International Review of Law, Computers & Technology 107.
[11] ibid 107.
[12] ibid 108.
[13] Kent Roach and others, 'Introduction' in Victor V. Ramraj, Michael Hor, Kent Roach, and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press. 2012) 1.
[14] Lynn Welchman, 'Anti-Terrorism Law and Policy in Arab States' in Victor V. Ramraj, Michael Hor, Kent Roach, and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press. 2012) 628.
[15] Roach and others (n 13) 1.

Arab Spring revolution in 2011.[16] Egypt has been undergoing transitional political transformation, which is moving towards, but has not yet achieved, full liberal democracy.[17] One of the biggest challenges to Egypt's transition is its fight against terrorism and restoring its security and stability.[18]Fighting terrorism while protecting rights is a challenging task in any country which respects the rule of law and constitutional separation of powers.[19] The rule of law requires that the security forces must also abide by laws which protect rights and liberties.[20] The Executive is also subject to the rule of law and to the supervision of other branches of the government. Moreover, judicial review by an independent judiciary is a fundamental tool for the adherence to the rule of law.[21] However, judges must not exceed their power in reviewing primary decisions of the Executive. They must remain cognizant of the extent of discretionary power granted to the Executive and respect the separation of powers principle. Accordingly, judges sometimes defer to the Executive on the grounds that they lack the expertise to second-guess governmental decisions.[22] In the UK and many other jurisdictions, judges use the principle of proportionality to strike an appropriate balance between public interest and individual interest.[23] In national security cases, judges are faced with an additional difficulty which is secrecy and confidentiality of classified information in relation to threats to national security. This also affects the rule of open justice which is essential in democracies to guarantee transparency and respect the right of the people and the media to know.[24]

In this thesis, I argue that one way of maintaining the rule of law while countering

[16] Catherine Turner, 'Transitional Constitutionalism and The Case of The Arab Spring' (2015) 64(2) The International and Comparative Law Quarterly 269-70.
[17] ibid 269-70.
[18] Antoni Abat i Ninet and Mark Tushnet, *The Arab Spring: An Essay on Revolution and Constitutionalism* (Edward Elgar Publishing 2015) 244; Maria Cristina Paciello, 'Egypt: Changes and Challenges of Political Transition' (2011) MEDPRO Technical Paper 16.
[19] Todd Landman, 'Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism' (2007) 38(1) California Western International Law Journal 85-86.
[20] A. W. Bradley, K. D. Ewing and C. J. S. Knight, *Constitutional law* (16th edn, Pearson Education Limited 2015) 77.
[21] ibid 88-89.
[22] Aileen Kavanagh, *Constitutional Review Under The UK Human Rights Act* (Cambridge University Press 2009) 168-70.
[23] Lucia Zedner, 'Ends and Means: Why Effective Counter-Terrorism Requires Respect for Proportionality and Rights' in Emmanouil Billis, Nandor Knust and Jon Petter Rui (eds), *Proportionality in Crime Control and Criminal Justice* (Bloomsbury Publishing 2022) 139.
[24] ibid 139-140

terrorism is providing strong mechanisms of horizontal accountability within the state.[25] 'Horizontal accountability (…) refers to the capacity of state institutions to check abuses by other public agencies and branches of government'.[26] An effective system of accountability encompasses both political and legal modes of accountability working in tandem.[27] It rests on the assumption that 'all departments of the state, the government, Parliament and the courts have a shared responsibility to uphold the rule of law'.[28] In addition, the government can also be held accountable by other non-state actors like international organizations, international courts, media, civil society, independent bodies and non-governmental organizations. Recently, the institutions carrying out this kind of oversight and accountability have been regarded by some scholars as representing a 'fourth branch' of government.[29]

Notwithstanding the exploration of accountability tools like civil society or political parties, the thesis retains its legal scope without delving into the realm of political science which is out of scope of this thesis. My research adopts a narrow viewpoint on accountability institutions, but it does not develop 'whole-of-society' dimensions of horizontal accountability, which are excluded from the scope of this thesis. The legal nature of this analysis does not allow for broad considerations about the structure of civil society, the social and cultural role of political parties, or the sociological foundations of mass movements. Rather, it is concerned more with accountability as a tool for limitation of powers of the government from constitutional law perspective and the institutions capable

[25] On horizontal accountability, see Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 3; Christopher G. Reddick, Tansu Demir, and Bruce Perlman, 'Horizontal, Vertical, and Hybrid: An Empirical Look at the Forms of Accountability' (2020) 52(9) Administration & Society 1416-18; Thomas Schillemans, 'Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies' (2011) 43(4) Administration & Society 390; Chales D. Kenney, 'Horizontal Accountability: Concepts and Conflicts' in Scott Mainwaring and Christopher Welna, *Democratic Accountability in Latin America* (Oxford University Press 2003) 55-68.
[26] Larry Diamond, Marc F. Plattner and Andreas Schedler, 'introduction' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 3.
[27] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023) 57.
[28] Murray Hunt, 'The Joint Committee on Human Rights' in Alexandre Horne, Gavin Drewry, and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013) 249.
[29] Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press 2021); Tarunabh Khaitan, 'Guarantor Institutions' (2021) 16(1) Asian Journal of Comparative Law 40-59; Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21(1) Review of Constitutional Studies 85-113.

of holding the government accountable. The thesis inspects the accountability issue through legal lens while focusing on the field of comparative counter-terrorism legal regulations.

1.2. Overview and Chapter Outline

The thesis is divided into seven chapters. Each chapter is designed to take the reader through one of the dimensions of the research problem and analyse it thoroughly, while highlighting its relevance to other chapters. The research problem has three dimensions: (i) freedom of expression; (ii) counter-terrorism measures, focusing on speech offences, like encouragement, glorification and incitement of terrorism; and (iii) national security. As previously mentioned, the research is concerned with the issue of balancing between protection of freedom of expression and protection of national security through counter-terrorism measures. It revolves around the inquiry into the best practices for achieving such balance. On the journey towards answering this question, I have examined relevant constitutional law principles in pursuit of clear definitions of the boundaries limiting the distribution of powers, rights and responsibilities between the branches of government and the people.

In this introductory chapter, I provide a general overview of the thesis topic. I outline the structure of the thesis and provide brief insights on each chapter. Chapter two examines the right of freedom of expression in the UK's law. It examines the UK's Human Rights Act 1998 (the "**HRA**"), in particular, the qualified right of freedom of expression as guaranteed in article 10 of the European Convention on Human rights (the "**ECHR**" or "**Convention**"). In this context, I outline the case-law of the European Court of Human Rights (the "**ECtHR**") on the application of the required conditions for restriction of freedom of expression, including its employment of the proportionality test and the margin of appreciation. I also examine speech offences like encouragement of terrorism in the UK's

law. I survey the controversial debates surrounding the criminalization of these offences. I explain the background behind the preventive approach followed by the UK's government, which clarifies the purpose behind criminalizing inchoate offences and launching the UK's counter-terrorism CONTEST strategy. I also investigate the compatibility of the provisions criminalizing speech offences with the HRA. In addition, I shed light on the areas of malfunction in counter-terrorism laws.

Chapter three shifts the focus to Egypt. The chapter provides background on the development of the Egyptian Constitution since the regime of former President Hosni Mubarak. It highlights the historical pinpoints in the recent history in Egypt which affected the constitutional structure of the Egyptian regime. The chapter summarizes the rules governing freedom of expression in Egypt, in accordance with the Egyptian Constitution and other international treaties and conventions to which Egypt is a party. The chapter moves on to examine the regulation of speech offences under the Egyptian Anti-Terrorism Law no. 94 of 2015 (as amended) (the "**Anti-Terrorism Law**"). I illustrate the opposing arguments in relation to the negative effect imposed on freedom of expression by the provisions of the Egyptian Anti-Terrorism Law. I conclude by showing that the Egyptian government attempts to strike a balance between freedom of expression and countering terrorism. Lastly, I demonstrate Egypt's desire to develop this area and its growing care of protection and respect of human rights and liberties.

After examining the limits of protection of freedom of expression in both jurisdictions - and highlighting the chilling effect of criminalizing encouragement of terrorism - chapter four turns to the third dimension of the research problem. Chapter four is concerned with national security in both the UK and Egypt. This chapter lays down different definitions of national security and shows the expansion of its meaning through history. It attempts to sort out how the term 'national security' is perceived in each

jurisdiction, given that its meaning is dependent on the threats facing each nation. It also highlights the role of public law principles in regulating the government's conduct, especially in terms of national security matters. It demonstrates the importance of deploying public law principles to control and prevent the government from unduly justifying human rights breaches under the broad objective of protection of national security. Public law principles discussed in this chapter include the rule of law, separation of powers, and judicial review. During the course of analyzing these significant concepts, the chapter investigates the dynamics of judicial deference, highlighting the way in which national security poses challenges to judicial decision-making.

At this stage of research, I draw the conclusion that striking a balance will ultimately be a product of heightened inter-institutional horizontal accountability. Accordingly, chapter five is dedicated for assessing accountability tools available in the UK for scrutinizing the government's conduct. The accountability institutions studied under this chapter are: (i) the UK Parliament, focusing on relevant parliamentary committees (i.e. the UK Intelligence and Security Committee (the "**ISC**") and the UK Joint Committee on Human Rights (the "**JCHR**")); (ii) the UK courts; (iii) international institutions and organizations, like the European Union, the ECtHR, the UN Universal Periodic Review (the "**UPR**"), the UN Special Rapporteur, and the UN Counter-Terrorism Committee (the "**CTC**"); and (iv) independent 'watchdogs', including the UK Independent Reviewer of Counter-Terrorism Legislation, the media, and UK Public Inquiries. The chapter concludes by putting these accountability tools in descending order showing the most influential institutions to the least and analyzing the points of strengths and weaknesses of each.

Chapter six examines accountability tools available in Egypt. Due to the differences between the UK and Egypt, accountability tools examined in Egypt do not necessarily reflect those covered in the UK. The choice of accountability institutions in each jurisdiction

depends on relevance and influence of these institutions in practice in each jurisdiction. Some influential institutions in one jurisdiction might not necessarily have influence in the other jurisdiction, like for example, the role of the military in Egypt. Accordingly, the institutions studied in the Egyptian jurisdiction are: (i) the judiciary, with special focus on the Egyptian Supreme Constitutional Court (the "**SCC**"); (ii) the military; (iii) the Parliament; (iv) political parties; (v) civil society and non-governmental organizations; (vi) the media; and (vii) international organizations and international community. Both chapters five and six connect the concept of horizontal accountability with the overarching aim of the research. More precisely, they investigate and analyze the effect of horizontal accountability in balancing between protection of freedom of expression and protection of national security through counter-terrorism measures.

The concluding chapter draws the strands of analysis together, drawing out the key lessons gleaned from the in-depth comparative analysis provided in the previous chapters. This chapter underlines the key takeaways from the comparison between the UK and Egypt along with highlighting the pros and cons of each system. In doing so, I reflect on the anticipated inspirational role of the UK to Egypt which initially motivated my idea of such comparison. Accordingly, I introduce recommendations to follow the UK's practice in relation to the UK JCHR and the UK Independent Reviewer of Counter-Terrorism Legislation. I propose some modifications to tailor these mechanisms to fit the Egyptian system and to avoid defects of these mechanisms which have been discovered by practice in the UK. Finally, I conduct a comparison between the ECtHR, the African Court on Human and Peoples' Rights (the "**African Court**") and the Arab Human Rights Court (the "**Arab Court**"). The aim of this comparison is to highlight the factors which contributed to the success of the ECtHR but are missing in either the African Court or the Arab Court. In addition to suggesting how the latter courts could be empowered to undertake similar

accountability role of the ECtHR. Subsequently, I present Egypt's achievements in the field of deradicalization of terrorists, which could be helpful to the UK. I propose establishing a cooperation protocol between the UK and Egypt in this area. Finally, I recommend some enhancements of counter-terrorism laws in each jurisdiction, tempered by the need to ensure that freedom of expression is protected and upheld.

1.3. Methodology

Traditionally, comparative law involves comparing two or more legal systems in a context where 'understanding is deepened by differentiation'.[30] Studying constitutional law in one system while reflecting on another system by way of comparison helps us to better understand our own system, as well as that of another jurisdiction.[31] However, whilst comparison can aid understanding, comparative scholars must be cautious not to presume that legal norms or structures can be readily 'transplanted' from one system into another without giving due care and attention to the cultural and historical differences between jurisdictions – differences which might render the 'transplantation' ineffective or even counterproductive.[32]

In this thesis, I have chosen to engage in a comparative analysis of two jurisdictions: the UK and Egypt. This focused two-country comparison enables me to provide an in-depth analysis of both jurisdictions. As Kim Lane Scheppele observed, sometimes 'knowing more about fewer cases tends to be more valuable than knowing less about more cases'.[33] Given that the UK was a completely new system for me, I needed to absorb and study thoroughly. In this comparative analysis, I focus on the aspects of development in the UK counter-terrorism policy and legal regulations, which could be useful if adopted in Egypt. These

[30] Aileen Kavanagh, 'Keeping it real in constitutional theory' (2023) 1(2) Comparative Constitutional Studies 263.
[31] Jaakko Husa, 'Comparative methodology and constitutional change' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020) 30.
[32] Kavanagh, 'Keeping it real in constitutional theory' (n 30) 264.
[33] Kim Lane Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38(3) Law and Society Review 401.

aspects are mainly accountability bodies which proved to be successful in the UK, like, the Independent Reviewer of Counter-Terrorism Legislation and the JCHR. I also shed light on the role of the judiciary in scrutinizing the government and the different impact inflicted by the judiciary in each of the UK and Egypt, given the distinct system of government of each state. In addition, I study international human rights bodies focusing on the influence of the ECtHR in the UK while reflecting on the drawbacks of similar international courts like the African Court and the Arab Court.

Choosing these two jurisdictions might initially sound strange, given that the two countries have many differences. However, there are good justifications for making such a choice. Some of the reasons are subjective and others are objective as follows: (i) being an Egyptian justifies why I chose Egypt as I already have an in-depth knowledge of the legal system which I can build on; (ii) the language was another barrier which minimised the choices available for me given that I can speak Arabic and English only and, accordingly, I started thinking about the UK; (iii) as an Egyptian lawyer, I wanted to study counter-terrorism law comparatively to see if I could gain insight from other jurisdictions about how best to balance the difficult competing interests at stake; and (iv) the objective of my research encouraged me to pursue such a comparative study due to the fact that each of these jurisdictions has a long history in fighting terrorism. For me, the UK has been a rich resource for studying the evolution of countering terrorism in one of the most developed constitutional systems in the world. Throughout my thesis, I claim that Egypt is currently in transition towards being a fully-fledged constitutional democracy which respects rights and the rule of law. Given this ambition of the Egyptian state, engaging in a comparison with an established democracy undergirded by the rule of law – the UK - is an instructive and insightful example.

This comparative study also takes into account that the underlying comparators are

two regimes which have different legal systems. The UK operates under a common law system, while Egypt operates under a civil law system.[34] There are number of differences between civil law systems and common law systems. Binding judicial precedents or *stare decisis* is one of the main features which distinguishes common law systems. According to this principle, judges are bound by previous court judgments. On the contrary, in civil law systems, judges are bound by codified laws and may issue judgments which contradict with the case law of the court.[35]

The impact of the difference between common law and civil systems is further analyzed in the comparison between the role of courts in the UK and Egypt, in the context of its ability to put pressure to change counter-terrorism laws which are seen to violate human rights. In civil law countries like Egypt, judges' power to interpret the law is restricted by the existence of codified laws by which the judge must abide. Similarly, while it is accepted that judges can make law in common law countries such as the UK, this is not an accepted norm within civil law systems, like Egypt. Whereas in common law systems, the sources of law include legislation and judicial precedents. Accordingly, the common law judge has a wider array of interpretative powers which exceed its counterpart in civil law systems.[36] Nevertheless, this difference need not to be exaggerated as '[t]he claim that common law is created by the case law is only partly true, as the common law is based in large part on statutes, which the judges are supposed to apply and interpret in much the same way as the judges in civil law'.[37]

Despite the substantial differences between both jurisdictions, there are also some commonalities as follows: (i) both face the challenge of terrorism; and (ii) both countries

[34] On civil law and common law legal systems, see Thomas Lundmark, *Charting the Divide between Common and Civil Law* (Oxford University Press 2012); Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 32(3) 155 Victoria University of Wellington Law Review 817-42; Orrantia Fernando, 'Conceptual Differences between the Civil Law System and the Common Law System' (1990) 19(4) Southwestern University Law Review; Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15(3) American Journal of Comparative Law 419-435.
[35] Pejovic (n 34) 819.
[36] Fernando (n34) 1164.
[37] Pejovic (n 34) 820.

aspire to conform to international human rights norms. Ran Hirschl emphasized that 'perhaps it is the comparison of the incomparable that produces the most exciting results'.[38] This was illustrated by Benedict Anderson as follows:

> [W]ithin the limits of plausible argument, the most instructive comparisons (whether of difference or similarity) are those that surprise. No Japanese will be surprised by a comparison with China, since it has been made for centuries, the path is well trodden, and people usually have their minds made up already. But a comparison of Japan with Austria or Mexico might catch the reader off her guard'.[39]

This is not to say that Egypt and the UK are polar extremes. When we look closely at counter-terrorism laws in both countries, we will discover that there are nearly universal broad guidelines which are acceptable by most of the countries in regulating either constitutional rights or countering terrorism.[40] The concern to protect national security whilst simultaneously uphold rights is common to both countries. Therefore, it is worthwhile investigating how this common aim plays out in different jurisdictional contexts.

Terrorism is a global challenge for many countries leading to re-arrangement of the distribution of powers between the Executive and the Legislature, by expanding the power of the earlier at the expense of the latter.[41] Balancing is difficult and complicated in all countries. In this thesis, I do not assume that the UK has a magical solution which Egypt can simply adopt and apply. However, the aim is to see if the UK system could offer some reflective inspiration for Egypt, and to draw lessons from desirable and undesirable practices by the UK. Normative comparative study of constitutionalism across nations is undoubtedly

[38] Ran Hirschl, 'Methodology and Research Design' in David S. Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022) 46-47.
[39] Benedict Anderson, *A Life Beyond Boundaries: A Memoir* (Verso 2018) 130.
[40] Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 57-62.
[41] ibid 57-58.

justifiable within this scope.[42] The exploration of different approaches in comparator countries may serve a normative purpose of prompting self-reflection – 'at once trying to understand other systems and identify improvements of one's own'.[43] This is applicable to studying principles governed by similar set of values which are generally and globally accepted, for instance, studying democracy and human rights in comparative jurisdictions.[44]

The structure of the thesis is designed to put more focus on Egypt and the development of its constitutional governance. On the other side, it directs less focus on the UK while limiting its scope for the purpose of taking the UK as an inspirational model for Egypt to learn lessons from comparative experiences. Accordingly, the Egyptian case study is the primary focus of the thesis and the UK's comparative analysis is positioned as a reference point.

'Functionalism' is one approach to comparative constitutional studies.[45] The functionalist approach requires us to study institutions in different jurisdictions, which are sought to carry out similar functions.[46] The outcome of the study is to examine whether these institutions function properly as it is sought to, or how they function differently in different jurisdictions despite their similarities.[47] It is mainly studying institutions in a jurisdiction which serve the same function of institutions in another jurisdiction. In this way, it would be beneficial, as appropriate, to use comparative outcomes from another jurisdiction to improve domestic institutions.[48]

The comparison between the UK and Egypt in this area can be a step forward in Egypt's reform journey in trying to achieve high standards of human rights' protection and to live up to the claim, in article one of its Constitution, that Egypt is a democratic republic.

[42] ibid 57-58.
[43] ibid 61.
[44] ibid 61-62.
[45] ibid 62.
[46] ibid 62.
[47] ibid 62.
[48] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108(6) The Yale Law Journal 1228.

By this comparison, I seek to study and suggest developments of practices in my own jurisdiction by exploring how the other jurisdiction treats and solves the same issues.[49] In other words, the aim is to use the UK as inspiration for Egypt as it seeks to make progress, whilst avoiding the UK's shortcomings or failures. In my analysis, I also point out some defects in the UK system, whilst outlining ways in which accountability could be enhanced.

Given the long history of Egypt's fight against terrorism, it has independently developed some good practices as well.[50] During my research, I have discovered some mechanisms of fighting terrorism specifically in relation to deradicalization of terrorists which were successful in Egypt that could also be useful if adopted by the UK. This is to highlight that the study of constitutions in comparative perspective is helpful in learning lessons from the experiences of other states, whilst testing how the outcome of these experiences could fit in other jurisdictions.[51] The Egyptian case study of deradicalization of the terrorists is important as it is the first weapon to the fight 'homegrown terrorism', which has been suffered in Egypt and delayed its democratization process. The danger of 'homegrown terrorism' is emphasized by Kent Roach as he wonders 'whether a more libertarian North American constitutional culture would survive dramatic increases in homegrown terrorism'.[52] Moreover, deradicalization of terrorists has significant importance in preventing recidivism. 'Ultimately, disengaged terrorists themselves may be the most potent force in pre-empting engagement among prospective recruits'.[53]

To sum up, the UK is a good choice for comparison with Egypt given that it is one of the most constitutionally developed countries and commonly used as a comparator in comparative constitutional studies. The UK has also been fighting terrorism for ages and has

[49] Ran Hirschl, 'The Rise of Comparative Constitutional Law: Thoughts on Substance and Method' (2008) 2(1) Indian Journal of Constitutional Law 26.
[50] E.g. Egypt's approach towards deradicalization and rehabilitation of terrorists. See Chapter 7, section 7.6.
[51] Scheppele (n 33) 390.
[52] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge 2011) 430.
[53] John Horgan and Mary Beth Altier, 'The Future of Terrorist De-Radicalization Programs' (2012) 13(2) Georgetown Journal of International Affairs 84.

been working on the development of balancing rights against national security since 9/11 trajectory. Accordingly, it has a rich academic literature on the subject and presents a rich resource of history and precedents which can help Egypt in its transition. This is without ignorance of the variations between both systems which could require adjustments of the solutions used in the UK to be suitable for use in Egypt. Therefore, the main goal of my thesis is to extract helpful solutions from the UK system, tailoring it in a suitable form to smoothly blend in with the existing Egyptian system.

I am also cautious that the same or similar terms could carry different interpretations in different systems.[54] My research revolves around norms which typically maintain universal understanding, e.g. freedom of expression, separation of powers, constitutionalism, judicial independence, and the rule of law.[55] I also research the employment of these principles considering threats to national security. I focus on how the level of democracy can affect the practice applied in each jurisdiction even though theoretically both jurisdictions might agree on the same legal norms and abide by similar international conventions. In doing so, I provide the example of the established democratic legal system of the UK and another example of the Egyptian ongoing experience of transition from authoritarianism to democracy. In light of the significant differences between both jurisdictions - including the level of democracy and the approach to national security - I try to articulate a framework for protecting rights. My aim is to benchmark the minimum level of guarantees which can maintain the balance between conflicting interests in either a democratic country or a country in transition. In addition to highlighting best practices applied in both jurisdictions for better protection of human rights whilst countering terrorism.

[54] Hirschl, 'The Rise of Comparative Constitutional Law: Thoughts on Substance and Method' (n 49) 24.
[55] Andrea Pin, *Religious Freedom without the Rule of Law: The Constitutional Odysseys of Afghanistan, Egypt, and Iraq and the Fate of the Middle East* (Brill 2024) 12-13; Jackson (n 40) 57-62.

My research also adopts a legal doctrinal method by looking at cases and laws, trying to discern legal principles in each of the UK and Egypt.[56] As Jason Varuhas observes '[t]he basic question with which doctrinal scholarship is concerned is: "What is the law?" As such, doctrinal method is the primary method for the study of law, upon which all other methods necessarily depend'.[57] In this thesis, my first question is 'what is the law relating to counter-terrorism and freedom of expression in Egypt and the UK?' Doctrinal methodology is relevant to my research given that legal categorization of public law includes two main categories i.e. 'the law relating to regulation of public powers in the public interest and the law relating to protection and vindication of basic individual rights'.[58] Each of these components constitutes a foundational part of my thesis, which comprises of researching the regulation of the Executive's powers in matters related to protection of national security and its effect on the preservation of freedom of expression. Accordingly, when studying counter-terrorism law in both jurisdictions, I employ traditional doctrinal methods, canvassing case-law, legislation, government documents, and policy analysis.[59]

The ultimate aim of the doctrinal scholarship is to enhance understanding of law, while applying critical analysis of legal provisions and decisions.[60] Only when the analytical pieces of the jigsaw are in place, can we then go on to compare different jurisdictional approaches, and to critique them. Doctrinal methodology necessitates that scholars must be able to criticise the underlying systems, including court judgments' reasoning, when required. Analysis does not preclude critique. Therefore, in this thesis, I start with an analytical overview of each system, before then going on to critique and compare.[61]

[56] Jason Ne Varuhas, 'Mapping Doctrinal Methods' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar Publishing 2023) 70.
[57] ibid 70.
[58] Jason Ne Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018) 78.
[59] Varuhas, 'Mapping Doctrinal Methods' (n 56) 71.
[60] ibid 73.
[61] Alan Bogg, 'Doctrinal method in labour law in common law systems: potential, problems, prospects' in Alysia Blackham and Sean Cooney (eds), *Research Methods in Labour Law: A Handbook* (Edward Elgar Publishing Ltd 2023) 215.

My dissertation has been inspired by Egypt's recent efforts to comply with international norms and human rights standards, while simultaneously fight terrorism.[62] My research is funded by the Egyptian government, as part of an effort to learn lessons from comparative experience and develop Egyptian law in a rights-protective direction. As Justice Claire L'Heureux-Dube, former judge of the Supreme Court of Canada, observed: '[i]f we continue to learn from each other, we as judges, lawyers, and scholars will contribute in the best possible way not only to the advancement of human rights but to the pursuit of justice itself, wherever we are'.[63]

[62] 'Report of the Office of the United Nations High Commissioner for Human Rights' (*United Nations Human Rights Office of the High Commissioner*, 14 August 2019) A/HRC/WG.6/34/EGY/3, para 3-9; See Chapter 3, Section 3.5.
[63] Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization, The Rehnquist Court, and Human Rights' in Martin H. Belsky (ed), *The Rehnquist Court: A Retrospective* (Oxford University Press 2002) 247.

CHAPTER TWO

CRIMINALIZING ENCOURAGEMENT AND INCITEMENT OF TERRORISM AND ITS EFFECT ON FREEDOM OF EXPRESSION IN THE UK

2.1. Introduction

In the UK, people's constitutional rights are protected under the European Convention on Human Rights (the "**ECHR**" or the "**Convention**") as ratified by virtue of the Human Rights Act 1998 (the "**HRA**").[64] Freedom of expression is one of the rights protected under the Convention, which has fundamental importance in the foundation of democratic societies. It must be highly protected to allow citizens to express their opinions freely and produce healthy political environment encompassing minorities, opposition groups and all other categories of the society.[65] The right of freedom of expression is granted by virtue of article 10(1) of the Convention, which states:

> 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

However, freedom of expression is not an absolute or unconditional right. It is subject to limitations. Given the importance of freedom of expression, the interference with it is treated as an exception to the general principle of respect. Such exception must be applied very restrictively.[66] The limitation of freedom of expression is stipulated under

[64] Helen Fenwick and Richard Edwards, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge Taylor & Francis Group 2016) 1.
[65] David Harris and other, *Law of The European Convention on Human Rights* (4th edn, Oxford University Press 2018) 592.
[66] ibid 592.

article 10(2) of the Convention, which states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The guarantee of freedom of expression is also bolstered by articles 17 and 18 of the Convention.[67] According to it, states should not rely on the provisions of the Convention to deprive citizens from their constitutional rights or restrict those rights massively without reasonable justification. Freedom of expression may only be restricted within the limits set out in the Convention.[68]

The European Court of Human Rights (the "**ECtHR**") applies the limitation of freedom of expression based on the conditions stipulated in the Convention. According to the Convention, the interference with freedom of expression should be lawful, legitimate, and necessary in a democratic society. The ECtHR has also established framework for the limitation of freedom of expression based on proportionality test and margin of appreciation.[69] I will go through these conditions in some detail in this chapter focusing on the application of proportionality and margin of appreciation in specific, which are the most important factors in the assessment of restrictions.

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[67] Article 17 states *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention"*; Article 18 states *"The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed"*.
[68] Fenwick and Edwards, (n 64) 98–99.
[69] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and The Principle of Proportionality in The Jurisprudence of The ECHR* (Intersentia 2002) 9-15.

The UK has long history of fighting terrorism. The Irish Republican Army or the Provisional Irish Republican Army (the "**IRA**") has been threatening the UK's security for many years for the purpose of liberation of Northern Ireland. More recently, the 9/11 attack in the United States in 2001 started a new era of terrorism, followed by the 7/7 London bombing in 2005 and other similar attacks within Europe. This new type of terrorism has international nature with different motives. Many countries, including the UK, updated their counter-terrorism regimes to capture all forms of terrorism including international terrorism committed by organisations like Al-Qaeda.[70]

The UK's government has pursued partly preventive approach with respect to counter-terrorism policy.[71] Parliament enacted 'inchoate offences' like for example the offences of encouragement and glorification of terrorism. These offences were introduced in the Terrorism Act 2006 (the "**TA 2006**"). The introduction of these offences in the UK's law has been criticized for putting freedom of expression at risk.[72] 'An act of terrorism' in the TA 2006 is defined in accordance with the definition of terrorism in the Terrorism Act 2000 (as amended) (the "**TA 2000**").[73] The definition of terrorism is subject to criticism as well, which increases the debate about the risks surrounding the design of the offences of encouragement and glorification of terrorism.[74]

The UK's government has also developed a strategy for countering terrorism named the United Kingdom's Strategy for Countering Terrorism (CONTEST). The CONTEST is based on four main aspects, including terrorism prevention.[75] The CONTEST strategy

[70] Meagan Smith and Sean M. Zeigler, 'Terrorism before and after 9/11 – a more dangerous world?' (2017) 4(4) SAGE journals 1; Jessie Blackbourn, 'The evolving definition of terrorism in UK law' (2011) 3(2) Behavioral Sciences of Terrorism and Political Aggression 132; Sterling A. Marchand, 'An Ambiguous Response to a Real Threat: Criminalizing the Glorification of Terrorism in Britain' (2010) 42(1) George Washington International Law Review 141.
[71] Fenwick and Edwards (n 64) 1023.
[72] Francesca Galli, 'Freedom of thought or 'thought-crimes'? Counter-terrorism and freedom of expression' in Aniceto Masferrer and Clive Walker (eds), *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar Publishing Limited and Edward Elgar Publishing Inc. 2013) 106-7.
[73] UK Terrorism Act 2006, section 20(2).
[74] Daragh Murray, 'Freedom of Expression, Counter-Terrorism and the Internet in Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights' (2009) 27(3) Netherlands Quarterly of Human Rights 344.
[75] Home Office, 'CONTEST The United Kingdom's Strategy for Countering Terrorism' (4 June 2018) para 8.

follows the approach of fighting terrorism through military and police operations. While at the same time adopts precautionary measures to prevent people who are more likely to participate in terrorist activity at early stages.[76] Exploring the goals of the CONTEST preventive approach helps in understanding the government's direction towards preventive policy. The encouragement and glorification offences are applied within the same preventive sphere. The question which needs to be answered here is whether these offences are within the boundaries of the margin of appreciation of the government in limiting freedom of expression. To answer this question, we must first assess whether the government's measures are proportionate to the threats encountered.

The purpose of this chapter is to survey the general framework for the limitation of freedom of expression and the application of the proportionality test. This chapter focuses on the limitation of freedom of expression in the context of criminalization of encouragement and glorification of terrorism. In the next chapters, I can then dive more deeply into protecting national security, and its intersection with the limitation of freedom of expression. Therefore, this chapter is divided into three sections. The first section discusses the general framework for the limitation of freedom of expression based on the criteria established in the case law of the ECtHR. Whilst the second section includes a study of the offences of encouragement and glorification of terrorism and their distinction from other similar offences. This part also includes the definition of terrorism and background on the prevent strand of the CONTEST strategy. The third section includes an assessment of the risks posed on freedom of expression due to criminalization of encouragement and glorification of terrorism.

[76] Christiane Rabenstein and Marnie Ratcliffe, *Blackstone Counter-Terrorism Handbook* (4th edn, Oxford University Press 2019) 47.

2.2. The General Framework for The Limitation of Freedom of Expression[77]

Although freedom of expression can be restricted, the ECtHR is vigilant in ensuring that it is protected to a substantial extent. The ECtHR has affirmed that protected expression includes that which is offensive, shocking, disturbing or otherwise. In *Handyside v The United Kingdom*,[78] the ECtHR stated that:

> The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.[79]

Accordingly, the government must make sure, in applying such limitation, that it does not encroach upon people's freedom of expression without justification. For the limitation to be justified under article 10(2) of the Convention, the Court held that three conditions must be fulfilled. First, the restriction must be 'prescribed by law'. Second, the restriction must have a 'legitimate aim'. Third, the restriction must be 'necessary in a democratic society'. The application of the third condition requires the evaluation of proportionality between the extent of restriction of the relevant right and the importance of the protected legitimate aim.[80] The proportionality test requires scrutiny in its evaluation

[77] See European Court of Human Rights, Guide on Article 10 of the European Convention on Human Rights (2021); David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of The European Convention on Human Rights* (2018); Helen Fenwick and Richard Edwards, *Fenwick on Civil Liberties and Human Rights* (2016); Andrew Legg, *The Margin of Appreciation in International Human Rights Law Deference and Proportionality* (2012); Aileen Kavanagh, *Constitutional Review Under The UK Human Rights Act* (2009); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and The Principle of Proportionality in The Jurisprudence of The ECHR* (2002).
[78] (1979-80) 1 EHRR 737.
[79] ibid [49].
[80] *Animal Defenders International v the United Kingdom* (2013) 57 EHRR 21 [100].

more than the first two conditions which are easier to prove and do not usually raise issues. Accordingly, I will go through the first two conditions briefly, then I will discuss the third condition with a detailed examination of the proportionality test and the principle of margin of appreciation of the government.

2.2.1. First Condition: The restriction must be 'prescribed by law'

The restriction of freedom of expression must be clearly stipulated in law. The lawfulness of the restriction does not mean that common law or uncodified law is excluded.[81] Yet, the law must satisfy two main elements, which are 'accessibility' and 'foreseeability'.[82] For the law to be accessible, it should be made available to citizens. Accessibility is presumed as long as the law is published in a national official gazette.[83] In most of the cases, proving accessibility is not an issue, while the assessment of foreseeability might be more complicated.[84] Foreseeability means that the law should be accurate enough to allow citizens to understand the limits of the relevant restriction. Citizens should also be able to identify the variety of acts which could be triggered under such restriction and the consequences of the commission of these acts, though the definitive knowledge of the consequences is not essential.[85] The ECtHR in *Sunday Times v The United Kingdom*,[86] explained foreseeability as follows:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in

[81] Arai-Takahashi (n 77) 10.
[82] *Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245 [49].
[83] European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights' (30 April 2021) para 63.
[84] Arai-Takahashi (n 77) 10.
[85] Marchand (n 70) 129.
[86] *Sunday Times* (n 82).

> the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty.[87]

In *Delfi AS v Estonia*,[88] the applicant, which was a company operating news portal, claimed, to the contrary of the government's view, that its freedom of expression was unlawfully violated. The company argued that there was no legal provision which considers an operator of a news portal as a publisher, with regard to comments posted by third parties, even if the company is aware of the defamatory content of large number of the comments. It was controversial whether the company's activity is considered as intermediary with no legal liability for third party comments or otherwise as publisher entailing liability. The ECtHR concluded that the company should have foreseen that its scope of activity might entail the application of the general provisions regulating publishers on the company's platform. This is because the activity of the company exceeded the role of an intermediary and qualified as a publisher in accordance with the case law.[89]

The ECtHR took into consideration, in this specific case, the size of the company as the largest news portal in Estonia which resulted in large number of claims filed against the defamatory comments uploaded in the news portal. Moreover, being a well-established professional company in this field makes it foreseeable for the company to predict the consequences of its acts, even if seeking a professional legal advice was required or if the provision of law was applied to this case for the first time. Accordingly, the ECtHR decided that the interference with the company's freedom of expression was foreseeable and lawful.[90]

[87] ibid [49].
[88] (2016) 62 EHRR 6; For more cases on foreseeability see *Perinçek v Switzerland* (2016) 63 EHRR 6.
[89] *Delfi AS* (n 81) [120] – [129].
[90] ibid [120] – [129].

2.2.2. Second Condition: The restriction must have a 'legitimate aim'

The Convention enumerates several legitimate aims for restriction of freedom of expression. States must justify their interference with freedom of expression under one of these legitimate aims, including the protection of national security, which is the focus of this research.[91] It is worth mentioning that the failure of the government to justify its interference with freedom of expression under one of the legitimate aims is rare in practice.[92]

However, in *Stoll v Switzerland*,[93] the ECtHR refused to uphold the interference of the government with the applicant's freedom of expression based on national security purposes. The government stated that the report disclosed by the applicant included sensitive political comments which could negatively impact national security. However, The ECtHR confirmed that the justification of interference with the applicant's right requires that the applicant's conduct should be grave enough to threaten the security foundation of the state. In addition, the ECtHR noted that the government did not charge the applicant on the basis of protecting national security. Accordingly, the ECtHR concluded that the interference could not be justified for the interest of national security.[94]

On the contrary, in *Zana v Turkey*,[95] the ECtHR condemned the applicant for his supporting statements in relation to the PKK.[96] The ECtHR confirmed that the government's interference with the applicant's freedom of expression pursued a legitimate aim of protecting the national security of the state. The ECtHR took into consideration several facts. The main factors which influenced the decision of ECtHR against the applicant were the identity of the speaker who is a famous politician in Turkey and the timing of his speech

[91] Harris (n 77) 697.
[92] ibid 659.
[93] (2008) 47 EHRR 59.
[94] ibid [51] – [62].
[95] (1999) 27 EHRR 667.
[96] Kurdistan Workers' Party.

after the PKK killing of innocent civilians.[97]

In addition, in *Bayev and others v Russia*,[98] the court declined the claim that banning homosexual manifestation within minors could be justified for the purpose of protection of morals. The court insisted that homosexuality is accepted within Europe, even if it is not common in the Russian community, and that the rights of minorities should not be undermined just because the majority does not acknowledge those rights. States should be flexible in adapting to the development of societies.[99] These cases provide a sense of the ECtHR's methods of evaluating the existence of legitimate aim. It takes into consideration many factors depending on the identity of the applicant, the timing of interference and the nature of the society. Generally, the proof of this condition does not usually raise issues and is not the hardest compared to the proof of proportionality which is discussed below.[100]

2.2.3. Third condition: the restriction must be 'necessary in a democratic society'

States must establish that interference with freedom of expression is necessary in a democratic society. The ECtHR interpreted the term necessary as less restrictive than 'indispensable', while more restrictive than terms like 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.[101] The ECtHR adopted three standards for the assessment of necessity in democratic society. These standards are the existence of 'pressing social need' for the interference, the proportionality between the methods used for interference and the 'legitimate aim pursued', and the existence of a relevant and sufficient justification for interference by the government.[102] Accordingly, this entails the employment of a degree of 'margin of appreciation' by states to strike the right balance between competing interests.[103]

[97] *Zana* (n 95) [48] – [50].
[98] (2018) 66 EHRR 10.
[99] ibid [63] – [83].
[100] Marchand (n 70) 131.
[101] *Sunday Times* (n 82) [59]
[102] ibid [62].
[103] Marchand (n 70) 131.

The proportionality doctrine has been developed by the court.[104] It is not stipulated under the Convention. However, judges have used the proportionality doctrine to evaluate the balance between the limitation of the Convention rights, pursuant to the limitation clauses, and the legitimate aims pursued from such limitation. Proportionality is a tool which judges use to assess the value of the competing interests.[105] The purpose behind this exercise is to make sure that there is a valid reason and justification for the interference with the Convention rights and that the measures used for interference are suitable for the risk threatened. The judge has to make sure that the government does not abuse its margin of appreciation to unduly limit the Convention rights, by exceeding the purpose of protecting the relevant interest.[106]

The ECtHR takes into consideration the seriousness of the adopted measure by the government and try to evaluate if there are less restrictive available measures achieving the same pursued aim in the relevant circumstances.[107] However, it is argued that it is not the function of the court to exercise a review of the local laws to make sure that it applies the most restrictive measure. In contrast, the court's responsibility is to assess whether the government has applied the provisions of the local law fairly and suitably. Accordingly, the court is not supposed to declare the government's measure as inadmissible on the basis that it is not the least restrictive, as long as it is suitable in the relevant circumstances.[108] This argument was confirmed by the ECtHR in *Animal Defenders International v the United Kingdom*.[109] The ECtHR acknowledged that if the government did not exceed its margin of appreciation in acting, there is no benefit of assessing whether the measure adopted by the

[104] For more analysis on proportionality see Aileen Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: outcomes, substance and process' (2014); Alan D.P. Brady, *Proportionality and Deference under The UK Human Rights Act: An Institutionally Sensitive Approach* (2012); Francisco Urbina, *A Critique of Proportionality and Balancing* (2017); Kai Möller, *The Global Model of Constitutional Rights* (2012); Benjamin Goold, Liora Lazarus and Gabriel Swiney, 'Public Protection, Proportionality, and the Search for Balance' (2007).
[105] *Glor v Switzerland* App no 13444/04 (ECtHR, 30 April 2009) [94]; *Mouvement Raëlien Suisse v Switzerland* (2013) 56 EHRR 14 [75].
[106] ibid.
[107] ibid.
[108] Aileen Kavanagh, *Constitutional Review Under The UK Human Rights Act* (Cambridge University Press 2009) 233-41.
[109] *Animal Defenders International* (n 73).

government was the least restrictive or not. Accordingly, the court did not test whether the prohibition of paid political advertisement is the least restrictive available measure. Rather, the court evaluated whether the prohibition exceeded the margin of appreciation granted to the Legislature or not.[110]

The concept of margin of appreciation is a doctrinal creation of the ECtHR as well. It does not find its basis in an explicit stipulation in the Convention. There are controversial views concerning the concept of margin of appreciation. Some views claim that it is vague and results in putting rights and freedoms at risk, while others support that it is essential and is functioning properly.[111] Evaluating the margin of appreciation with respect to restrictions of freedom of expression varies based on different circumstances. It depends on the content of expression, the importance of the legitimate aim pursued, and the harshness of the measure used.[112] Accordingly, both the doctrine of proportionality and the concept of margin of appreciation co-exist and go 'hand in hand', they both function concurrently.[113]

As this research discusses the limitation of freedom of expression in the context of national security interest, I will focus on the legitimate aim of protecting national security. In this sense, it has been noticed that the aim of protecting national security usually widens the scope of margin of appreciation of the government. Countering terrorism can be placed on top of the list for national security purposes which justify broader margin of appreciation. For example, allowing restrictions on freedom of expression in relation to interviewing members of terrorist organisations, for the purpose of protecting national security.[114]

Another example, in *Kaptan v Switzerland*,[115] the ECtHR decided that the Swiss government's seizure of publications is justified for the protection of national security. The

[110] ibid [110]; Harris (n 77) 13.
[111] Andrew Legg, *The Margin of Appreciation in International Human Rights Law Deference and Proportionality* (Oxford University Press 2012) 3.
[112] Arai-Takahashi (n 77) 101.
[113] Kavanagh, *Constitutional Review Under The UK Human Rights Act* (n 108) 237.
[114] Arai-Takahashi (n 77) 105.
[115] App no 55641/00 (ECtHR, 15 March 2000).

publications consist of books and magazines including incitement to violence against the Turkish government. Accordingly, the distribution of these publications constitutes threat to the national security of Switzerland. It was also concluded that incitement to violence extended along the whole publications which made it hard to partly seize the offensive parts of the publications and leave the rest. Therefore, the ECtHR held that the Swiss government's seizure of publication is proportionate and does not exceed the appropriate margin of appreciation.[116]

The assessment of both proportionality and margin of appreciation is influenced by the nature of the right under review. The Convention rights can be classified into four main categories based on the strength of their protection.[117] The first category includes the right to life, which enjoys the highest protection. The restriction of such right requires absolute necessity. The second category includes rights which can be restricted on very limited instances, like the right to liberty. The third category, which is less protected than the first and the second, includes the rights reserved with limitation clauses stipulated under articles (8–11) of the Convention. This category includes the right of freedom of expression and can be restricted for reasons 'necessary in a democratic society'. The fourth category includes the least protected rights, for example, the right to property. This type of rights can be limited for reasons necessary for the general interest.[118] Accordingly, the extent of justification required for the use of margin of appreciation should be assessed in each specific case based on the degree of protection granted to the right under discussion. On the other hand, the type of the case,[119] along with the nature of the right, play an important role in strengthening or weakening the position of the government when it interferes with the Convention rights.[120]

[116] ibid.
[117] Legg (n 111) 202-10.
[118] ibid 202-10.
[119] The type of the case differs based on the legitimate aim pursued from the limitation of the relevant right.
[120] Legg (n 111) 202-10.

It is argued that the type of the government's obligations, either positive or negative, is another factor which is taken into consideration when evaluating the government's margin of appreciation. Whereby, positive obligations are given more weight than negative obligations in the process of assessing the necessity of interference by governments with the Convention rights.[121] In the context of human rights, negative obligation means the state's obligation of omission of any act which could limit the Convention rights. Article 10 is an example of negative obligations. It puts an obligation on the state to abstain from interfering with freedom of expression of citizens. While positive obligation means that the government is under an obligation to act in order to protect the Convention Rights. Article 2 of the Convention in relation to the right to life is an example of the state's positive obligations.[122] It is noted however that most of the Convention rights imply negative obligations. Thus, the classification of the Convention rights based on the type of the incurred obligations is sometimes difficult and complicated. The ECtHR does not always undertake such classification unless necessary in its assessment. The most important function of the ECtHR is the assessment of the existence of violation regardless of the type of the obligations under the relevant Convention right.[123]

Although there is substantial jurisprudence on the application of the proportionality test and there are many principles in place as shown above, it is still not an easy task to assess proportionality in all cases.[124] For example, in *Janowski v Poland*,[125] the ECtHR had to strike a balance between freedom of expression of the applicant and the protection of civil servants against insults or attacks while undertaking their official duties.[126] The facts of the case are briefly that the applicant directed to a civil servant two insulting words. The

[121] ibid 203-04.
[122] Harris (n 77) 24-27.
[123] ibid 24-27.
[124] Kristina Trykhlib, 'The Principle of Proportionality in The Jurisprudence of The European Court of Human Rights' (2020) 4 EU and comparative law issues and challenges series (ECLIC) 129.
[125] (2000) 29 EHRR 705.
[126] ibid [21] – [35].

applicant's act was a reaction to the civil servant's unauthorized order to street vendors to change their place. The ECtHR concluded that the conviction of the applicant was proportionate and did not exceed the limits of the protected public interest (i.e., the protection of civil servants against insults during the exercise of their official duties). The ECtHR supported its position by stating that although the act of the civil servant was not authorized in the relevant regulations, it was undertaken for traffic considerations. The ECtHR confirmed its understanding of the motives behind the applicant's act which aims at protecting other citizens from unlawful interference by the civil servant. However, the ECtHR found that the applicant's conduct is exaggerated compared to the civil servant's act who was performing his official duties.[127]

Nevertheless, this judgment was not unanimous. Four judges dissented, arguing that there is an absence of pressing social need, given that the applicant was derived by good faith and his conduct is not grave enough compared to the imposed fine. Another reason was that the conviction and the charge of the applicant are seen to be disproportionate to the legitimate aim pursued because the applicant was exercising his right of freedom of expression, objecting to the unlawful act of the civil servant, which should be protected under article 10 of the Convention. The fact that the means used by the applicant in expressing himself were not the most appropriate due to his frustration of the civil servant, does not in itself deprive him from his right of freedom of expression. Meanwhile, it has not been proved that the applicant's words affected the performance of the public servant's duties.[128] In addition, it was highlighted that if we are to compare two pressing social needs justifying interference, then the interference with the abuse of power by the civil servant should be given priority. While the interference with the applicant's excess of the limits of

[127] ibid [21] – [35].
[128] ibid [21] – [35].

reasonable objection should have less priority. Otherwise, it could put the law in a position of securing the executive authority from criticism by citizens when it is abusing its power.[129]

In the context of national security cases, many guidelines could be extracted from the ECtHR jurisprudence. In *Karataş v Turkey*,[130] the applicant was convicted for publishing a poem which includes statements referring to some parts of Turkey as Kurdish. It also included negative statements against Turkey which could be seen as encouraging violence and separation. The ECtHR took into consideration the medium through which the statements were published, and the number of audiences addressed through this medium. In addition, the ECtHR stressed on the artistic nature of the statements as part of assessing the content and the context in which they were published and acknowledged the protection of artistic works under freedom of expression.[131]

The ECtHR found that the poems have much little audience than mass media, which undermines their effect on the society due to its limited distribution. Moreover, the government should not ignore the facts of the case which might minimize the effect of the relevant publications. The ECtHR enumerates factors like the political sense of the poem and that the statements were directed against the government. These factors affect the margin of appreciation of the government, given that political speech enjoys high standards of protection and should be limited in the least possible ways. Additionally, the power of the government makes it less protected against criticism to maintain the 'watchdog' function of the public. Accordingly, the government should follow proportionate means when responding to similar situations, rather than resorting to criminal convictions in all cases without discrimination.[132]

Although the ECtHR is aware of the terrorist threats in Turkey, it found that the

[129] ibid [21] – [35].
[130] App no 23168/94 (ECtHR, 8 July 1999).
[131] ibid [48] – [54].
[132] ibid [48] – [54].

conviction and penalty were not proportionate to the applicant's act and exceeded the moderate response expected from the government. Therefore, the main takeaway from this judgment is that expressions posted on mass media are more influential than other less distributable mediums and increases the risk of conviction due to higher number of audiences. Furthermore, political expressions and offensive expressions against the government enjoy higher protection and should be treated more leniently than offensive expressions addressed to private individuals or other private institutions.[133]

Furthermore, the timing of publication or expression is given attention in evaluating the proportionality of the adopted measure. In *Leroy v France*,[134] the applicant was convicted for publishing caption showing support to the perpetrators of the 11th of September event. The ECtHR found no violation of article 10 because the timing of the publication took place right after such a shocking accident. The prevalent atmosphere at that time increased the probability of heating up the public and the commission of more violence due to such publication. The ECtHR confirmed that the intention of the applicant and the actual impact of publications were not relevant and does not affect the conclusion of the court.[135]

In contrast, the ECtHR, in *Döner and others v Turkey*,[136] stated that the struggle of a state against terrorism in itself does not qualify as justification for interference with freedom of expression. Although the burden of proof is not determined in the Convention, the prevalent position is that the applicant has to prove the existence of limitation of right, while the onus is on the government to prove that the interference with the applicant's right is justified. The government remains under an obligation to prove that the measure taken

[133] ibid [48] – [54].
[134] App no 36109/03 (ECtHR, 2 October 2008).
[135] ibid.
[136] App no 29994/02 (ECtHR, 7 June 2017).

fulfills the requirements of legitimacy and necessity.[137] Nevertheless, during the assessment of proportionality, the court will take into consideration the threat of terrorism to national security, but there must be other supporting factors justifying interference. Therefore, the ECtHR concluded that the interference with the applicants' freedom of expression was unlawful because the applicants' petition to provide education in Kurdish is a peaceful act protected under article 10. The public authorities were unable to establish proof of any relationship between the applicants' petition and the terrorist activities of the PKK in Turkey. The fact that the PKK has invited for similar petitions alone is not sufficient to establish such connection.[138]

It is clear from the above that courts face considerable challenges when assessing proportionality in cases involving national security aspects. On the one hand, the ECtHR has a duty to protect and uphold rights, including freedom of expression. On the other hand, courts have limitations in assessing the degree and seriousness of threats to national security. The courts navigate this tension by exercising a degree of restraint and showing a degree of deference when appropriate, whilst recognizing that the responsibility for protecting the country's national security lies primarily with the Executive branch.

Therefore, the court considers many factors in assessing proportionality. Firstly, the court evaluates whether the used measure is suitable and appropriate. Secondly, the court balances between the competing interests based on the content of expression, the importance of the legitimate aim pursued, and the severity of the measure used. The legitimate aim pursued is given more weight if national security is involved. Thirdly, the nature of the right and the type of the government's obligation sometimes affect the court's assessment as well. Lastly, the court applies these guidelines in light of the facts of each case to strike the right

[137] Aileen Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: outcomes, substance and process' (2014) 130 Law Quarterly Review 249; Cora Chan, 'The Burden of Proof Under the Human Rights Act' (2014) 19(1) Judicial Review 46.
[138] *Döner and others* (n 136) [96] – [109].

balance between public and private interests based on the specific circumstances of each case.

2.3. Encouragement of Terrorism

The enactment of section 1 of the TA 2006 criminalizing encouragement and glorification of terrorism came as fulfilment to the requirements of the Council of Europe Convention on the Prevention of Terrorism (the "**CECPT**").[139] It also came as a direct response to the 7/7 London bombing event. The UK's government realised that it needs to fight this new type of terrorism at early stages of radicalization of jihadists. Accordingly, restrictions on terrorist speech were seen to be an adequate solution to minimise the spread of these extremist ideologies.[140] I will begin with the definition of terrorism in the UK law and then move forward to the criminalization of encouragement and glorification of terrorism.

2.3.1. Definition of terrorism

'An act of terrorism' in section 1 of the TA 2006 – which criminalizes encouragement and glorification of terrorism - is defined in accordance with the definition of terrorism in the TA 2000.[141] Accordingly, the definition of terrorism has substantial importance in the interpretation of the offences of encouragement and glorification of terrorism. Therefore, the study of the definition of terrorism is essential.

While reviewing the definition of terrorism, there are two main elements in relation to the intention of a terrorist, which should be taken into consideration. The intention of the perpetrator of a terrorist act should be directed towards terrorizing people and spreading fear

[139] Marchand (n 70) 139-40.
[140] ibid 140-43.
[141] UK Terrorism Act 2006, section 20(2).

among them.[142] If these acts were repeated for the same purpose and the perpetrator commits these acts indiscriminately, this should increase the probability and strengthen the evidence that the committed crimes constitute terrorism.[143] Additionally, the perpetrator must intend to put pressure on a democratic government to force it to respond to specific demands or to adopt specific beliefs.[144] A clear example of this criteria is the electricity cut-off crisis in Florida in 2008.[145] This crisis caused terror to people and affected hospitals, traffic, and other facilities. If this crisis was planned and executed intentionally to force, for instance, political change, it would have been characterized of course as terrorism.[146]

The TA 2000 frames the dimensions of 'an act of terrorism' by setting some conditions which should be fulfilled to characterize an act as terrorism. The TA 2000 defines terrorism in section 1 as follows:

> (1) In this Act "terrorism" means the use or threat of action where—
>
> (a) the action falls within subsection (2),
>
> (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
>
> (2) Action falls within this subsection if it—
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the

[142] Mariona Llobet Anglí, 'What does 'terrorism mean'? in Aniceto Masferrer and Clive Walker (eds), *Counter-Terrorism, Human Rights and the Rule of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar Publishing Limited and Edward Elgar Publishing Inc. 2013) 22.
[143] ibid 23.
[144] ibid 24.
[145] ibid 25.
[146] ibid 25.

action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

The definition of terrorism is limited to the commission or threat of action, but it does not refer to omission as an element constituting terrorism. Although omission can be a constituent element in some crimes, this is not the case in the definition of terrorism. Accordingly, terrorism cannot be formed passively like for example the omission to go in a demonstration against terrorism.[147] However, it is argued that this could lead to exclusion of unlawful acts which could represent terrorism, for example, omission to undertake an obligation to keep people safe, in order to cause a state of terror for achieving political purpose.[148]

The definition of terrorism has three main elements. These elements are (i) the target, which is influence or intimidation of government or public; (ii) the purpose, which is 'political, religious, racial or ideological'; and (iii) the method, which is violence in a way that terrifies.[149] However, there is an exception to the requirement of influence or intimidation of the government or the public if the method used for terrorism is explosives or firearms. The justification behind this exception is to secure political or public persons in case of unclear purposes behind acts like assassinations.[150] This has been subject to criticism

[147] Clive Walker, *Blackstone Guide to The Anti-Terrorism Legislation* (3rd edn, Oxford University Press 2014) para 1.31.
[148] ibid para 1.34.
[149] ibid paras 1.32-1.33.
[150] ibid paras 1.32-1.33.

because it excludes the effect of the act on the public, which is essential requirement in a terrorist act and confuses it with ordinary crimes which does not have a terror effect.[151]

In addition, the definition of terrorism requires the committed violence to be with a degree of seriousness.[152] However, terrorism could also exist without the use of violence, through cybercrimes. The definition of terrorism refers to any act which interferes with electronic system. This is to cover terrorist acts committed electronically, for example, hacking public databases or disrupting hospital systems causing public panic.[153]

The objective of terrorism has been broadened from previous definitions of terrorism to include, besides political objectives, religious, racial, and ideological objectives as well. The need to include religious objectives is clear due to the recent rise of religiously motivated terrorism. Social objectives were not included in the definition to avoid exceeding the limits of terrorism and criminalizing political opposition and ordinary social activities.[154]

The definition of terrorism does not exclude acts committed against dictator governments. Freedom fighters, rebellions, journalists, minority groups and opposers to undemocratic governments can all be at risk of being not only stripped of their right of freedom of expression, but also being convicted under the definition of terrorism.[155] In such cases, a differentiation must be established between acts committed against the government and acts committed against members of the public. It is argued that only the latter should be classified as terrorism. Otherwise, it might be hard to oppose or ouster oppressive governments.[156] This issue persists on both national and international levels as David McKeever observes:

> The international community has largely failed to agree on a definition of

[151] Jessie Blackbourn, 'The evolving definition of terrorism in UK law' (2011) 3(2) Behavioral Sciences of Terrorism and Political Aggression 142.
[152] ibid 141.
[153] ibid 142.
[154] ibid.
[155] Stella Margariti, 'Defining International Terrorism to Protect Human Rights in the Context of Counter-terrorism' (2018) Security and Human Rights 188.
[156] Anglí (n 142) 31-32.

> terrorism which reconciles both the general abhorrence for violence which is indiscriminate and/or actively targets civilians, with the acknowledgement that some forms of political oppression may be so unjust as to legitimate violent action by the oppressed.[157]

Additionally, the TA 2000 has extra-territorial effect in order to counter international terrorism. It criminalizes acts of terrorism committed abroad against foreign governments regardless of the legitimacy of the government and irrespective of the existence of armed conflicts. However, it is not clear what are the terrorist risks which could be imposed on the UK or its citizens by such foreign tragedy which could justify this expansion of application.[158] Accordingly, the agreed upon interpretation of the definition of terrorism includes terrorist acts committed against undemocratic or repressive governments. Terrorism is characterized by its indiscriminate nature, which threatens the right to life of peaceful citizens. Accordingly, it cannot be justified by the moral objective of fighting for liberation from invasion or tyranny regimes.[159] This interpretation has also been confirmed in the case law in *R v F*,[160] and *R v Gul*.[161] In *R v F*, whereby the court states that:

> [T]he terrorist legislation applies to countries which are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause.[162]

Accordingly, violence cannot be justified due to its illegality, even if it is directed against evil people or responds to illegitimate acts of government. Violent acts remain acts

[157] David McKeever, 'The Human Rights Act and anti-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?' (2010) 1 Public Law 113-14.
[158] Clive Walker, 'Terrorism Prosecutions and The Right to A Fair Trial' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing Limited 2014) 429.
[159] Fenwick and Edwards (n 64) 1050.
[160] [2007] EWCA Crim 243 [29],[32].
[161] [2013] UKSC 64 [26].
[162] *R v F* (n 160) [32].

of terrorism regardless of its motive given that it contradicts with the rule of law.[163] Nevertheless, violence in fact could lead to liberation and some states like the Republic of Ireland followed this approach and eventually gained international recognition as a sovereign state although it was achieved through violence. Accordingly, this issue continues to be debatable and controversial.[164]

It is argued then by governments that the use of violence is legitimately exclusive to states which in turn provides security to its citizens. However, this permission of use of violence is not without limitation. When the state is subject to a risk threatening its exclusive right of use of violence by an organized group - like the acts of the Troubles in Northern Ireland - it needs to increase the degree of violence to counteract such groups and maintain security. However, in doing so it could exceed its permitted limits of using violence and lose its legality. Accordingly, states tend to exclusively use violence against the ethnic group or minority posing risk while excluding other publics. The generality of sanction against specific minority group has been suffered in the UK by the Irish in the past and the Muslims in present. This issue also raised questions about the degree of state violence which is accepted as within the boundaries permitted by law and which if crossed would not be justified by law.[165]

2.3.2. Encouragement of terrorism in the Terrorism Act 2006

The TA 2006 criminalizes encouragement of terrorism, which states in section 1(1):

> This section applies to a statement that is likely to be understood by a reasonable person as a direct or indirect encouragement or other inducement, to some or all of the members of the public to whom it is published, to the

[163] Cian C. Murphy, 'Terrorism and Transnational Law: Rules of Law Under Conditions of Globalisation' (2019) The Bristol Law Research Paper Series 4.
[164] ibid 11.
[165] ibid 5-7.

commission, preparation or instigation of acts of terrorism or Convention offences.

A 'statement' refers to a communication by words, sounds or images.[166] However, it is not clear whether the meaning of a statement includes the whole material (for example, a book or magazine) or only the parts of the material which encourage terrorism. It makes more sense to consider only the parts of the material which are relevant to encouragement of terrorism as the prohibited statement and exclude the remaining parts. As for instance, one book can include articles from different authors, which makes it illogical to consider the whole book within the meaning of a statement encouraging terrorism because one of the articles is such.[167]

The statement must be understood as direct or indirect encouragement of terrorism.[168] The content and context of the statement should be taken into consideration to decide on the likely common understanding of the statement by the members of the public.[169] This means that the medium on which the statement is published is substantial element in this regard. The effect of a statement communicated through the internet would be different from a statement published in a poem. The more public and accessible the statement is, the more issues will arise concerning the determination of the common understanding of such statement. For instance, a statement published on the internet and globally available to different sectors of the public makes it hard to prove if it is likely to be understood as encouragement of terrorism by different members of the public.[170]

Members of the public include members within the UK or abroad.[171] It is not clear how many members of the public would be sufficient in terms of section 1(1) of the TA

[166] UK Terrorism Act 2006, section 20(6).
[167] Alun Jones, Rupert Bowers and Hugo D Lodge, *Blackstone's Guide to The Terrorism Act 2006* (Blackstone Press 2006) para 2.16.
[168] UK Terrorism Act 2006, section 1(1).
[169] UK Terrorism Act 2006, section 1(4).
[170] Jones, Bowers and Lodge (n 167) paras 2.11-2.12.
[171] UK Terrorism Act 2006, section 20(3); Rabenstein and Ratcliffe (n 76) 109.

2006. It is unlikely that one person would be sufficient because the provision could have mentioned an individual or a person instead of using the term members of the public.[172] In *R v Faraz*,[173] the trial judge clarified that the quantity of the members of the public should be 'significant number' to qualify for the requirement of encouragement.[174] In addition, the use of the term members of the public indicates that this provision is not applicable on statements communicated privately.[175] However, private communication of terrorist publications could be captured under the offence of dissemination of terrorist publication.[176]

The Court of Appeal stated, in *R v Faraz*,[177] that the effect of the statement would differ based on the recipients who could be children or adults, liberal or conservative, strong or vulnerable, knowledgeable or uneducated. Considering the different backgrounds of the members of the public to whom the statement is made available is substantial in the evaluation of the probability of their understanding of the statement as encouragement of terrorism.[178] The Court also confirmed that the mere fact that a publication is in possession of a terrorist is not enough to prove that the publication encourages terrorism.[179]

The act constituting the offence could be either publishing the statement or causing it to be published by another person.[180] Publishing a statement encouraging terrorism implies the liability of the publisher if he intends to encourage terrorism or is reckless in doing so.[181] The publisher is considered reckless if he publishes the statement even though he is aware that it might impose the risk of encouraging members of the public to terrorism and he nevertheless takes that risk. The meaning of recklessness is established in the case law in *R*

[172] Jones, Bowers and Lodge (n 167) para 2.18.
[173] [2012] EWCA Crim 2820.
[174] ibid [52].
[175] Rabenstein and Ratcliffe (n 76) 111.
[176] *R v Ali (Humza)* [2018] EWCA Crim 547 [23]-[24].
[177] *R v Faraz* (n 173).
[178] ibid [43].
[179] ibid [46].
[180] UK Terrorism Act 2006, section 1(2); Adrian Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' (2007) Criminal Law Review 3.
[181] UK Terrorism Act 2006, section 2(b).

v G.[182] The required recklessness in this context is 'subjective recklessness' which means 'that the defendant had knowledge of a serious and obvious risk that a publication will have the effect of encouraging, directly or indirectly, the commission of terrorist offences'.[183] Conversely, 'objective recklessness' entails that 'the element of interpretation, or risk evaluation, is not dependent upon the speaker, but instead rests with a third party'.[184] However, building the evaluation of encouragement of terrorism on the likely understanding of the statement by the members of the public, rather than the speaker, might be considered as 'objective recklessness'.[185]

It is worth mentioning that the CECPT states in article 5 that the direct intention to commit the crime must exist. However, the provisions of section 1 of the TA 2006 exceed the requirements of the CECPT and goes beyond it by allowing recklessness to be sufficient for the crime to occur.[186] This runs against the international practice and guidelines in this respect which supports the approach of requiring intent to commit a terrorist act rather than recklessness.[187]

Publishing a statement means (i) any kind of publication; (ii) providing electronic service to make the statement available for access by others, for example, internet service providers; or (iii) using electronic service delivered by service providers to give or facilitate access to a statement made by others, for example, website operators or owners. This includes the case where the statement is published by others and the website owner or operator is not aware of its publication.[188] Nevertheless, an accused of this offence will not be liable if he succeeded to prove that the published statement does not express his opinion

[182] [2003] UKHL 50 [6]; Jones, Bowers and Lodge (n 172) paras 2.47-2.48.
[183] *R v Faraz* (n 173) [49].
[184] Murray (n 74) 342-43.
[185] ibid 342-43.
[186] Marchand (n 70) 139-40.
[187] Yael Ronen, 'Terrorism and Freedom of Expression in International Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing Limited 2014) 450-51.
[188] UK Terrorism Act 2006, section 20(4); Hunt (n 180) 6.

nor has his approval.[189] This defence would be likely used in cases where the publisher and the author are different persons, for example website owners or publishing corporations.[190]

It is not relevant whether the statement mentions specific acts of terrorism or terrorism in general. Additionally, the consequence of the statement is of no concern to the law. It does not matter if the statement resulted in the commission of terrorism in fact or not or the existence of people who were in fact encouraged by the statement.[191] This also exceeds the requirements of article 5 of the CECPT, which states that the provocation should result in a real risk that a terrorist act may be committed.[192]

2.3.3. Glorification of terrorism as example of indirect encouragement of terrorism

The inclusion of 'glorification of terrorism' as an offence under the TA 2006 was fiercely debated in both Houses of Parliament. The House of Lords objected twice on the glorification of terrorism offence before the House of Commons has managed to pass the Act including the offence.[193] Glorification of terrorism is criminalized to capture statements like those of Omar Bakri Muhammad, Abu Qutada and Abu Hamza al-Masri, which praise terrorist acts such as 9/11 and 7/7 events.[194] These statements are not caught under the provisions criminalizing incitement. Therefore, section 1 of the TA 2006 came to substitute the existing law and cover this gap.[195]

Encouragement of terrorism can be direct or indirect encouragement. The law designates glorification of terrorism as type of indirect encouragement of terrorism. However, glorification of terrorism is mentioned as a non-exhaustive example of indirect

[189] Terrorism Act 2006, section 1(6).
[190] Jones, Bowers and Lodge (n 172) para 2.53.
[191] UK Terrorism Act 2006, section 1(5); Rabenstein and Ratcliffe (n 76) 112.
[192] Marchand (n 70) 140.
[193] Ellen Parker, 'Implementation of the UK Terrorism Act 2006 - The Relationship between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom versus the United States' (2007) 21(2) Emory International Law Review 713 -14.
[194] Fenwick and Edwards (n 64) 1076.
[195] Marchand (n 70) 138.

encouragement of terrorism. This means that indirect encouragement of terrorism could be committed in different forms other than glorification. However, the law does not further explain what could be considered indirect encouragement, other than glorification.[196] The same rules explained above in relation to encouragement of terrorism apply on glorification of terrorism. According to section 1(3) of the TA 2006, glorification of acts of terrorism means:

> Every statement which—
>
> (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
>
> (b) is a statement from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

Glorification means 'any form of praise or celebration'.[197] A statement glorifying terrorism must satisfy two conditions. First, the statement should glorify terrorism in the meaning of praise or celebration. Second, it should be clear from the statement that members of the public would understand that the purpose behind such statement is to encourage them to emulate the glorified acts of terrorism.[198] It would be hard to assess the second condition, given that mere praise or celebration of acts of terrorism could be understood as implied encouragement to emulate the terrorist acts without including any invitation to the public to emulate those acts. It might not be clear in which scenario a praise or celebration of terrorism would not be considered as encouragement to emulate acts of terrorism, and accordingly would not be covered under this provision.[199]

The phrase stating 'in the existing circumstances' - in section 1(3)(b) of the TA 2006

[196] UK Terrorism Act 2006, section 1(1); Rabenstein and Ratcliffe (n 76) 111.
[197] UK Terrorism Act 2006, section 20(2).
[198] UK Terrorism Act 2006, section 1(5); Rabenstein and Ratcliffe (n 76) 111-12.
[199] Hunt (n 180) 14-15.

- has a significant effect on the interpretation of the provision. It means that it should be possible to emulate the glorified act by the existing audience in the existing circumstances. It is not sufficient that the glorified act could be emulated in the far future. This is beneficial in tightening the broad definition of glorification, but there is no reference that this interpretation applies to other modes of encouragement than glorification.[200]

The relationship between the offence of glorification of terrorism and the definition of terrorism leads to criminalising acts as glorifying terrorism while not imposing any serious threat to life or national security. For instance, a statement glorifying violent opposition against undemocratic government outside of the UK or glorifying violent acts in the history could be easily caught under the provisions of glorification. This is notwithstanding that those statements might not represent any serious risk which require the aggressive measures taken against terrorism.[201]

2.3.4. Differentiation between encouragement, glorification, and incitement of terrorism

During the discussions on the Bill of the TA 2006, Baroness Scotland of Asthal clarified the difference between incitement and glorification offences as follows:

> It is not an offence, as we have already discussed in our debate on the previous amendment, to incite people to engage in terrorist activities generally, or to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable. That is the gap that we want to close.[202]

The TA 2000 criminalizes incitement of an act of terrorism overseas, provided that

[200] Fenwick and Edwards (n 64) 1077.
[201] ibid 1079.
[202] HL Deb 5 December 2005, vol 676, col 455 <www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051205/text/51205-15.htm> accessed 29 June 2022.

the act of terrorism should be one of the crimes stipulated under section 59(2) of the TA 2000, which relate to murder, wounding with intent, poison, explosions, and endangering life by damaging property.[203] The main difference between incitement and encouragement of terrorism is that incitement is directed towards the participation in specific crimes enumerated under the law, while encouragement does not have to be concerned with the commission of specific crime. It can include any encouragement or glorification of terrorism generally even if the crime has already been committed in the past. This justifies the introduction of the new offences of encouragement and glorification of terrorism. It is to fill this gap and catch statements which encourage or glorify terrorism in general without mentioning the specific crimes listed under the provisions of section 59(2) of the TA 2000.[204]

Criminalizing incitement of terrorism was initiated at the international level at the beginning then was applied at the local level in the UK. International bodies like the EU counter-terrorism institutions are usually dominated by the local governments of its member states. According, to strengthen its position, these governments sometimes use the method of initiating its policies at the international level and manage to get it approved then apply it locally. In this way, the government supports its policy with strong justification of being an international obligation. This is how the crime of incitement of terrorism was introduced in the UK national law after being proposed at the EU level by the UK.[205]

2.3.5. The government's direction towards preventive counter-terrorism policy and the issuance of the CONTEST strategy

The UK's government has developed the United Kingdom's Strategy for Countering Terrorism (CONTEST). This strategy is based on four main pillars which are: (i) Prevent;

[203] UK Terrorism Act 2000, section 59(1).
[204] Marchand (n 70) 138-39.
[205] Cian C. Murphy, 'EU Counter-Terrorism & The Rule of Law in a Post –'War on Terror' World' in Martin Scheinin (ed) *European and United States Counter-Terrorism Policies, The Rule of Law and Human Rights* (2011) 03(6) European University Institute 12.

(ii) Pursue; (iii) Protect; and (iv) Prepare.[206] Those pillars include the fight against terrorism through military and police operations. It also includes precautionary measures to try to prevent people who are more likely to participate in terrorist activity or are vulnerable to radicalization at early stages. Moreover, it engages people in the process by launching a website through which a citizen may report any suspicious activity which might be characterized as terrorism or preparation for terrorist act.[207]

The most relevant purpose of the CONTEST strategy to this chapter is the Prevent strand, given that it seeks to prevent terrorism before its occurrence like the offences of encouragement and incitement of terrorism. The main aim of the Prevent strand as stipulated in the CONTEST strategy is 'to safeguard and support vulnerable people to stop them from becoming terrorists or supporting terrorism'.[208] It targets people who are more vulnerable to extremism or radicalisation at early stages. Its purpose is to eliminate any factors which could turn those people to become terrorists in the future or engage with terrorist organisations.[209]

It has been argued that violation of human rights in the course of fighting terrorism is a direct cause of radicalization. This argument is based on the finding that Guantanamo Bay, in which severe violations of human rights take place, is one of the richest terrorist recruitment sources. Accordingly, the insistence on respecting human rights while countering terrorism is crucial for the prevention of radicalization and recruitment of terrorists.[210] The UK's policy towards terrorism has been developed to move from reactive to proactive status. This is obvious in the Prevent strategy, which aims at eliminating terrorism from its roots and tightening the sphere of radicalization and recruitment as much

[206] Home Office (n 75) para 8.
[207] Rabenstein and Ratcliffe (n 76) 47.
[208] Home Office (n 75) para 99.
[209] ibid para 99.
[210] Helen Duffy, 'International Human Rights Law and Terrorism: An Overview' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing Limited 2014) 348-49.

as possible.[211] In light of this policy, the background behind the enactment of encouragement and glorification of terrorism offences could be understood.[212]

2.4. Assessment of The Encouragement and Glorification of Terrorism Offences in The Context of Protection of Freedom of Expression

Criminalizing speech falls within the restriction of freedom of expression protected under article 10 of the ECHR. Some terrorist related speech might be outside of the ambit of article 10. A person who exists on site before the commission of suicide bombing and directs or encourages the perpetrators by any statement to go forward with the bombing will be likely considered a participant in the terrorist act. This conduct is not protected under freedom of expression.[213] The restriction of freedom of expression, through the prohibition of encouragement and glorification of terrorism, must be justified in accordance with the conditions set out in the ECHR. This means that the provisions criminalizing encouragement and glorification of terrorism must be (a) prescribed by law; (b) pursuing a legitimate aim; and (c) necessary in a democratic society.[214] This section analyzes and evaluates the provisions of section 1 of the TA 2006 regarding encouragement and glorification of terrorism, in accordance with the ECHR conditions for restriction of freedom of expression.

2.4.1. Are the offences prescribed by law?

In order for section 1 of TA 2006 to be prescribed by law, it must be accessible and foreseeable.[215] Although accessibility might not be subject to challenge in our case, foreseeability raises some concerns. It is argued that the provisions criminalizing indirect

[211] Fenwick and Edwards (n 64) 1026-27.
[212] Tufyal Choudhury, 'The Terrorism Act 2006: Discouraging Terrorism' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford Scholarship Online 2009) 465.
[213] Eric Barendt, 'Incitement to, and glorification of terrorism' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford Scholarship Online 2009) 447.
[214] Marchand (n 70) 143; For more information about ECtHR case law in relation to terrorism, see European Court of Human Rights, 'Guide to the case-law of the European Court of Human Rights' (31 December 2021).
[215] *Sunday Times* (n 82) [49].

encouragement of terrorism could be unforeseeable for a reasonable citizen.[216] First, a person is required to anticipate if their statement is likely to be understood by any section of the public as indirect encouragement of terrorism. This anticipatory exercise raises many difficulties. First, the public whom that person should anticipate their understanding are not defined by number, age, race, culture, or anything. They could be in the UK or abroad if the statement is published on the internet. Moreover, this means that the statement will be considered indirect encouragement of terrorism even if it was accessible by very large number of people and only very few people understood it as such.[217]

Second, distinguishing glorification as a type of indirect encouragement and defining it without clarifying what else could be indirect encouragement other than glorification is problematic. The definition of glorification in itself is not clear. It would be difficult for a reasonable person to identify which statement is representing a discussion or analysis of understanding and which is praising or celebrating terrorism.[218]

Third, a person might glorify an act willingly, but without having in mind that this act is terrorism at all. Here the broad definition of terrorism adds additional layer of un-foreseeability. For instance, freedom fighters might be caught under the definition of terrorism and a statement praising them could be considered as glorification of terrorism. It might not be clear for a reasonable person if Palestinians who fight for their freedom and liberation are considered freedom fighters or terrorists under the UK law.[219] Especially that there is no common practice of the UK government in this regard which could provide guidance on the main elements of differentiation between a terrorist and a freedom fighter. Yet, the practice changes overtime. Former prime minister, Margret Thatcher, refused to justify violence by the existence of political dispute and rejected to grant special treatment

[216] Marchand (n 70) 143.
[217] ibid 144.
[218] Fenwick and Edwards (n 64) 1078.
[219] Marchand (n 70) 145-46; Parker (n 193) 750-51.

to political prisoners while insisting on describing them as criminals. However, those prisoners held government posts in Northen Ireland afterwards. Another example of controversy is Margret Thatcher's perceiving Nelson Mandela as a terrorist. The Conservative Party subsequently announced an apology for such declaration confirming that they were wrong.[220] The United Nations' position in this regard is obvious in the UN Convention for the Suppression of the Financing of Terrorism, which supports the argument that:

> [A]ttacks by freedom fighters and other combatants in armed conflict, if directed at military personnel and objectives in keeping with international humanitarian law, are lawful and may not be termed terrorism. If instead they target civilians, they amount to terrorist acts (not, therefore, to war crimes) if their purpose is to terrorize civilians.[221]

The Arab League follows the same approach of the United Nations and explicitly declared its position in relation to the characterization of acts committed by Palestinians in their fights against the Israeli occupation as follows:

> [T]he legitimacy of the Palestinian struggle for self-determination did not imply that innocent civilians (be they Palestinian or Israeli) might be attacked. By this he [Amr Moussa, the then Secretary General of the Arab League] clearly meant to say that Palestinians legitimately fighting in the occupied territories against the foreign Occupant were not allowed by international law deliberately to attack civilians.[222]

While in contrast, Egypt seems to follow a broader approach as evidenced from its reservation made to the Convention for the Suppression of the Financing of Terrorism.

[220] Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Expanded edn, Hart Publishing Ltd 2015) 6.
[221] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4(5) Journal of International Criminal Justice 955.
[222] ibid 953.

Whereby, it excluded, from the application of counter-terrorism convensions, freedom fighters comitting violence against occupation for the purpose of liberation. It did not make a distinction between acts committed against civilians and those committed against militants.[223] In my opinion, the approach of the United Nations and the Arab League should prevail, given that peaceful civilians should not be invoked in armed conflicts. Accordingly, I would recommend that the UK law should include guidance on the differentiation between acts of freedom fighters and acts of terrorists and exclude the former from the scope of criminalization provided that it is not directed against peaceful civilians.

Fourth, glorification or indirect encouragement does not need to cause actual encouragement of terrorism. So, the level of cautiousness required from an ordinary person discussing any topic which could be related to terrorism is very high. It includes hypothetical expectations even if in the surrounding circumstances nobody was in fact encouraged and no risk arouse. This in turn restricts freedom of expression excessively with the absence of real or serious risk.[224]

Putting all these impediments together might affect the foreseeability of the provisions of section 1 of the TA 2006 criminalizing indirect encouragement of terrorism. Foreseeability assumes that the law should be accurate enough to allow citizens to understand the limits of the relevant restriction and regulate their conduct accordingly. Although definitive knowledge is not essential, citizens should be able to identify the variety of acts which could be triggered under such restriction and the consequences of the commission of these acts,.[225] However, these requirements are not fulfilled in the provision criminalizing indirect encouragement of terrorism due to the difficulties highlighted above.

[223] ibid 952.
[224] Marchand (n 70) 146.
[225] ibid 129.

2.4.2. Do the offences have Legitimate aim?

The UK Parliament justified section 1 of the TA 2006 as essential for the protection of national security. The aim of protection of national security is sufficient legitimate aim and usually the ECtHR defers to the relevant government to assess the legitimate aim based on the surrounding circumstances. Accordingly, there should not be an issue with regard to the fulfillment of this condition under the Convention.[226]

2.4.3. Are the offences necessary in a democratic society?

To answer the question of necessity in a democratic society, three sub-questions must be answered first. Is there a pressing social need for section 1 of the TA 2006? Is section 1 a proportionate response to the pressing social need for achieving the legitimate aim pursued? Is the degree of margin of appreciation of the government sufficiently justified?

The enactment of section 1 of the TA 2006 is justified by Parliament for three reasons. First, it was a response to the 7/7 London bombing event, to make it clear that the government is taking intolerant position against similar attacks. Second, the goal behind section 1 is to curb radicalization of youth to fight terrorism from its roots. Accordingly, section 1 represents a preventive measure to protect people who are more vulnerable to radicalization and to fight terrorism in early stages before the commission of terrorist acts. Third, section 1 is essential for the fulfilment of the UK's obligations under the CECPT, which requires that member states criminalize provocation of terrorism. Although section 1 might be criticized for exceeding the requirements of the CECPT, the prevention of radicalization can sufficiently work as pressing social need justifying the restriction of freedom of expression.[227]

[226] ibid 149.
[227] ibid 150.

Going forward to the next question regarding proportionality, we should assess whether the measures used for interference by the government are suitable for the risk threatened. Given that Parliament provided three reasons as grounds for justification, it could be argued that two of them are not proportionate to the risk. First, Parliament claimed that criminalizing encouragement of terrorism as response to the 7/7 London bombings event aims at protecting the victims and their families from anticipated offensive speech by proponents of the event.[228] However, in *Handyside v The United Kingdom*,[229] the ECtHR established that offensive speech is protected under freedom of expression and should not be restricted.[230]

Second, criminalizing indirect encouragement of terrorism under section 1 cannot be justified by the fulfillment of the CECPT requirements. The CECPT requires that the offender must have intention to provocation of terrorism, while section 1 is more restrictive as recklessness of the offender is sufficient to establish the crime without the need for direct intent.[231] The inclusion of recklessness was justified by Baroness Scotland of Asthal. As this is essential to avoid claims by the accused that they published the impugned statement recklessly knowing that it might encourage terrorism, but they did not intend to encourage terrorism. Baroness Scotland of Asthal confirmed there is no reason for allowing a person who knows that risk and nevertheless commits the act to be protected from criminal liability arising from such recklessness.[232]

Moreover, the assessment of the effect of the statement according to section 1 of the TA 2006 is not based on the intent of the publisher alone. It is also evaluated based on the understanding of members of the public to the statement. This causes confusion between

[228] ibid 150.
[229] *Handyside* (n 78).
[230] ibid [49].
[231] Marchand (n 70) 140.
[232] HL Deb 5 December 2005, vol 676, cols 457-58 <www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051205/text/51205-15.htm> accessed 29 June 2022.

being negligent and being reckless. Accordingly, it would be hard for the person who is publishing a statement to assess such risk in the first place.[233] It is argued that the evaluation of the *mens rea* based on external element to the offender (i.e., the likely understanding of the members of the public of the statement) indicates objective recklessness.[234] This is contrary to what is established by the case law that recklessness under section 1 means subjective recklessness.[235]

In addition, the CECPT stipulates that the provocation should result in a real risk that a terrorist act may be committed. However, section 1 does not take into consideration the consequences of encouragement of terrorism. The statement of encouragement will constitute a crime regardless of whether it caused actual risk of encouragement or not. This is contrary to what has been established by the ECtHR, which requires the risk of actual violence for the restriction to be valid. Accordingly, the measures used by the government, if assessed under these justifications, will be seen disproportionate to the risk threatened. This also contradicts with the conditions set out in article 12 of the CECPT in relation to respecting article 10 of the ECHR and maintaining proportionality between the competing interests.[236]

It is worth noting that in *Leroy v France*,[237] the ECtHR found no violation to article 10 of the ECHR. The facts of the case were mainly that the applicant published caricature about the 9/11 event with a quote '[w]e have all dreamt of it... Hamas did it'. This publication was made after two days of the 9/11 event, when people were still in a state of panic from the attack. The ECtHR found that the publication of this caricature is highly likely to cause chaos in such circumstances. The court held that the caricature with the quote written on it

[233] Murray (n 74) 342-43.
[234] Peter Kalulé, 'Of Haunted Speech. A critical examination of incitement to terrorism laws and speech regulatory practices in the post-9/11-7/7 continuum' (DPhil thesis, University of London 2019) 101.
[235] *R v Faraz* (n 173) [49].
[236] Hunt (n 180) 24-25.
[237] *Leroy* (n 134).

are considered as glorification of terrorist act. Accordingly, the ECtHR concluded that the imposed fine is proportionate response in the given context. The ECtHR also found that the actual consequence of the caricature was not relevant in its assessment. To this end, the ECtHR did not give weight to the actual damage as long as the probability of the risk threatened is high.[238]

However, what could be challenged here is the punishment imposed for the glorification of terrorism offence under the TA 2006. Glorification of terrorism is punishable under section 1(7) of the TA 2006 by imprisonment for a maximum period of 15 years or fine or both. Given the roughness of the sentence, the ECtHR might have a different opinion in relation to the proportionality of the punishment with the offence committed.[239] This argument is supported by the ECtHR's judgment in *Stomakhin v Russia*.[240] Whereas the ECtHR decided that a sentence of five years imprisonment and a banning on practicing journalism for three years is disproportionate punishment to the offence committed. The offence of the applicant included glorification of terrorism. In reasoning its judgment, the ECtHR took into consideration (i) the criminal record of the applicant; (ii) his identity as not being a public figure; and (iii) the low viewers of the medium on which the statements were published, which is newsletter. Accordingly, the ECtHR looked at the actual risk caused by the impugned statements when evaluating the appropriateness of the penalty.[241]

In *R v Faraz*,[242] the court states that the offence of encouragement of terrorism does not breach the right of freedom of expression. The court confirmed that political and religious expressions are protected under article 10 of the Convention as long as it does not imply an encouragement of terrorism.[243] In *Regina v Humza Ali*,[244] the court states '[i]t is in

[238] ibid.
[239] Marchand (n 70) 154.
[240] App no 52273/07 (ECtHR, 8 October 2018).
[241] ibid [127]-[132].
[242] *R v Faraz* (n 173).
[243] ibid [54].
[244] [2018] EWCA Crim 547, 2018 WL.

our view clearly a legitimate objective to criminalise conduct which intentionally or recklessly encourages others to commit acts of terrorism, including acts of violence on behalf of proscribed organisations'.[245] It is also confirmed in *Regina v Humza Ali* that '[e]ncouragement to agree with the aims of an organisation, or express or show agreement and support, is not sufficient. That is because passive support of those organisations without more is legal and not a terrorist act'.[246]

In terms of prevention of radicalization as the third and strongest justification for section 1, it is not completely free of challenge. It has been noticed that the issuance of section 1 did not have tangible effect on the prevention of radicalization.[247] At the same time, due to the broad language of the provisions of section 1, it could threaten legitimate speech given that people might refrain from expressing their legitimate opinions in fear of being caught under section 1 of the TA 2006.[248]

In the government's view, balance is achieved by adding a procedural layer for prosecution as safeguard. According to section 19 of the TA 2006, cases must be referred to either the Director of Public Prosecutions or the Attorney General (as the case may be) for consent before prosecution. So, it provides extra level of guarantee by requiring additional formalities for prosecution.[249] However, there is also counterargument that this is not the responsibility of the Director of Public Prosecutions or the Attorney General to decide on which cases to proceed with prosecution without having clear guidelines from the applicable legislation. It is claimed that this might lead to inconsistency of application.[250]

In *R v Gul*,[251] the UK Supreme Court confirmed that the jurisdiction of the Director

[245] ibid [17].
[246] ibid [18].
[247] Marchand (n 70) 153.
[248] Imran Awan, 'Glorifying and encouraging terrorism: preserving the golden thread of civil liberties in Britain' (2012) 4(3) Journal of Aggression, Conflict and Peace Research 148.
[249] Marchand (n 70) 136-37; See Crown Prosecution Service Website for information about terrorism prosecution cases from 2016 to 2021.
[250] Marchand (n 70) 146-47.
[251] [2013] UKSC 64.

of Public Prosecutions or the Attorney General to approve prosecutions aims at achieving public interest. There is no intention behind this role to grant the Director of Public Prosecutions or the Attorney General any responsibility to interpret or create legal provisions of law. The UK Parliament is the legislative arm of the state and legislation is supposed to be enacted clear enough to allow smooth application by the Executive. Nevertheless, the UK Supreme Court criticized the prosecution approval tool. The UK Supreme Court concluded that the broadness of the definition of terrorism coupled with the prosecution approval requirement leaves citizens confused about the exact boundaries of the criminal provision. It also gives the power of defining such uncertainty to unelected authorities as the Director of Public Prosecutions or the Attorney General, unlike the UK Parliament.[252]

It has been noticed as well that there are few prosecutions applied under section 1 of the TA 2006 in practice. This could evidence that the government does not intend to expand the application of section 1 and is using its margin of appreciation properly.[253] However, this does not eliminate the risk of the provisions of law which are in place which could be subject to abuse at any time. The government can use the provisions of section 1 to prosecute any kind of opposition including for political purposes. This is in addition to the risk of putting people in fear of expressing themselves and increasing self-censorship excessively.[254]

The opinion of the UK Parliament's Joint Committee on Human Rights (the "**JCHR**") in its report supported the position of the opponents of the TA 2006. It argued that the TA 2006 might not be acceptable as a proportionate response to the pressing social need due to its broad and confusing provisions. The report was based on the same arguments

[252] ibid [35]-[38].
[253] Marchand (n 70) 147-48.
[254] Parker (n 193) 749-51.

highlighted above, which are mainly the replacement of intent with recklessness, the broad definition of terrorism and the potential risk on freedom of expression.[255] It is even believed that may be the amount of criticism directed towards the TA 2006 lowered its effectiveness. The government's non-use of the TA 2006 to prosecute terrorist speech is obvious in case like Muhamad al-Massari's website. The content on this website falls within the scope of section 1 of the TA 2006. The website includes posts praising suicide bombings and encouraging violence.[256] This position of the government could be a result of the opposition to avoid heated discussions against the TA 2006.[257]

Cian Murphy argues that the European Union's approach towards Counter-terrorism policies and laws leads to several violations of human rights and liberties, including freedom of expression. This is obvious for example in the regulations of incitement of terrorism and anti-money laundering.[258] These laws and policies not only affect the rights of terrorists or suspected terrorists, but also affect ordinary citizens due to intensified counter-terrorism measures, like excessive surveillance. Accordingly, Murphy claims that it is impossible to evaluate the proportionality and necessity of such counter-terrorism laws as it is assumed rather than evidenced.[259] He suggests 'subjecting proposals for new powers to rigorous scrutiny, and accepting that not all risks can be eliminated'.[260]

To sum up, criminalizing glorification and indirect encouragement of terrorism as set out under section 1 of the TA 2006 might infringe on freedom of expression for the reasons discussed above. Some suggestions which could eliminate that risk are to (i) replace recklessness with intent as constituting element of the crime; (ii) require the existence of high probability that the impugned statement would result in a risk of terrorism; (iii) define

[255] ibid 752.
[256] Souad Mekhennet and Dexter Filkins, 'British law against glorifying terrorism has not silenced calls to kill for Islam' *New York Times* (21 August 2006) <www.nytimes.com/2006/08/21/world/europe/21london.html> accessed 24 June 2022.
[257] Parker (n 193) 756-57.
[258] Murphy, 'EU Counter-Terrorism & The Rule of Law in a Post –'War on Terror' World' (n 205) 12-13.
[259] ibid 13.
[260] ibid 13.

indirect encouragement in general and remove glorification; (iv) include guidance on the differentiation between acts of freedom fighters and acts of terrorists and exclude the former from the scope of criminalization; and (v) publish the guidelines upon which the Director of Public Prosecution or the Attorney General prosecute under section 1 of the TA 2006.[261]

2.5. Conclusion

Freedom of expression and national security intersects in multiple ways. Both interests are essential for a democratic and secure society. Although freedom of expression is a significant human right, it fails to stand without restriction when security risks emerge. That is why the limitation of freedom of expression is legally allowed. However, the limitation of freedom of expression is not left open. It must be applied without crossing the boundaries determined by the human rights law. The issue arises when freedom of expression is restricted for the protection of national security against terrorism.

This chapter serves as an overview of the right to freedom of expression in accordance with the ECHR, while examining the rules governing its limitation for the protection of national security in the case of criminalizing encouragement of terrorism. This chapter tries to establish the connection between the limitation of freedom of expression and the adoption of counter-terrorism measures for the protection of national security. The chapter sheds light on the challenge of keeping the balance between civil rights while fighting terrorism. The fine line between freedom of expression and encouraging terrorism makes the responsibility of the government more difficult. Even if none or minimal infringements of freedom of expression exist due to the application of section 1 of the TA 2006, this does not mean that the provisions of the law itself does not impose the risk of such infringements.

[261] Marchand (n 70) 155-57.

It is obvious that the offence of indirect encouragement including glorification of terrorism raises crucial concerns regarding freedom of expression. According to the principles of limitation of freedom of expressions of the ECHR, the calculation of the proportionality equation might fail to give the correct answer, and the competing interests might not be balanced. That is why the provisions of section 1 of the TA 2006 are faced with much criticism.

It is worth noting that the spread of radicalization throughout the UK and the variety of methods employed for achieving this purpose cannot be ignored. Radicalization is the seed of terrorism planted in youth to build armies of blind minds obeying terrorism leaders in executing lethal attacks like 9/11 and 7/7 events. In light of the evolution of radicalization, the UK's government could not stand still watching terrorism growing within its citizens. The UK's government shifted from reactive to proactive status in combating terrorism and followed a preventive strategy to curb radicalization. Encouragement and glorification of terrorism were among the risks captured by the government's preventive policy.

Through this chapter I assume I showed the urgence for the preventive policy adopted in the UK, while emphasizing the shortcomings of its application. It is not the intention of this chapter to suggest the elimination of the offence of encouragement of terrorism entirely. The criminalization of this offence can be confidently justified for the protection of national security. It is, however, claimed that the provisions of law need some tweaking to maintain the aimed balance and protect freedom of expression concurrently.

Accordingly, the outcome of this chapter can be summarised in the following three main points:

Firstly, Freedom of expression is one of the most important rights and its respect is essential in democratic societies. However, freedom of expression is not absolute. It can be limited for the purpose of recognizing more important rights or interests. One of these

interests is national security, which is the main focus of this thesis.

Secondly, the restriction of freedom of expression is also not absolute. There are certain conditions which must be fulfilled to justify any restriction. Otherwise, the restriction should be declared inadmissible. The restriction must be 'prescribed by law', which means that the law must be accessible and foreseeable. The restriction must be justified by a 'legitimate aim', which is national security in our case. The restriction must be 'necessary in a democratic society', which requires the existence of 'pressing social need'. The latter condition means that the government enjoys margin of appreciation in assessing the priority of competing interests. The government must also be proportionate in choosing the measures used in the restriction of freedom of expression. The proportionality test is the most important and the hardest condition in proof.

Finally, the main struggles facing section 1 of the TA 2006 could be summarized in two sets as follows: (i) the vague and broad scope of the law hinders its foreseeability, which leads to the failure of the offence of encouragement of terrorism to be sufficiently prescribed by law in accordance with the ECHR; and (ii) although the risk of radicalization poses a pressing social need, the government's measures might be exceeding the limits of proportionate response and accordingly might not be considered as necessary in a democratic society. These deficiencies can be cured through legislative amendments seeking more clarity as previously recommended in this chapter.

CHAPTER THREE

CRIMINALIZING ENCOURAGEMENT AND INCITEMENT OF TERRORISM AND ITS EFFECT ON FREEDOM OF EXPRESSION IN EGYPT

3.1. Introduction

Egypt is an Arab republic located in north-eastern Africa and south-western Asia.[262] The population of Egypt is more than one hundred million.[263] The political system in Egypt is presidential, composing of the Executive headed by the President, the Legislature represented by the Parliament, and the judiciary represented by courts. The political system is a multi-party system. The Constitution of 2014 is the currently valid constitution in place.[264] The constitution possesses the highest status in the hierarchy of laws and legislation. It regulates the structure of the governing bodies, and the jurisdictions of the supreme authorities of the state. It also guarantees people's rights and freedoms, including political rights.[265] According to the Constitution of 2014, Egypt is 'a democratic republic'.[266]

Egypt is a civil law country, and its constitution, laws and regulations are codified. It does not have a system of *stare decisis* or judicial precedents which exists in common law countries, like the UK.[267] Although judgments of higher courts carry great moral weight and are referred to in future memorandums and judgments, they do not have legal binding effect on future court judgments.[268] However, the Egyptian Supreme Constitutional Court (the "**SCC**") has jurisdiction to interpret laws.[269] The SCC's interpretations of laws have binding effect.[270] Moreover, the SCC is empowered to strike down laws which it finds to violate the

[262] 'Egypt Location' (*State Information Service*).
[263] 'السكان (population)' (*State Information Service*).
[264] 'النظام السياسي في مصر (*Political System in Egypt*)' *The Arab Republic of Egypt Presidency*).
[265] Hamdy Ali Omar, *النظام الدستوري المصري وفقا لدستور ٢٠١٤ (The Egyptian constitutional regime according to the constitution of 2014)* (Almaaref Institution 2016) 7.
[266] Article 1 of the Egyptian Constitution of 2014.
[267] Mohamed A. Arafa, 'Whither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or a Military Coup D' État?' (2014) 24(4) Indiana International & Comparative Law Review 877.
[268] 'Key Features of Common Law or Civil Law Systems' (*The world Bank*, 2 March 2022).
[269] Article 192 of the Egyptian Constitution of 2014
[270] Omar (n 265) 212.

Egyptian Constitution.[271]

The recent history of Egypt is complicated, especially after the emergence of the Arab Spring revolutions which commenced in Tunisia, but spread to Egypt.[272] On 25th of January 2011, the Egyptian youth revolted against the former President, Hosni Mubarak, who has ruled Egypt for 30 years.[273] The instability caused by the Arab Spring revolution and the subsequent events led to decline in the economic, social, security and political conditions of the state.[274] The Arab Spring in Egypt was a significant step towards the establishment of a state based on the rule of law. However, political complications and increased terrorism and instability delayed the process of democratization and led to extended transitional period. Currently, terrorism is one of the most challenging obstacles hindering the development of Egypt and threatening its national security.[275] In this chapter, I claim that Egypt is currently in a stage of 'transitional constitutionalism'.[276] Egypt is undergoing transitional political transformation, which is moving towards, but has not yet achieved, full liberal democracy.[277]

In 2014, the Anti-Terrorism Law no. 94 of 2015 (as amended) (the "**Anti-Terrorism Law**") was issued, following the assassination of the Egyptian Public Prosecutor, Hisham Barakat.[278] The Anti-Terrorism Law faced much criticism within Egypt as well as abroad, and raised concerns in relation to its negative effect on constitutional rights and freedoms.[279] In this context, the issue of balancing between the protection of national security against

[271] Sanaa Sayed Khalil, 'مبادئ حقوق الإنسان في الدستور المصري' (Human rights principles in the Egyptian constitution) (*Studies in Human Rights*).
[272] Antoni Abat i Ninet and Mark Tushnet, *The Arab Spring: An Essay on Revolution and Constitutionalism* (Edward Elgar Publishing 2015) 20.
[273] Michael Georgy, 'Special Report - The real force behind Egypt's 'revolution of the state'' *Reuters* (10 October 2013) <www.reuters.com/article/uk-egypt-interior-special-report-idUKBRE99908720131010> accessed 27 September 2022.
[274] Arafa (n 267) 867-68.
[275] Ninet and Tushnet (n 272) 244.
[276] Catherine Turner, 'Transitional Constitutionalism and The Case of The Arab Spring' (2015) 64(2) The International and Comparative Law Quarterly 269-70.
[277] ibid 269-70.
[278] Aidan Lewis, 'Egypt executes nine over public prosecutor's killing' *Reuters* (20 February 2019) <www.reuters.com/article/us-egypt-execution-idUSKCN1Q9125> accessed 27 September 2022.
[279] Fionnuala D. Ní Aoláin, 'Egypt's updated terrorism law opens the door to more rights abuses, says UN expert' (*United Nations Human Rights Office of the High Commissioner*, 09 April 2020).

terrorism, and the protection of freedom of expression became obvious.

As Egypt is conscious of the national security threats surrounding it, countering terrorism is set as the seventh goal of Egypt's vision of 2030, which is a national strategy announced in 2016 to achieve a long-term sustainability plan in all fields by 2030.[280] On the other hand, Egypt also recognizes the importance of protecting human rights of peaceful citizens. Accordingly, Egypt looks forward to developing this area with many efforts on the national and international levels.[281]

This chapter starts with a brief background on constitutionalism in Egypt highlighting the historical pinpoints contributing to the development of the regime. It introduces the regulation of freedom of expression in the Egyptian regime and the guarantees of rights and freedoms. Going in-depth, the chapter sheds light on the Anti-Terrorism Law. It highlights the provisions which are relevant to encouragement and incitement of terrorism. This part focuses on the counter arguments addressed in relation to the negative effect of the Anti-Terrorism Law on freedom of expression. Finally, the chapter presents the efforts of the government to enhance this area.

3.2. Historical Background of The Egyptian Constitutions

Constitutional law can be defined as 'the set of legal rules regulating the governing regime of the state (the government), which regulates peaceful coexistence of authority and freedom'.[282] Constitutional law provides a form of coordination between the legislative, the judicial, and the executive arms of the state. On the other side, constitutional law sets the balance between the authorities of the state and the freedoms of the public.[283] Accordingly, the constitution places limitations on the exercise of powers of each branch of

[280] 'Egypt 2030' (*The Arab Republic of Egypt Presidency*).
[281] 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 Egypt' (*United Nations Human Rights Office of the High Commissioner*, 21 August 2019) A/HRC/WG.6/34/EGY/1, 22-26.
[282] Ramzy Taha Eshaer, *الوجيز في القانون الدستوري (The brief of constitutional law)* (Dar Alnahda Alarabia, 2017) 13-14.
[283] ibid 13-14.

government.[284] The constitution imposes duties on the governing bodies of the state and sets the framework within which the powers of the government should be exercised.[285]

Constitutions also typically provide guarantees for civil rights, freedoms and liberties which must be respected by the authorities of the state. Examples of those rights are freedom of expression, the right to life, political rights, ...etc. Therefore, constitutionalism represents a limitation of the government powers for the sake of protecting peoples' civil rights.[286] As Eric Barendt explained, 'a constitutional text without legally enforceable guarantees of citizens' freedoms and a proper balance or separation of powers scarcely merits the description of a *constitution*'.[287] The fact that a state has a constitution in place is not sufficient to achieve constitutionalism. If the government does not respect human rights, the constitution shall be considered a constitution in form, but not in substance, namely a 'sham constitution'.[288] Constitutionalism occurs when the government powers are limited through separation of powers, and fundamental rights are respected.[289]

Antoni Ninet and Mark Tushnet further described the Egyptian regime under Mubarak as follows: 'governments in power use the term democracy in their constitutions, but at the same time distort its meaning in everyday politics'.[290] While Nimer Sultany view the constitutions of Arab states as lacking constitutionalism. The reason behind this view is that these constitutions could not effectively hold the government accountable or control its powers. Accordingly, human rights could not be guaranteed in light of the Executive's absolute power. In addition, these constitutions serve the interests of the governing elite rather than the popular majority.[291]

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[284] Wil Waluchow and Dimitrios Kyritsis, 'Constitutionalism', *The Stanford Encyclopedia of Philosophy* (Summer Edn, 2022) 1-2.
[285] Jo Eric Khushal Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29(3) Oxford Journal of Legal Studies 440.
[286] Waluchow and Kyritsis (n 284) 1-2.
[287] Eric Barendt, 'Is there a United Kingdom Constitution?' (1997) 17(1) Oxford Journal of Legal Studies 141.
[288] David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101(4) California Law Review 880.
[289] Barendt (n 287) 141.
[290] Ninet and Tushnet (n 272) 214.
[291] Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press 2017) 37.

Historically, Egypt witnessed many revolutions and constitutional developments. It has also been occupied by different empires. For instance, Britain occupied Egypt for 74 years since 1882 until full and final liberation in 1956, after the nationalization of the Suez Canal.[292] All these events affected the structure and evolution of Egypt's Constitution. However, for the purpose of this research, I will limit the background on the evolution of the Egyptian Constitutions to the period starting from the Arab Spring in Egypt to date. During this period, Egypt witnessed two revolutions on the 25th of January 2011 and the 30th of June 2013. Each revolution was followed by constitutional reform.[293]

3.2.1. The Arab Spring in Egypt (25th of January 2011)

In 2011, former President Hosni Mubarak - who was also a former military officer - was forced to step down from presidency in response to a revolution against his regime which eventually escalated to demand his removal. Peaceful demonstrations started on the 25th of January 2011 in huge numbers. The Arab Spring started by the Tunisian revolution which managed at last to remove the Tunisian President. In Egypt, the flame of the revolution was the unlawful brutal murder of Khaled Saeed by police officers. Khaled Saeed was a peaceful citizen who has been beaten to death in the street by two police officers.[294] This incident ignited the frustration of the public. A group on Facebook was created named in Arabic 'We Are All Khaled Saeed' and condemned the incident.[295] The use of the internet and social media platforms to call for demonstrations was a fundamental contribution in the large numbers of participants, especially among youth.[296] The massive numbers of people

[292] Martin Thomas and Richard Toye, 'Arguing about Empire: Imperial Rhetoric in Britain and France, 1882-1956' (2013) Oxford University Press 20; Mohamed Abdelrahman, 'بداية الاحتلال.. حكاية 74 عامًا من الاحتلال البريطاني لمصر أنهته ثورة يوليو (beginning of Occupation.. Story of 74 Years of the British Occupation of Egypt)' *yoom 7* (28 June 2019) <www.youm7.com/story/2019/6/28/بداية-الاحتلال-حكاية-74-عامًا-من-الاحتلال-البريطانى-لمصر-أنهته/4308484> accessed 4 November 2022.

[293] Ninet and Tushnet (n 272) 185.

[294] 'Egypt police jailed over 2010 death of Khaled Said' *BBC News* (3 March 2014) <www.bbc.co.uk/news/world-middle-east-26416964> accessed 28 September 2022.

[295] Jean Lachapelle, 'Repression of Islamists and Authoritarian Survival in the Arab World: A Case Study of Egypt' in Melani Cammett and Pauline Jones (eds), *The Oxford handbook of politics in Muslim societies* (Oxford University Press 2022) 101.

[296] Bruce K. Rutherford, *Egypt after Mubarak: liberalism, Islam, and democracy in the Arab world* (Princeton University Press 2013) ix-xi.

who joined the revolution united under simple humanitarian demands reflecting the low quality of life which lacks minimum human rights. The main slogan representing the initial demands of the revolution of 2011 was 'bread, freedom, social justice'.[297]

Mubarak's regime could be described as authoritarian, albeit with a democratic veneer. Regular presidential and parliamentary elections were being held. The Constitution of 1971, which was the valid constitution during Mubarak's period, provided for protection of fundamental rights. However, the government was not subject to real accountability, which resulted in violations of laws, abuses of citizens' rights, and absence of proper rule of law. To complete the democratic image, the regime gave the opposition a monitored space to criticize the government without crossing red lines.[298] The conditions set for presidential candidates to nominate themselves for elections were very strict leaving political parties unable to compete with Mubarak who represented the National Democratic Party (the "**NDP**").[299] One of the examples of deterring presidential competitors is Ayman Noor, who was a competing candidate with Mubarak in the presidential elections of 2005. Noor was jailed after the elections based on accusation of using forged documents in establishing his political party.[300]

The Egyptian Constitution of 1971 lasted for forty years, though with some amendments. However, it was characterized by ambiguity. It left some topics unresolved, which allowed the Executive to direct the Constitution's ambiguous provisions to serve its interests and control opposition minorities. Despite its deficiencies, it is argued that the reason behind the Constitution's survival for such a long period is that each political group - either authoritarians, liberals or Islamists - believed that ambiguity could serve their

[297] Zaid Al-Ali, 'The Arab Spring Constitutions: for Whose Benefit?' in Tom Ginsburg and Aziz Z. Huq (eds.), *Assessing Constitutional Performance* (Cambridge 2016) 380-81.
[298] Joshua A. Stacher, 'Parties Over: The Demise of Egypt's Opposition Parties', British Journal of Middle Eastern Studies (2004) 31(2) 218; Francesco Biagi, 'Constitution Drafting after the Arab Spring: A Comparative Overview' (2022) 29(1) Indiana Journal of Global Legal Studies 6-7.
[299] Ninet and Tushnet (n 272) 210.
[300] Ahmed Eldakak, 'Approaching Rule of Law in Post-Revolution Egypt: Where We Were, Where We Are, and Where We Should Be' (2012) 18(2) University of California Davis Journal of International Law and Policy 279.

interests.[301] Another justification for the survival of the Constitution of 1971 is the weak opposition due to the vast oppressive powers of the Executive. Accordingly, the opposition became reluctant to take dissenting steps against the regime in fear of its aggressive response and tried to coup with it. Nevertheless, eventually the Constitution of 1971 collapsed. Long decades of ambiguous Constitution with abusive government led to uniting liberals with Islamists against authoritarians in 2011 to put an end to the governing regime and terminate its Constitution.[302]

The Parliament was dominated by the NDP which was presided by Mubarak. The Parliament used to approve all Mubarak's proposed constitutional amendments, while the government used to manipulate referendum results.[303] Mubarak's regime aborted any trial to build opposition parties capable of competing with the NDP. Even any member of the Parliament who gained public popularity was restricted from leading a strong political party. A committee was established for licensing and supervising political parties. This committee was dominated by pro-regime members, which played an important role in restricting any active political opposition.[304] During the thirty years of Mubarak's regime, the economic, social, and political conditions of the state deteriorated. The purchasing power decreased due to inflation, and poverty rates increased to 40% of the population. The unemployment rate was also very high that it reached 25% of university graduates.[305]

In addition, the continuous declaration of a state of emergency represented a huge decline in the preservation of civil rights.[306] The Emergency Law no. 162 of 1985 (as amended) (the "**Emergency Law**"), gave the President extreme powers of detention and

[301] Clark B. Lombardi, 'The Constitution as Agreement to Agree: The Social and Political Foundations (and effects) of the 1971 Egyptian Constitution' in Denis J. Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press 2013) 425-29.
[302] ibid 425-29.
[303] Eldakak (n 300) 277.
[304] Stacher (n 298) 220-222.
[305] Rutherford (n 296) ix-x.
[306] Stacher (n 298) 216-17.

limitation of freedoms.[307] Declaration of a state of emergency is a common practice to protect national security when nations face threats, for example, terrorism. The existence of a state of emergency allows, with the fulfilment of some conditions, the derogation from international human rights conventions. Such derogation typically authorizes the government to expand the use of force and security measures at the expense of human rights.[308]

The British occupation of Egypt, which has lasted since 1882 until complete and final liberation in 1956, has contributed to Egypt's accumulated legacy of emergency powers which has continued into its national system ever since.[309] Martial laws and special courts were part of the colonization process and were deepened in the Egyptian system strengthening military rule. The British colonization has exported emergency measures and entrenched it in the Egyptian Constitution of 1923. The colonization legacy shaped Egypt's approach to national security and emergency measures.[310] Subsequently, these measures have been used by Mubarak's regime to fight terrorism and to maintain his oppressive government under the cover of countering terrorism.[311] It took Egypt decades until it was able to end the state of emergency which has been excessively declared since 1981.[312]

After the success of the Arab Spring in Egypt to remove Mubarak, the Supreme Council of the Armed Forces (the "**SCAF**") ruled the state during a transitional period.[313] The SCAF assumed power during the transitional period with support from the public. This support was a result of the military's supportive position towards the demonstrations of the Arab Spring. The military did not use force against the demonstrations and guaranteed

[307] Rutherford (n 296) i.
[308] Fiona de Londras, 'Counter-Terrorist Detention and International Human Rights Law' in Ben Saul, *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 410-11.
[309] Sadiq Reza, 'Endless Emergency: The Case of Egypt' (2007) 10 (4) New Criminal Law Review 535-36.
[310] ibid 535.
[311] Fatemah Alzubairi, 'The Role of Colonialism and Neo-Colonialism in Shaping Anti-Terrorism Law in Comparative and International Perspectives: Case Studies of Egypt and Tunisia' (DPHIL thesis, York University 2017) 186.
[312] Reza (n 309) 532.
[313] Matthew Weaver and Tom McCarthy, 'Egyptian army suspends constitution and removes President Morsi – as it happened' *The Guardian* (3 July 2013) <www.theguardian.com/world/middle-east-live/2013/jul/03/egypt-countdown-army-deadline-live> accessed 27 September 2022.

peaceful transition of power. This was followed by a series of constitutional declarations regulating the transitional period until the election of new President and Parliament, and the issuance of new constitution.[314] In addition, the Supreme Administrative Court dissolved the NDP and ordered the confiscation of its assets.[315]

The Egyptian youth of the Arab Spring believed in liberal democracy. However, they failed to unite in one strong party which could compete and gain sufficient votes in elections. Although their success in convincing many people to join the demonstrations, they failed to win popularity as political parties.[316] On the other side, Islamist parties managed to secure electoral majority. Their strong networks in mosques helped them to connect easily with wide range of people. They also used to provide health care services which supported their image and increased their popularity. An additional factor is the cultural orientation of the Egyptians which is influenced by religion. The strategy of Islamist parties in conveying their campaigns in a religious context gives them privilege in attracting Egyptians.[317] For example, in their campaign supporting one of the constitutional referendums, they used quotes from Quran. They were convincing the voters that they are voting for Islam and that voting in the referendum against the constitutional declaration means no to Islam.[318] It is claimed that the majority of people choosing Islamist parties are motivated by Islam regardless of the party, its members or its political plan.[319]

I will focus on the Muslim Brotherhood Group (the "**MB**") and their political party named Freedom and Justice Party (the "**FJP**") as the most popular Islamist party in Egypt. Historically, the MB attempted to assassin former President, Gamal Abdel Nasser, which

[314] Anthony F. Lang, 'From revolutions to constitutions: the case of Egypt' (2013) 89(2) Royal Institute of International Affairs 357.
[315] Eldakak (n 300) 296.
[316] Rutherford (n 296) xiv-xv.
[317] Lachapelle (n 295) 103-04.
[318] Nora Medhat Abdelkader, 'Islamist parties and social movements: cases of Egypt and Tunisia' (2020) 4(3) Review of Economics and Political Science 234.
[319] Thomas Pepinsky, 'Ideologies, Brands, and Demographics in Muslim Southeast Asia "Voting for Islam"' in Melani Cammett and Pauline Jones (eds), *The Oxford handbook of politics in Muslim societies* (Oxford University Press 2022) 253.

resulted in their marginalization.[320] However, the MB succeeded in maintaining their political existence. They managed to secure seats in the Parliament in 2000 and 2005 through independent members. They also provided wide variety of social, educational, and charitable services which strengthened their network.[321] The FJP was not established until 2011 after the success of the Arab Spring.[322] The MB maintained full control over the decision-making process in the FJP and did not follow fair electoral process in appointing the FJP leaders.[323] In 2012, the FJP earned the majority of seats in the Parliament.[324] However, the SCC declared some of the provisions regulating the parliamentary elections as unconstitutional.[325] Accordingly, the SCAF dissolved the Parliament.[326]

In June 2012, Mohamed Morsi, who was a member of the MB and the FJP, won the presidential elections.[327] Morsi cancelled the SCAF's decree dissolving the Parliament.[328] He also issued a constitutional declaration stipulating that his decrees are non-appealable by any means. The constitutional declaration immunized the constituent assembly, drafting the constitution, from dissolution by court judgments.[329] Antoni Ninet and Mark Tushnet emphasized that '[t]he president was using the constitution in an authoritarian way. The new president suddenly has unlimited constituent and political competences. Essentially, he sought constitutional immunity from any legal challenge'.[330] However, due to massive opposition, Morsi had to cancel this constitutional declaration.[331] The constituent assembly worked on drafting the constitution rapidly. The MB supporters tried to put pressure on the judges of the SCC by protesting in front of the SCC's building to prevent judges from issuing

[320] Jeffrey T. Kenney, 'Millennial Politics in Modern Egypt: Islamism and Secular Nationalism in Context and Contest' (2012) 59 (5-6) Numen International Review for the History of Religions 441.
[321] Abdelkader (n 318) 227.
[322] ibid 228.
[323] ibid 230.
[324] ibid 234-35.
[325] Case no 20 of 34J (Egyptian Supreme Constitutional Court).
[326] Egyptian Supreme Council of the Armed Forces Decree no 350 of 2012; Rutherford (n 296) xxiii.
[327] Abdelkader (n 318) 231-32.
[328] Egyptian Presidential Decree no 11 of 2012; Nirmala Pillay, 'The Rule of Law and the New Egyptian Constitution' (2014) 35 Liverpool Law Review 149-50.
[329] Ninet and Tushnet (n 272) 222-24.
[330] Ninet and Tushnet (n 272) 223.
[331] Egyptian Constitutional Declaration dated 8 December 2012; Pillay (n 328) 149-50.

any judgments affecting the legality of the constituent assembly.[332] In December 2012, the Constitution of 2012 was approved through a public referendum.[333]

The Constitution of 2012 referred, in its preamble, to the revolution of 2011 and the role of the Egyptian army. It stipulated that Egypt is a democratic state.[334] It included a charter of rights with fundamental civil rights and provided for civil rights' guarantees.[335] It stipulated that the state is governed by the legislative body represented by the Parliament, the Executive represented by the President and the cabinet, and the judiciary represented by courts.[336] Similar to the previous Constitution of 1971, the Constitution of 2012 maintained the provision which states that 'the principles of Islamic *Shariea* are the main source of legislation'.[337]

However, the constitution of 2012 provided that the principles of *Shariea* include jurisprudential principles in accordance with *Sunni* doctrine.[338] In terms of the rules governing the interpretation of the sources of *Shariea*, there are *Sunni* and *Shiea* schools of thought. Each school follows a number of scholars who apply different interpretations of the provisions of the sources of *Shariea*. Egyptian Muslims typically do not stick to one school in their daily lives, they may follow norms acknowledged by different schools.[339]

The above provision of the Constitution of 2012 imposes many implications on the Egyptian community and its moderate identity. First, it expands the scope of *Shariea* as the main source of legislation contrary to what has been established by the SCC in its interpretation of this concept. Whereby, the SCC differentiates between the principles of *Shariea* as to their effect of restricting legislation.[340] Accordingly, only definitive principles

[332] Nathalie Bernard-Maugiron, 'A Clash of Institutions: Judiciary vs. Executive in Egypt' in Eva Bellin and Heidi Lane (eds), *Building rule of law in the Arab world: Tunisia, Egypt, and beyond* (Lynne Rienner 2016) 41.
[333] Ninet and Tushnet (n 272) 224.
[334] Article 1 of the Egyptian Constitution of 2012.
[335] Articles 31 to 81 of the Egyptian Constitution of 2012.
[336] Articles 82 to 182 of the Egyptian Constitution of 2012.
[337] Article 2 of the Egyptian Constitution of 2012.
[338] Article 219 of the Egyptian Constitution of 2012.
[339] Arafa (n 267) 879-80.
[340] Case no 8 of 17J (Egyptian Supreme Constitutional Court).

of *Shariea* must be considered when issuing legislation. While principles established in jurisprudence are not within the meaning of principles of *Shariea* as the main source of legislation. The SCC justified its interpretation by stating that definitive principles of *Shariea* are not subject to change, while jurisprudential opinions could be challenged and updated based on the development of communities.[341]

The Constitution of 2012 stated that Al-Azhar, which is an independent Egyptian Islamic educational institution, shall be consulted in Islamic *Shariea* related matters.[342] Again, this provision encroaches on the jurisdiction of the SCC, which is the entity entitled to interpret the Constitution. Moreover, it involves the biggest educational Islamic institution in Egypt in politics which could affect its transparency and open the door for its corruption.[343]

During Morsi's presidency, many concerns were raised due to different reasons. Morsi started his ruling by having tensions with the judiciary and the military institutions. he reconvened the Parliament after the SCC's judgment of unconstitutionality of some provisions of the parliamentary elections law.[344] In addition, Morsi's authoritarian constitutional declarations increased the fears of establishing a new dictator regime.[345] Morsi appointed the founder of the Islamic Group (the "**IG**"), which is a terrorist group, as Luxor's governor. The IG was previously responsible for a terrorist attack on tourists in Luxor causing the death of more than sixty persons. Morsi also issued presidential pardons for terrorists in prisons.[346] Another frustrating event was the attendance of Tarek Al Zomor of the 6th of October war celebrations. Al Zomor was one of the convicted assassins of the former President Mohamed Anwar El-Sadat.[347]

[341] Case no 8 of 17J (Egyptian Supreme Constitutional Court).
[342] Article 4 of The Egyptian Constitution of 2012.
[343] Arafa (n 267) 894.
[344] Ninet and Tushnet (n 272) 229.
[345] ibid 222-24.
[346] ibid 232-33.
[347] Mohammed Salah, 'The age of rhetoric' *Alarabiya news* (9 October 2012) <https://english.alarabiya.net/News/2012/10/09/The-age-of-rhetoric> accessed 4 November 2022.

These acts raised concerns about Morsi's policy and his ability to lead the country.[348] The above instances were not the only reasons for frustration, Morsi declared a state of emergency in three cities, repeating Mubarak's authoritarian policy.[349] Morsi's policy towards equality and civil rights became unclear given the poor representation of women and non-Muslims in the leading positions in the Executive, the Legislature and in the FJP. The Parliament, which was dominated by the FJP, established the constituent assembly which drafted the Constitution of 2012, mostly representing Islamists with small representation of the rest of players in the political scene.[350] It is worth mentioning that the economic, social, security and international affairs continued to decline during Morsi's period.[351]

3.2.2. The revolution of the 30th of June 2013

For the above reasons, demonstrations and opposition increased against Morsi's regime.[352] Accordingly, a movement named in Arabic 'Tamarod', which means rebel, started to collect signatures supporting for the ouster of Morsi in the first anniversary of his presidency.[353] Tamarod started to call for demonstrations against Morsi, while Morsi's supporters initiated counter demonstrations and started to threaten Copts that they will set fire in their properties if they go to protest.[354] The demonstrations against Morsi reached around ten million protestors authorizing the military to take action against Morsi. Accordingly, the SCAF, headed by Abdul Fattah El-Sisi, had to intervene again to settle the battle. The SCAF proposed early presidential and parliamentary elections. However, Morsi refused the proposal and insisted on his legitimacy as the democratically elected

[348] Ninet and Tushnet (n 272) 232-233.
[349] Ninet and Tushnet (n 272) 233.
[350] Rutherford (n 296) xlii.
[351] Arafa (n 267) 867-68.
[352] Ninet and Tushnet (n 272) 234.
[353] Arafa (n 267) 866.
[354] ibid 866-67.

President.[355] Therefore, the SCAF ousted Morsi and handed the power to the Chief Justice of the SCC during a transitional period until the election of a new President of the state.[356] The SCAF suspended the Constitution of 2012.[357] The choice of military intervention in politics might not be the best option for achieving democracy and constitutionalism, if other alternatives were available. However, it could be concluded that the 'intolerance' against the MB led to 'excessive tolerance' towards the military.[358]

Pro-Morsi protesters gathered in two sit ins in Rabaa and Al-Nahda squares.[359] According to the National Council for Human Rights, which is an independent Egyptian human rights council established by virtue of Law no. 94 of 2003 (as amended), the sit ins were not peaceful. Many violations were reported by residents of Rabaa district. Tortured corps were found around Rabaa and Al-Nahda squares. Survivors acknowledged that they were being subjected to torture and detention by protestors who interrogated them in Rabaa's sit in.[360] Children were used in the sit in to carry signs stating 'martyrs to be'. Armed groups participated, and weapons were allocated in the sit ins.[361]

The speakers in the sit in's podiums incited hatred and encouraged violence.[362] They used statements like '[n]o peacefulness after today. We will establish war council in Sinai. One day, we might expel the police forces and the Military forces from Sinai'.[363] 'We will crush them on the 30th of June'.[364] Safwat Hegazy, who is a leader in the MB, declared that '[w]hoever sprays Morsi with water, we will spray them with blood'.[365] While Mohamed

[355] Ninet and Tushnet (n 272) 234.
[356] Arafa (n 267) 868-69.
[357] Ninet and Tushnet (n 272) 230.
[358] Michel Rosenfeld, 'On constitutionalism and the paradoxes of tolerance: Reflections on Egypt, the US, and beyond' (2013) 11(4) International Journal of Constitutional Law 837.
[359] Rania Magdi Fawzy, 'A tale of two squares: spatial iconization of the Al Tahrir and Rabaa protests' (2021) 20(1) Visual Communication 61.
[360] 'Summary of National Council for Human Rights fact-finding mission about the disperse of Rabaa Al-adaweya sit-in' (*National Council for Human Rights*) 1-2.
[361] ibid 1-2; 'غرفة الأخبار: 6 سنوات على فض اعتصام رابعة العدوية المسلح (Newsroom: 6 years after the evacuation of militant Rabaa Sit in)' *Extra news* (14 August 2019) <www.youtube.com/watch?v=aStWDmRNl_w> accessed 4 November 2022.
[362] 'Summary of National Council for Human Rights fact-finding mission about the disperse of Rabaa Al-adaweya sit-in' (n 360) 3.
[363] 'غرفة الأخبار: 6 سنوات على فض اعتصام رابعة العدوية المسلح (Newsroom: 6 years after the evacuation of militant Rabaa Sit in)' (n 361).
[364] ibid.
[365] ibid.

Elbeltagy, who is another leader in the MB, confirmed the MB's responsibility for terrorist attacks in Sinai by stating that '[w]hat happens in Sinai, as response to the military coup d'etat stops at the moment when El-Sisi declares that he redressed the coup d'etat'.[366] MB protesters were recorded in videos during their protest in the sit in announcing that they intend to divide into groups to explode and destroy Egypt. They also threatened that the ouster of Morsi would result in the establishment of another Taleban or Al-Qaeda groups in Egypt.[367] Other protesters stated that '[t]here will be blood, explosive cars, and remote-control explosives'.[368]

Based on claims from residents of Rabaa district against the sit in - due to the protestors' behavior in restricting residents' freedoms - the Public Prosecutor ordered the evacuation of the sit in.[369] After forty-seven days of protest, Rabaa's sit in was evacuated. The police forces asked the protesters to leave the sit in and secured safe exits. After twenty-five minutes of the announcement to evacuate, the police forces started to disperse the protesters. During the evacuation, one of the police officers was shot and killed by armed protesters, which was followed by heavy exchange of fire leading to hundreds of victims.[370] The evacuation of Rabaa's sit in was followed by a series of terrorist attacks on churches and governmental buildings in twenty-two governorates. These attacks caused the death of six hundred eighty six persons in four days, sixty four of whom were policemen.[371] In December 2013, the MB was declared as a terrorist group following an attack on police office causing the death of sixteen and injury of over one hundred persons.[372] Subsequently, El-Sisi applied for the presidential elections. In June 2014, El-Sisi won the elections and became Egypt's current President.[373]

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[366] ibid.
[367] ibid.
[368] ibid.
[369] 'Summary of National Council for Human Rights fact-finding mission about the disperse of Rabaa Al-adaweya sit-in' (n 360) 6.
[370] ibid 6-7.
[371] ibid 8.
[372] Ninet and Tushnet (n 272) 237-38.
[373] ibid 243-44.

Despite the evident breaches of the MB and the protesters in Rabaa which were documented by videos and reports, western mass media turned a blind eye on these violations. Most of the western media condemned the evacuation of the sit in without mentioning the violations committed by the MB and its affiliates in a very biased unjustified position.[374] The terrorist activities of the MB are further evidenced by the Bill introduced in the American Congress, which states that it is believed that the MB satisfies the conditions for designation as terrorist group. Although the Bill has not been approved or issued as an Act yet, it provides strong evidence and enumerates the terrorist attacks and crimes committed by the MB members.[375] In addition, the UK confirmed the historic terrorist activities of the MB and their support to terrorist groups, like Hamas.[376]

3.2.3. The Constitution of 2014

Based on the above background, the Arab Spring in Egypt missed the opportunity to pursue the path to democratic constitutionalism. It is claimed that the absence of a leader of the revolution who could represent the protesters and take over the power to achieve the revolution's goals is the main reason for the revolution's depression.[377] Mubarak's regime left a poor environment of competing political parties, where the MB was the most organized institution capable of collecting votes and winning elections, especially with the limited variety of choices for voters.[378] The MB's monopoly of state control and attempt to Islamize the identity of the state resulted in polarization. This hindered the smooth transition and led to a second wave of revolution which engaged the army again in the political battle. Repeatedly, the same issue of who claims the representation of the revolution arouse. These

[374] Arafa (n 267) 862-63.
[375] H.R.3892 - 114th Congress (2015-2016): Muslim Brotherhood Terrorist Designation Act of 2015 <www.congress.gov/bill/114th-congress/house-bill/3892/text?q=%7B%22search%22%3A%5B%22muslim+brotherhood+terrorist+designation+act+2015%22%5D%7D> accessed 4 November 2022.
[376] David Cameron, 'Muslim Brotherhood Review: Main Findings' (*Gov.UK*, 17 December 2015) paras 14, 16, 39.
[377] Turner (n 276) 277-79.
[378] Nathan J. Brown, 'Tracking the "Arab Spring": Egypt's Failed Transition' (2013) 24(4) Journal of Democracy 52.

complications must be taken into account in the assessment of the situation in Egypt.[379] As Nathan Brown states, 'decades of authoritarian rule had left behind an unbalanced political scene that tilted elections toward the Islamists and gave non-Islamists a deep mistrust of the ballot'.[380]

The challenge of switching from military to democratic ruling is the absence of multi-party system with sufficient experience and popularity to enable political parties to compete and initiate political activism. Such multi-party competition is necessary for the development of new democracies and the enhancement of political accountability. However, with deep military rule for decades, the political activity diminished leaving behind weak political parties unable to assume power. Accordingly, the military remains the most organized institution capable of ruling and the people are given few choices between either the military or chaos.[381]

The negotiations on drafting a new constitution after the removal of a governing regime - albeit military one - is very critical and should be performed in a way to ensure smooth transition into democratic rule. Otherwise, the new system could collapse returning the military rule and this is what happened in the failed period of Morsi's regime supported by the MB.[382] The MB confronted the military and the judiciary and could not bargain well for constitutional setup. They rushed to full control which accelerated their loss of the people's trust.[383] However, '[t]ransition from military rule often require civilian and military leaders to live together in one cage as lambs and wolves as they negotiate the framework for transition and design a new constitution'.[384]

The idea of constitutionalism supposes that the issuance of constitution following

[379] Turner (n 276) 277-79.
[380] Brown (n 378) 52.
[381] Ozan O. Varol, 'Constitutional Performance in Transitions from Military to Civilian Rule' in Tom Ginsburg and Aziz Z. Huq (eds.), *Assessing Constitutional Performance* (Cambridge 2016) 164.
[382] ibid 168.
[383] Ninet and Tushnet (n 272) 229.
[384] Varol (n 381) 167.

revolution marks the end of the revolution by drafting a constitution which reflects some political consensus and agreement of the people. However, the case of Egypt could be different because I believe that Egypt is in a state of 'transitional constitutionalism'.[385] This presumes that the issuance of new constitution has past and future effects. It overcomes the defeats of the past and draws the lines for reaching an agreement on the future. Accordingly, the constitution does not codify an already existing agreement, but structures plan for transitional political transformation based on negotiations on the future.[386] A simple approach of defining 'transitional constitutionalism' is presented as follows:

> 'Transition' is a change or transformation; something that occupies a temporal space between *A* and *B*. The question is, how to define *A* and *B* in the case of transitional constitutionalism. (…) In the case of contemporary 'transitional constitutionalism', *A* may identify any non-democratic system (…), while *B* is defined by democratic rule, however understood, whether in its more liberal or more populist version.[387]

I believe that Egypt is in transition between '*A*' and '*B*'. It is on a long, hard trajectory from authoritarianism to liberal, democratic constitutionalism. People managed to get rid of a non-democratic regime, but Egypt has not yet made it to liberal democracy. Nevertheless, there is good progress in terms of achieving democracy considering the recent challenges encountered by the state. Egypt was on the edge of a civil war between supporters and proponents of Morsi, in addition to the decline of its economic conditions. However, Egypt succeeded to follow the planned roadmap for achieving democracy by having elected President, new constitution approved through public referendum and elected Parliament.[388]

Transitional constitutionalism is variable and not necessarily a straightforward

[385] Turner (n 276) 269-70.
[386] ibid 269-70.
[387] Wojciech Sadurski, 'Transitional Constitutionalism Versus the Rule of Law?' (2016) 8 Hague Journal on the Rule of Law 338-39.
[388] A. Y. Zohny, 'The Rule of Law and Judicial Independence in Egypt during the Transition to Democracy after the Arab Spring' (2017) 14(5) US-China Law Review 308.

process, as its features differ based on the distinctive experiences of each nation.[389] Political transition faces a lot of challenges such as the expansion of the jurisdiction of judiciary, specifically constitutional courts, to take political decisions which the political decision-makers fail to take. This leads to disturbance of the system of checks and balances and the accountability equilibrium.[390] Another challenge is what is described by some scholars as 'democratic deficit' denoting that not all the decisions taken during transition are completely legitimate or democratic.[391] 'While democratic legitimacy is weak in transitional constitutionalism, it is not necessarily irresolvable'.[392] Therefore, it is important to take these challenges and constraints into account when assessing the performance of countries in constitutional transition.

To reflect this on the case of Egypt, I would like to assert that I am aware of the significant literature criticizing the performance of the government in Egypt during the transition after the Arab Spring. Many scholars describe the status of Egypt as being a 'failed transition'.[393] I am, however, adopting in this thesis a more positive and constructive point of view. I am definitely not denying the problems in the Egyptian system, and I am also not claiming that the criticism in the existing literature is completely unreasonable or inaccurate, as it truly points out some of the defects of the transition of Egypt. However, my approach is different in that it follows a more optimistic standpoint, which highlights the achievements as well as the failures. I support my argument by facts which evidence the eagerness of the

[389] Jiunn-Rong Yeh and Wen-Chen Chang, 'The Changing Landscapes of Modern Constitutionalism: Transnational Perspective' (2009) 4(1) National Taiwan University Law Review 149.
[390] ibid 171-72.
[391] ibid 173.
[392] ibid 172.
[393] Azmi Bishara, *Egypt: Revolution, Failed Transition and Counter-Revolution* (I.B. Tauris 2022); Şuayip Turan, 'The Role of Global Actors on The Failed Transition to Democracy in Egypt' (2018) 15(4) Journal of Human Sciences 2357; Justine Louis, 'Egypt: The Failed Transition' in Alina Mungiu-Pippidi and Jana Warkotsch (eds), *Beyond the Panama Papers. The Performance of EU Good Governance Promotion: The Anticorruption* (Verlag Barbara Budrich 2017) (89-103); Antoni Abat i Ninet, 'The role of the judiciary in Egypt's failed transition to democracy' in Helle Krunke, Marina Aksenova and Martin Scheinin (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing 2016); Sahar F. Aziz, 'Independence Without Accountability: The Judicial Paradox of Egypt's Failed Transition to Democracy' (2015) 120(3) Penn State Law Review 101; Abdeslam Maghraoui, 'Egypt's Failed Transition to Democracy: Was Political Culture a Major Factor?' (2014) E-International Relations; Nathan J. Brown, 'Tracking the "Arab Spring": Egypt's Failed Transition' (2013) 24(4) Journal of Democracy; Robert Springborg, 'Learning from Failure: Egypt' in Florina Cristiana Matei and Thomas C. Bruneau (eds), *The Routledge Handbook of Civil-Military Relations* (Routledge 2012).

Egyptian government to develop and work towards liberal democracy. I also claim that insecurity and terrorism are substantial factors which led to the delay of transition in Egypt,[394] but at the same time the efforts of the government in the field of protection of rights, which I highlighted throughout this chapter, provide more evidence of its serious intention to reform.[395]

In addition, there are fundamental steps marking significant developments in the scope of adherence to the rule of law in Egypt. The former Presidents, Mubarak and Morsi, were tried in civil courts rather than special or military courts.[396] In addition, for the first time in the Egyptian history, the former Military Chief, the former Minister of Interior and a senior Intelligence Officer were all summoned to testify in court in Mubarak's trial.[397]

Historically, the principle of the rule of law has not been inherent in the Egyptian legal system. However, it has been developed in the Egyptian jurisprudence by scholars. The initial understanding of the rule of law by judges represented 'the use of the court system by citizens to lodge suits against officials in other branches of government'.[398] Currently, the rule of law has deepened its roots in the Egyptian legal system and its understanding has been expanded. The Egyptian Constitution confirms that 'sovereignty of law is the basis for governance in the state. The State is subject to law and the independence, immunity and neutrality of the Judiciary are essential guarantees for the protection of rights and liberties'.[399] It also acknowledges what is known in Egypt as the principle of legality in criminal matters. The principle of legality in Egypt means that 'there shall be no crime nor penalty except by virtue of law. Penalties may only be inflicted by virtue of court judgment.

[394] Maria Cristina Paciello, 'Egypt: Changes and Challenges of Political Transition' (2011) MEDPRO Technical Paper 16; Antoni Abat i Ninet and Mark Tushnet (n 272) 244.
[395] See point 3.5 below.
[396] ibid 306.
[397] Eldakak (n 300) 294.
[398] Ellis Goldberg and Hind Ahmed Zaki, 'After the Revolution: Sovereign Respect and the Rule of Law in Egypt' (2020-2011) 16 Yearbook of Islamic and Middle Eastern Law 18.
[399] Article 94 of the Egyptian Constitution of 2014 (as amended).

Penalties may only apply to acts committed after the enforcement date of the law'.[400] This is a clear application of the rule of law which highlights the importance of such principle in the Egyptian legal system.

The current valid Egyptian constitution is the Constitution of 2014. The constitution is not issued by the Parliament, because the constitution is supposed to be the constituent document of all the authorities in the state including the Parliament, the Executive, and the judiciary. There are different methods for approving the issuance of the constitution. It could be done through constituent assembly elected by the public or through referendum.[401] The order of legislation in terms of its supremacy is the Constitution, laws and regulations respectively. Laws must comply with the provisions of the Constitution, while regulations must comply with the provisions of both laws and the Constitution.[402] A constituent assembly was appointed by virtue of Presidential Decree, composing of fifty members representing different sectors but excluding the MB. While other Islamist party was represented. The constituent assembly drafted the Constitution of 2014 which was approved in a public referendum in January 2014.[403] The Constitution of 2014 was subsequently amended in 2019.[404]

The Constitution of 2014 refers to previous revolutions ending with the revolution of 2011 and the revolution of 2013, acknowledging that the people's will has supremacy. It states that 'the revolutions of the 25th of January – the 30th of June are unique among big revolutions in human history, (…) due to the protection of the army to the popular will'.[405] Article 1 of the Constitution of 2014 states that '[t]he Arab Republic of Egypt is a state enjoying supremacy, united, non-divisible, and none of its parts is to be surrendered, its

[400] Article 95 of the Egyptian Constitution of 2014 (as amended).
[401] Omar (n 265) 21-23.
[402] Mohamed Hussein Mansour, *المدخل الى القانون (Introduction to law)* (Al-Halabi Legal Publications 2010) 113.
[403] Biagi (n 298) 20-21.
[404] ibid 37.
[405] The preamble of The Egyptian Constitution of 2014.

regime is a democratic republic, based on citizenship and the sovereignty of law'. Article 5 of the Constitution of 2014 states that '[t]he political system is based on political and partisan multiplicity, peaceful transition of power, balance and separation of power, accountability accompany power and protection of human rights and freedoms'.

The Constitution of 2014 maintains the principles of *Shariea* as the main source of legislation, but it eliminated the text of article 219 of the Constitution of 2012, which defined the principles of *Shariea* to include jurisprudential opinions in accordance with *Sunni* doctrine.[406] It also reinstated the role of Al-Azhar as an independent Islamic institution without mentioning the need for its consultancy in matters related to *Shariea*.[407] Article 11 of the Constitution of 2014 confirms that:

> The state guarantees equality between women and men in all civil, political, economic, social and cultural rights in accordance with the provisions of the Constitution. The state shall take all measures to guarantee women's suitable representation in Parliament, as stipulated in law, in addition to guarantee women's right in holding public posts, supreme administrative posts in the state and appointment in judicial institutions and authorities, without discrimination.

Previously, women were not eligible to be judges except for a very small number of women who were appointed - via exceptional presidential decrees - in the SCC and the ordinary courts, which handles civil, criminal and commercial disputes.[408] However, this situation changed, and women were being allowed to be judges in ordinary courts and public prosecutors.[409] Similarly, the Council of State, which consists of the administrative courts,

[406] Ninet and Tushnet (n 272) 239.
[407] Article 7 of The Egyptian Constitution of 2014.
[408] Monika Lindbekk, 'Women Judges in Egypt: Discourse and Practice' in Monika Lindbekk and Nadia Sonneveld (eds), *The Muslim World: A Comparative Study of Discourse and Practice* (Brill 2017) 284-85.
[409] Hala Abdelgawad, 'Egypt will finally appoint women judges. But is the move really progress?' *Open Democracy* (North Africa, West Asia, 28 June 2021).

never admitted women.[410] However, after the issuance of the Constitution of 2014, women were allowed for the first time to sit as judges in the courts of the Council of State in 2022, which marks a fundamental step towards women empowerment and gender equality. It is worth mentioning as well that during the same year, women occupied around quarter of the governmental posts and 30% of Parliament seats.[411]

3.3. Protection of Freedom of Expression in The Egyptian Regime

Civil rights and liberties are protected by virtue of the Egyptian Constitution of 2014.[412] Accordingly, it has the power of the supreme law of the state, which means that all laws and regulations must respect the protected constitutional rights and liberties. Freedom of expression is protected under article 65 of the Egyptian Constitution of 2014, which states 'freedom of thought and opinion is guaranteed. Everyone has the right to express their opinion verbally, in writing, by photograph or otherwise by any means of expression or publication'.

The SCC is entitled to review constitutionality of laws and ensure that it complies with the Constitution.[413] Constitutional review by the SCC is exercised based on case referral from other courts, such that the SCC can ultimately strike down a law if it is found to violate the Constitution. A court refers a case to the SCC if the court finds, in its opinion, that a provision of law might be unconstitutional or if one of the parties of a claim filed a petition of unconstitutionality of a provision of law. There is no means by which any individual can file a direct claim of unconstitutionality before the SCC.[414]

In practice, the SCC has a long history of striking down unconstitutional laws. For

[410] Monika Lindbekk, 'Women Judges in Egypt: Discourse and Practice' in Monika Lindbekk and Nadia Sonneveld (eds), *The Muslim World: A Comparative Study of Discourse and Practice* (Brill 2017) 285.
[411] 'First female judge presides over hearing at top court in Egypt' *The Guardian* (Cairo, 5 March 2022) <www.theguardian.com/world/2022/mar/05/first-female-judge-presides-over-hearing-at-top-court-in-egypt> accessed 4 November 2022.
[412] Articles 51 to 93 of the Egyptian Constitution of 2014.
[413] Khalil (n 271).
[414] Mansour (n 402) 147-48.

instance, the SCC issued twelve judgments of unconstitutionality during the period from the beginning of August 2019 to the end of September 2020.[415] The legal effect of an unconstitutionality judgment is that the provision of law loses its validity from the day following the publication of the judgment in the official gazette, unless the judgment stipulates an earlier date. Accordingly, the application of such provision of law stops from that date.[416] Historically, the main purpose behind establishing the SCC was to regain the investors' trust in the Egyptian property rights system, after the nationalization of the Suez Canal, and to encourage foreign investments. However, the SCC succeeded in undertaking a leading role in the area of protection of civil rights and liberties in general.[417]

Another layer of guarantee for rights and liberties is the independence of judiciary, which is confirmed in article 184 of the Egyptian Constitution of 2014. This is an essential guarantee for the protection of constitutional rights and freedoms. According to article 186 of the Egyptian Constitution of 2014 'judges cannot be dismissed and are not subject to any power in their work except as per the law'. Accordingly, the supremacy of law is the rule governing the judiciary, which means that the judiciary has the sole independent jurisdiction over adjudication, without supervision from other authorities.[418] In addition, the judiciary has independent budget which guarantees its financial independence.[419] Ninet and Tushnet noted that the Egyptian judiciary is 'claimed to be the most independent in the whole Arab world'.[420]

The Egyptian SCC and the Egyptian Court of Cassation (the "**CC**") emphasized the importance of freedom of expression including the right to criticize public figures and

[415] Mahmoud Mohamed Ali Ghoniem, 'Judgments and Decrees of The Supreme Constitutional Court: Constitutional Collections Part eighteen' (*The Supreme Constitutional Court*) 1307-34.
[416] Article 49 of Egyptian Law no 48 of 1979, as amended by Law no. 168 of 1998; Case no 76 of 22J (Egyptian Supreme Constitutional Court).
[417] Tom Ginsburg, 'The Politics of Courts in Democratization' in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds), *Global Perspectives on The Rule of Law* (Routledge 2010) 178.
[418] Omar (n 265) 203-04.
[419] Article 185 of The Egyptian Constitution of 2014.
[420] Ninet and Tushnet (n 272) 229.

government's performance.[421] It is not acceptable to consider people's criticism of public authorities, showing its deficiencies, as harming public interest by any means. Otherwise, freedom of expression would be limited without justification.[422] The government should always be held accountable before the public who grant it its legality. If the government failed in carrying out its obligations, it should always be subject to evaluation and constructive criticism from the public.[423] The SCC and the CC confirmed that public debate is essential for democracy.[424] Freedom of expression does not only include favorable opinions. It must also protect strict criticism to public authorities. People's freedom of expression cannot be restricted by force. Using force leads to the growth of feelings of aggression between the public and the government, which threatens the security and stability of the state.[425]

Freedom of expression is one of the main constitutional rights and is the source of many subsidiary rights. Exercising political rights in a democratic society cannot be achieved without the protection of freedom of expression. However, freedom of expression is not absolute, given that its effect is not limited to the speaker alone. It could be restricted to avoid harming others or harming the society.[426] The CC stated that when persons are exercising freedom of expression, they must not encroach on others' rights and freedoms. When expressing an opinion, the speaker is under an obligation to ensure the accuracy of facts and claims expressed by them. Accordingly, unlawful defamation of others' reputations is not protected under the right of freedom of expression.[427]

Egypt is also a signatory of many treaties and international conventions which

[421] Case no 42 of 16 J (Egyptian Supreme Constitutional Court); Case no 3221 of 79 J Civ 1 January 2017 (Egyptian Court of Cassation).
[422] ibid.
[423] ibid.
[424] ibid.
[425] ibid.
[426] Case no 44 of 7 J (Egyptian Supreme Constitutional Court).
[427] Case no 14992 of 78 J Civ 8 May 2017 (Egyptian Court of Cassation).

promote freedom of expression.[428] The relevant provisions of these treaties are article 19 of the Universal Declaration of Human Rights, article 19 of the International Covenant on Civil and Political Rights (the "**ICCPR**"), article 9 of the African Charter on Human and Peoples' Rights, article 32 of the Arab Charter on Human Rights, and article 21 of Cairo Declaration on Human Rights in Islam.

3.4. Encouragement and Incitement of Terrorism under The Anti-Terrorism Law

Counter-terrorism provisions were first included under the Egyptian Criminal Law no. 97 of 1992 (the "**Criminal Code**").[429] Currently, there are dedicated laws in Egypt regulating terrorism related crimes. Encouragement of terrorism is one of the criminalized acts under the Egyptian Anti-Terrorism Law, which aims at achieving three goals. Firstly, to replace the Emergency Law which has been excessively used since 1981.[430] The Emergency Law is heavily criticized for granting the Executive vast exceptional powers, including detention and limitation of peoples' rights and freedoms.[431] Secondly, to overcome the massive terrorist attacks directed against Egypt in the period preceding 2015, which affected the economic, social, and political conditions of the state. Terrorism has been recently advanced in all aspects including the spread all over the country, the use of developed communication devices and weapons, and the availability of different sources of finance.[432] Thirdly, to comply with the provisions of the Constitution of 2014, which confirms the duty to fight terrorism and to preserve the safety of the state and the public.[433] It is worth noting that this requirement could be considered a formal requirement rather than

[428] Khalil (n 271).
[429] Alzubairi (n 311) 220.
[430] Basheer Saad Zaghlool, 'المواجهة الجنائية الإجرائية للجريمة الإرهابية دراسة تحليلية للنصوص التشريعية المصرية' (Criminal procedural countering to terrorism crime analytical study of the Egyptian legislative provisions) (2019) 92 Law and Economics Journal 38-39.
[431] Reza (n 309) 538.
[432] Zaghlool (n 430) 38-39.
[433] Article 237 of The Egyptian Constitution of 2014.

subjective requirement, given that the Egyptian Penal Code no. 58 of 1937 (as amended) (the "**Penal Code**") already included counter-terrorism provisions, which were added by virtue of the Criminal Code.[434]

A common issue facing the study of counter-terrorism laws is the absence of consensus on the definition of an act of terrorism. Many definitions were adopted by the UN and the United States, failing to agree on a unified definition.[435] Although there is no universally accepted definition of terrorism, the UN Security Council has established guidelines for defining terrorism and terrorist acts. The conditions which should be satisfied in a terrorist act are as follows (i) it must cause death or serious damage; and (ii) the ultimate purpose behind a terrorist act must be terrifying people or spreading terror. Accordingly, the intention of the offender must be clearly directed towards achieving these conditions.[436] I will focus on the crime of encouragement and incitement of terrorism under the Egyptian law to show the deficiencies in the drafting of the Anti-Terrorism Law and its chilling effect on freedom of expression.

3.4.1. Encouragement and incitement of terrorism

The Anti-Terrorism Law enumerates different modes of encouragement of terrorism in several articles. The definition of a 'terrorist' includes 'any person who incites the commission of a terrorist act, locally or abroad, by any means and whether individually or in cooperation with others (…)'.[437] While the definition of a 'terrorist crime' includes any invitation for the commission or threat of commission of any crime stipulated under the

[434] Zaghlool (n 430) 38-39.
[435] David Ferguson, 'Silencing the Arab Spring with Co-opted Counterterrorism' (2016) 7 Berkeley Journal of Middle Eastern & Islamic Law 2-3.
[436] Fionnuala Ní Aoláin and others, 'Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders' (*United Nations Human Rights Office of the High Commissioner*, 28 February 2020) OL EGY 4/2020, 4.
[437] Article 1 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).

Anti-Terrorism Law.[438] This gives rise to the question of what is meant by a 'terrorist act', which is defined as:

> [A]ny use of force, violence, threat or intimidation locally or abroad, for the purpose of disturbing public order, endangering the safety, interests or security of the society, harming individuals or terrorizing them, endangering their lives, freedoms, public or private rights or security, or other freedoms and rights guaranteed by the constitution and the law, or harming national unity, social peace or security, or damaging the environment, natural resources, monuments, other money and assets, buildings, public or private property, or by occupying or seizing it, or by preventing or obstructing public authorities, bodies, judicial authorities, government authorities, local municipalities, worship places, hospitals, science institutes, diplomatic and consular missions, or regional and international organizations in Egypt, from carrying out all or part of their work, or resisting them, or disrupting the application of any of the provisions of the constitution, laws or regulations.
>
> In addition to any conduct committed with the intention of achieving, preparing for, or inciting any of the acts set forth in the first paragraph of this article, if it would harm communications, information systems, financial or banking systems, national economy, energy reserve or security reserve of goods, food products and water, or its safety or medical services, in disasters and crises.[439]

The Egyptian government illustrated the meaning of some of the expressions and terms used in the definition of 'terrorist act', in its response to the UN Special Procedures communication concerning the Anti-Terrorism Law. The government provided that the

[438] Article 1 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).
[439] Article 2 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).

drafting of this definition is based on the text of article 86 of the Penal Code. The parliamentary debates at the time of issuance of article 86 of the Penal Code clarified the meanings of some vague terms used in the definition of 'terrorist act'.[440]

The word 'threat' entails that the perpetrator is threatening of the use of force or violence, while the word 'intimidate' does not entail the use of force or violence. Examples of intimidation of public are removing parts of railways or airplanes, causing trains to crash or airplanes to fall. Intimidation could also be done through damaging the environment, for instance, by poisoning water.[441]

The government did not clarify the definitions of the terms 'national unity' and 'social peace'. It reiterated the statement of the Minister of Justice during the parliamentary debates by saying that those terms are not newly introduced in the Egyptian laws. They have been previously included in the former Egyptian Constitution of 1971 and the Penal Code.[442] However, this does not present a valid justification for using unclear terms in the law without including precise definitions for it.

The parliamentary debates also revealed that a terrorist crime is composed of four elements: (i) constituent act, which is the use or threat of use of force or violence; (ii) circumstances surrounding the act, which is the existence of criminal plan behind the use or threat of use of force or violence; (iii) motive, which should aim at disturbing public order; and (iv) outcome, which is harming or terrifying people or putting their lives or freedoms in danger.[443]

Accordingly, a terrorist crime has two components. The material component is the use or threat of force or violence or intimidation. While the mental element or *mens rea* is

[440] 'Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice' (*United Nations Human Rights Office of the High Commissioner*, 10 March 2021) HRC/NONE/2021/SP/16, para 23.
[441] ibid para 24.
[442] Ibid para 24.
[443] ibid para 25.

the intention to spread a state of terror among the public and disturb public security and public order.[444] However, these two components do not characterize terrorist crimes only, it could be satisfied in ordinary crimes. A gang breaking into a bank to steal money does not have terrorist goals. Nevertheless, the gang uses force and violence to break into a bank. It also aims at spreading terror among people in the bank for the purpose of enforcing the gang's orders. This confusion between terrorist and ordinary crimes provides judges with ample discretion and might confuse people in relation to their rights and duties.[445]

The second paragraph of the definition of 'terrorist act' was introduced, due to technological development, and its effect on facilitating terrorist missions. Technology opened new opportunities for terrorism which were not previously available. The definition deals with interrupting infrastructure systems of the state like communication, information, financial or banking systems or energy and goods reserves, or the safety of the state.[446]

This type of terrorist acts is unique in its nature. It might not have the element of using force or violence like regular forms of terrorism, but still, it requires the satisfaction of other components of a 'terrorist crime'. Accordingly, these acts must be committed within a criminal plan which aims at terrorizing people or disturbing public order or public security.[447] There are practical examples of similar crimes committed in Egypt. The MB operated websites to spread chaos in Egypt, to perform electronic attacks on governmental websites, and to steal data of credit and debit cards. The MB's websites were owned by undercover trade companies which are ultimately owned by members of the MB. These companies appointed people to work on these websites with a salary of fifty dollars per day.[448]

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[444] ibid para 25.
[445] Lafy Saad Moneer Elmarzoki, 'العنف وأثره على الإجراءات الجنائية في الجريمة الإرهابية' (Violence and its effect on criminal procedures in terrorism crimes) (2021) 23 Shariea and Law School Journal 2670.
[446] The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).
[447] 'Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice' (n 440) paras 26-30.
[448] Samar Ibrahim Mohamed, 'دور الإرهاب الإليكتروني في تقويض الأمن القومي: دراسة حالة دول ثورات الربيع العربي' (The Role of Cyber Terrorism in Undermining National Security: A Case Study of The Countries of The Arab Spring Revolutions) (2019) 4 Politics and Economics

The Anti-Terrorism Law refers to incitement of terrorism in different articles. Article 6 of the Anti-Terrorism Law stipulates that:

> A person who incites any terrorist act shall be punished with the same penalty determined for committing the incited terrorist act, irrespective of whether the incitement is addressed to a specific person or group or is general incitement, or whether the incitement is committed in a public or private place, and whatever the means used for incitement, and even if the incitement has no actual effect.

While article 28 of the Anti-Terrorism Law states that, 'shall be punishable by a minimum punishment of five years imprisonment, any person who incites or prepares for incitement, whether directly or indirectly, of the commission of any terrorist crime by using any verbal, written or any other means'. Article 28 of the Anti-Terrorism Law gives an example for indirect incitement which is 'incitement of ideas and beliefs which invite for violence by any means previously mentioned'.

Based on the above, the Anti-Terrorism Law stipulates that both incitement of terrorist act and commission of terrorist act shall bear the same penalty.[449] However, in the penalties section, there is a specific penalty for incitement of terrorism, which is different from the penalties set for the commission of terrorist acts.[450] Accordingly, these two articles might seem contradictory. It leads us to question which penalty should be applicable in case of incitement of terrorist act. Is it the penalty set for incitement, or the penalty set for commission of the terrorist act?[451]

School Journal, 104; Ashraf Abdelhameed, 'مصر تكشف تفاصيل القبض على خلية إلكترونية مدعومة تركيا' (Egypt reveals the details of arresting electronic cell funded by Turkey) *Alarabiya* (Cairo, 15 January 2020) <www.alarabiya.net/arab-and-world/egypt/2020/01/15/مصر-تكشف-تفاصيل-القبض-على-خلية-الكترونية-مدعومة-تركيا> accessed 27 September 2022; Amr Elnakeeb, 'تفاصيل سقوط أكبر خلية إرهابية إلكترونية في مصر' (Details of fall of biggest electronic terrorist cell in Egypt) *24* (Cairo, 8 April 2019) <https://24.ae/article/499956/> accessed 27 September 2022.

[449] Article 6 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).

[450] Article 28 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).

[451] Ahmed Fathy Sroor, 'الدستور ومواجهة الإرهاب (The constitution and counter-terrorism)' (2019) 34 The Journal of The Supreme Constitutional Court.

In addition, the Anti-Terrorism Law sets the same penalty for incitement of terrorist crime and preparation for incitement.[452] It is not common to set the same penalty for commission of preparatory work and the commission of the crime itself. There are two reasons for giving lighter penalty for preparatory work. Firstly, the lack of clear intentional criminal will to commit the crime at the stage of preparatory work. Secondly, the penalty for preparatory work should be lighter to encourage the perpetrator to withdraw the criminal plan at the preparatory stage before committing the crime. Otherwise, the perpetrator once engaged with preparatory work will not have incentive to step back, given that the preparatory work is punishable with the same penalty set for incitement.[453]

The UN Special Procedure criticized article 28 of the Anti-Terrorism Law because it sets the same penalty for incitement and preparation for incitement. It considers preparatory work for the crime as a standalone crime. The Egyptian government defended the article by stating that this article was issued as response to the calls of the UN Security Council to fight indirect incitement and encouragement of terrorism.[454]

Using websites for incitement of terrorism or commission of terrorist acts is prohibited.[455] The CC confirmed its understanding of the broad meaning of terrorism including new forms which lack the regular image of violent terrorism. Therefore, it acknowledged the fundamental importance of article 29 of the Anti-Terrorism Law which is enacted to cover these new forms of terrorism. The CC emphasized the necessity to criminalize electronic or cyber-terrorism which is committed by hacking websites or spreading false news for the purpose of achieving terrorist goals.[456]

In recognition of the negative effects of spreading rumors and its consequences on

[452] Article 28 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).
[453] Mohamed Alansary, 'تعليقا على مشروعي القانون الحكوميين بشأن الإرهاب في مصر: مكافحة إرهاب أم قمع أي ممانعة؟' (Commentary on the bills of the government in relation to terrorism in Egypt: counterterrorism or repression of any reluctance?) (*Legal Agenda*, 21 April 2014).
[454] 'Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice' (n 440) para 41.
[455] Article 29 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).
[456] Case no 22781 of 84 J 9 May 2015 (Egyptian Court of Cassation); Case no 26806 of 84 J 1 January 2015 (Egyptian Court of Cassation).

national security, article 35 of the Anti-Terrorism Law prohibits:

> Intentional publication or incitement of incorrect news or data in relation to terrorist acts committed in Egypt or to missions related to countering these terrorist acts, in contradiction with what is published on the official website of the Egyptian Ministry of Defense.

The Egyptian Constitution states that 'the protection of national security and the state is a national obligation and responsibility protected by law',[457] and that 'the state is obliged to counter terrorism'.[458] However, the protection of national security must be balanced against the protection of freedom of expression as a substantial constitutional right which might be negatively affected by the Anti-Terrorism Law.

It is clear that the Anti-Terrorism Law tries to capture all types of terrorism. However, it is also crucial to examine whether these provisions are compatible with the principle of the rule of law. It is also essential to examine the effects of these provisions on undermining freedom of expression. The ICCPR provides that freedom of expression can be restricted but with the fulfilment of specific conditions. Article 19 of the ICCPR states that '[i]t may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary'.[459] For the restriction to satisfy this requirement, the law must be 'accessible, clear and precise'. Therefore, any restriction on freedom of expression in the Anti-Terrorism Law must also fulfil the conditions of article 19 of the ICCPR.[460]

3.4.2. Opposing arguments in relation to the Anti-Terrorism Law

The Anti-Terrorism Law has been subject to criticism from different opposition groups and international organizations. The UN Special Procedures claimed that the

[457] Article 86 of The Egyptian Constitution of 2014.
[458] Article 237 of The Egyptian Constitution of 2014.
[459] Noha Fathy, 'Freedom of expression in the digital age: enhanced or undermined? The case of Egypt' (2018) 3(1) Journal of Cyber Policy 98.
[460] ibid 98.

definition of ‘terrorist act’ under the Anti-Terrorism Law is broad and lacks the required precision for individuals to be able to distinguish between lawful and unlawful acts.[461] The reason behind this view is the use of ambiguous terms and vague expressions in the definition of ‘terrorist act’. These terms and expressions include ‘disturbing public order’, ‘harming national unity’, ‘social peace’ and ‘national security’. The vast methods of interpreting those terms might be problematic.[462]

The terms used in the Anti-Terrorism Law are claimed to be broad, inaccurate, and ambiguous.[463] This is thought to violate the rule of law, which assumes that the law must be clear enough to allow the addressees to determine the criminalized acts and avoid liability. Unclarity of legal provisions constitutes an obstacle in understanding the limits of the law and breaches the principle of the rule of law.[464] Considering any act threatening national unity as a terrorist act might negatively affect political freedom of expression. This provision if applied at the time of the Arab Spring might justify the characterization of protestors as terrorists based on this vague criterion of characterization.[465]

The SCC confirmed that the general rule is that law must be narrowly drafted to ensure strict application without extending to unintended purposes. Using uncertain terms opens the door for violating human rights, including freedom of expression. The SCC provided guidelines for drafting clear legal provisions, whereby it emphasized that law cannot carry more than one definitive meaning. Law cannot be subject to different interpretations based on the surrounding circumstances. Terms used in drafting law should not be too flexible to allow its application on acts which were not intended to be initially covered by the law.[466]

[461] Aoláin and others (n 436) 5.
[462] ibid 5.
[463] Alansary (n 453).
[464] ibid.
[465] Ferguson (n 435) 13.
[466] Case no 105 of 12 J 12 February 1994 (Egyptian Supreme Constitutional Court).

The Anti-Terrorism Law is open to different interpretations. Mentioning the use of violence or force as the material element of terrorist act might give the impression that it requires using weapons. Nevertheless, violence or force as interpreted by jurisprudence include any means of material coercion which results in hurting or terrorizing people.[467] Force can be military force using weapons or otherwise, for example, through demonstrations used to put pressure on public authorities.[468] In this case, peaceful demonstrations could be regarded as terrorism, especially that article 18 of the Anti-Terrorism Law sets a penalty for 'using force or violence to overthrow the ruling regime, the government or changing the constitution'. Accordingly, this provision might represent breach of freedom of expression in case of opposing non-democratic regimes by using demonstrations.

Moreover, the second paragraph of the definition of 'terrorist act' in relation to harming communications is not clear.[469] What does communication mean? Is it all types of communications or the communications of the National Telecom Regulatory Authority? If the provision means all types of communications, it will include variety of acts which might overlap with crimes stipulated under the Egyptian Communications Laws. These laws set much lighter penalties than the Anti-Terrorism Law.[470]

The UN Special Rapporteur claimed that the definition of 'terrorist act' lacks intentional criminal will and motive as essential requisites in terrorist crimes.[471] However, the Egyptian government clarified that the intentional element represents the requirement of use or threat of use of force or violence or use of other forms of terrorism which does not require violence, as explained above. While the motive represents the requirement that a

[467] Alansary (n 453).
[468] Ahmed Fathy Sroor, *"الوسيط في قانون العقوبات "القسم الخاص* (*The median in Penal Law "private section")* (4th edn, Modern Printing House in Cairo 1991) 85.
[469] Article 2 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).
[470] Alansary (n 453).
[471] Aoláin and others (n 436) 6.

terrorist act must aim at spreading terror among the public or disturbing public order.[472]

In relation to the motive, article 2 of the Anti-Terrorism Law uses phrases like harming or disturbing 'national security', 'national unity' and 'social peace'. These phrases broaden the meaning of motive that it might not be possible to differentiate between the required motive in terrorist crimes and ordinary crimes. Given that national security does not have a uniform definition, and criminal offences usually affect the security of citizens or the state, it would be hard to extract the criteria distinguishing terrorist crimes. The terrorist motive must be more obvious to justify the harsher penalties set for this type of crimes.[473] Comparatively, the Terrorism Act 2000 of the UK stipulates that the motive or objective of the terrorist act should be 'advancing a political, religious, racial or ideological cause'.[474]

In addition, article 35 of the Anti-Terrorism Law is criticized for breaching freedom of expression of journalists or researchers.[475] Self-censorship is another risk threatening freedom of expression. Journalists or any other citizens might raise their self-censorship due to the fear of being characterized as terrorists under the provisions of the Anti-Terrorism Law.[476] It has been argued that in Arab states - where political activity and freedom of expression of opposition groups are subject to much restraint - accepting broad definition of terrorism might have much harmful effect than in other countries. Despite the great danger posed on human rights by such broad definition, its progression in achieving higher security levels has not been proved.[477]

To sum up, having a law with strict provisions and deterrent sanctions for terrorist crimes is essential. The Anti-Terrorism Law is a first step to put an end to terrorism in Egypt.

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[472] 'Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice' (n 440) para 38.
[473] Alansary (n 453).
[474] Section 1(1)(c) of the UK Terrorism Act 2000.
[475] See article 35 of the Anti-Terrorism Law.
[476] Fathy (n 459) 105-09.
[477] Lynn Welchman, 'Anti-Terrorism Law and Policy in Arab States' in Victor V. Ramraj, Michael Hor, Kent Roach, and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press. 2012) 629.

However, the drafting of the Anti-Terrorism Law must be developed to enrich its provisions with clarity, precision, and accurateness necessary for the respect of the rule of law. The broad terms used in the Anti-Terrorism Law should be eliminated, replaced or strictly defined. There should be no doubt in relation to the main characteristics of terrorism distinguishing it from ordinary crimes. The development of the Anti-Terrorism Law is indispensable to maintain freedom of expression and enhance the democratic atmosphere.

3.5. Egypt's efforts to protect freedom of expression in light of the Anti-Terrorism Law

It is clear from the Universal Periodic Review (the "**UPR**") of the UN Human Rights Council in 2019 that one of the most important challenges for Egypt is countering terrorism. Accordingly, many recommendations, which were accepted by Egypt, relate to the reform of the legislative system governing the fight against terrorism and the respect for human rights in Egypt.[478] Despite the UN Commission's acknowledgement that there have been significant improvements in this field, there are still some areas of development that Egypt must continue working on.[479]

It is worth mentioning that Egypt is taking this issue very seriously and has already made some progress, which evidences the importance of this topic to Egypt. A very fresh example is that on the 25th of October 2021, President, Abdul Fattah El-Sisi, announced the end of the state of emergency in Egypt.[480] This proves the openness of the Egyptian regime to new developments and reform to enhance the environment of exercising freedoms and liberties.

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[478] 'Report of the Office of the United Nations High Commissioner for Human Rights' (*United Nations Human Rights Office of the High Commissioner*, 2 September 2019) A/HRC/WG.6/34/EGY/2, paras 12-13, 23-30.
[479] 'Report of the Office of the United Nations High Commissioner for Human Rights' (*United Nations Human Rights Office of the High Commissioner*, 14 August 2019) A/HRC/WG.6/34/EGY/3, para 3-9.
[480] Nayera Abdallah, 'Egypt's President Sisi ends state of emergency for the first time in years' *Reuters* (Cairo, 26 October 2021) <www.reuters.com/world/middle-east/egypts-president-sisi-ends-state-emergency-first-time-years-2021-10-25/> accessed 27 September 2022.

Another step in the reform plan is the establishment of the Supreme Standing Committee for Human Rights (the "**SSCHR**"). The Egyptian Prime Minister established the SSCHR on 14 November 2018. The main purpose of the SSCHR is to be responsible for evaluating the status of human rights in Egypt and examining and responding to the claims directed against Egypt in relation to human rights.[481] The SSCHR is chaired by the Minister of Foreign Affairs or its representative. The members of the SSCHR are composed of representatives from the following entities: the Ministry of Defence; the Ministry of Social Solidarity; the Ministry of Justice; the Ministry of Interior; the General Intelligence Authority; the Administrative Control Authority; the National Council for Women; the National Council for Childhood and Motherhood; the National Council for Persons with Disabilities; the State Information Authority; and the Public Prosecution. This is in addition to any other members whom the SSCHR requires for its operations, including legal, financial, diplomatic, administrative technical and any other experts.[482] The SSCHR shall, after coordination with the relevant authorities, be responsible for recommending laws and legislative amendments relating to the enhancement of human rights. Accordingly, the SSCHR could put the first building block of reforming the Anti-Terrorism Law. This could be great opportunity to benefit from the experience of the distinguished and diverse members of the SSCHR.[483]

Moreover, having a comprehensive strategy to remove the roots of terrorism by fighting terrorist thoughts and beliefs and counter radicalization is a must. In this context, Law no. 25 of 2018 in relation to the establishment of the Supreme Council for Countering Terrorism and Extremism (the "**SCCT**") was issued which replaced Law no. 355 of 2017 concerning the foundation of the National Council for Countering Terrorism and Extremism.

[481] Egyptian Ministerial Decree no 2396 of 2018.
[482] Egyptian Ministerial Decree no 2396 of 2018.
[483] Egyptian Ministerial Decree no 2396 of 2018.

The SCCT is presided by the President of the state, while its members comprise governmental and religious representatives.[484] The main role of SCCT is to fight terrorism and extremism as it aims at countering all types of terrorism, tracking the sources of its financing, limiting its causes, and curing its consequences.[485]

Building on the role of youth, which was emphasized during the Arab Spring, President, El-Sisi, created the youth conference initiative to connect with and empower youth all over the country. The conference convened seven times since 2016 in different governorates. During the conference, youth are invited to communicate directly with the President and the decision makers in the government to exchange ideas on politics, economy, and all other topics. The conference is convened in different places to guarantee the integration of youth from all parts of the country.[486]

3.6. Conclusion

'We Are All Khaled Saeed' was the spark which awakened freedom of expression in the Egyptian community. After many years of silence, the voice of the Arab Spring could not be ignored. Although freedom of expression is guaranteed in the Egyptian Constitution of 2014, there are other substantial constitutional rights which could be given priority over freedom of expression. Accordingly, legal provisions protecting freedom of expression might not be strong enough when it is compared with the provisions protecting the right to life or the duty to protect national security. This raises the difficulty of striking the right balance between competing interests.

The negative side-effects of the subsequent revolutions in Egypt extended the process of transition to liberal democracy. The lack of security with the spread of chaos and

[484] Article 3 of Law no. 25 of 2018 concerning the foundation of the Supreme Council for Countering Terrorism and Extremism.
[485] Article 1 of Egyptian Law no. 25 of 2018 concerning the foundation of the Supreme Council for Countering Terrorism and Extremism.
[486] Khaled Zakaria Amin and others, 'Egypt Human Development Report 2021' (*United Nations Development Programme, Ministry of Planning and Economic Development, Egypt*, 2021) 275.

terrorism resulted in a national crisis affecting also the economic, social, and political conditions. The Egyptian government went through difficult challenges and is still experiencing many challenges in terms of terrorism emerging domestically or internationally. The radicalization of youth is also a very dangerous tool used by terrorists to recruit fellows and supporters.

The efforts of the government cannot be denied in terms of pulling the country together again. However, the Anti-Terrorism Law might need some more efforts to achieve the balance between national security and freedom of expression. The drafting of the Anti-Terrorism Law needs to be reconsidered to clarify vague terms and ensure that it complies with the rule of law. The crimes of encouragement and incitement of terrorism as currently drafted could be used as a double-edged weapon to silence dissents. Even if these provisions were used reasonably in practice, self-censorship could still affect the atmosphere of freedom of expression as long as the provisions are drafted in a way that allow abuse. Accordingly, the Anti-Terrorism Law must be amended to put emphasis on the fine line between encouragement of terrorism and legitimate expression of an opinion.

Finally, as the fight against terrorism is not limited to military action, social strategy should be put in place to raise awareness of youth. Covering terrorist ideas with a religious cloth is very tricky, especially in the Egyptian community. People are more likely to get convinced with ideas if they falsely believed that these ideas are religious rather than political. Accordingly, the focus should be dedicated to youth and people in less educated areas to raise their awareness of terrorism and its dangers. The government has also started to explore how can it combat radicalization at early stages. However, there remains a lot to do in relation to fighting terrorism whilst upholding constitutional and democratic values.

CHAPTER FOUR

NATIONAL SECURITY AND FUNDAMENTAL CONSTITUTIONAL LAW PRINCIPLES IN THE UNITED KINGDOM AND EGYPT

4.1. Introduction

Having examined the regime governing freedom of expression in the UK and Egypt in previous chapters, it is time to focus on the issue of national security. Accordingly, the role of this chapter is to examine what constitutes national security in the UK and Egypt and the challenges accompanying this concept. The chapter also situates national security within the framework of fundamental constitutional law principles. By viewing national security in constitutional context, we can properly assess the appropriate balance between national security and liberties in the ongoing effort to counteract terrorism. Irene Khan described the relationship between counter-terrorism measures and human rights as follows: '[i]n a world engaged in the so-called "war on terrorism', human rights were seen as an obstacle to ensuring victory and human rights defenders as defenders of "terrorists"'.[487] Fighting terrorism while protecting rights is a challenging task in any country which respects the rule of law and constitutional separation of powers.[488]

The rule of law requires the security forces to abide by laws which protect rights and liberties.[489] It also subjects the Executive to the supervision of other branches of the government. Moreover, judicial review by an independent judiciary is an essential tool for adherence to the rule of law.[490] However, judges must not exceed their power in reviewing primary decisions of the Executive. They must remain cognizant of the extent of

[487] Lynn Welchman, 'Anti-Terrorism Law and Policy in Arab States' in Victor V. Ramraj, Michael Hor, Kent Roach, and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press. 2012) 625.
[488] Todd Landman, 'Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism' (2007) 38(1) California Western International Law Journal 85-86.
[489] A. W. Bradley, K. D. Ewing and C. J. S. Knight, *Constitutional law* (16th edn, Pearson Education Limited 2015) 77.
[490] ibid 88-89.

discretionary power granted to the Executive and respect the separation of powers principle. Accordingly, judges sometimes defer to the Executive on grounds that they lack the expertise to second-guess governmental decisions.[491] In other cases, judges apply the principle of proportionality to strike the right balance between public interest and individual interest.[492] In national security cases, judges are faced with an additional difficulty which is secrecy and confidentiality surrounding national security threats. This also affects the rule of open justice which is essential in democracies to guarantee transparency and respect the right of the people and the media to know.[493]

This chapter is divided into two main sections. In the first section, I seek to define national security, shedding light on the challenges introduced due to the protection of national security in the UK and Egypt. In the second section, I explain the main constitutional principles of the rule of law, separation of powers, and judicial review which regulate the government's conduct and the distribution of powers among its branches. The regulation of these constitutional principles in each jurisdiction defines the boundaries of the state's power in the protection of national security. This chapter tries to map out which branch is responsible for what and who is responsible for supervision and to what extent.

4.2. What Does National Security Mean?

Despite all efforts exerted in this field of study, it remains a hard task to try to adopt a commonly agreeable definition of national security. This is because the definition of national security depends on threats faced by each state which differ based on the background and circumstances of the state.[494] In the UN, national security is described as

[491] Aileen Kavanagh, *Constitutional Review Under The UK Human Rights Act* (Cambridge University Press 2009) 168-70.
[492] Lucia Zedner, 'Ends and Means: Why Effective Counter-Terrorism Requires Respect for Proportionality and Rights' in Emmanouil Billis, Nandor Knust and Jon Petter Rui (eds), *Proportionality in Crime Control and Criminal Justice* (Bloomsbury Publishing 2022) 139.
[493] ibid 139-140
[494] Kim Lane Scheppele, 'The International Standardization of National Security Law' (2010) 4(2) Journal of National Security & Policy 437.

'the ability of a state to cater for the protection and defence of its citizenry'.[495] There is a distinction between social security and national security. Social security aims at 'the full and fair distribution of the basic necessities of human flourishing'. While national security targets 'to protect the state and its territories principally by political and military means'.[496] The land or the territory is an essential element in defining national security which on the other side requires military protection.[497]

Historically, a threat to national security was mainly distinguished by weapons and military power.[498] Unlike in ancient nations, predictability of threats became much harder due to the rapid growth and development of communities. If past threats to national security emanated from powerful states and were characterized by the possession of a strong military, nowadays it is not that easy to predict the origin of the upcoming threat. With the technological evolution, it is not all about armies and weapons.[499] Over time, threats to nations were expanded beyond military threats to its land. Threats developed to include other factors like the decline in financial conditions, violations of human rights, natural catastrophes, state debts, conflicts on water resources, …etc.[500] Accordingly, the meaning of security currently expanded to include the security of the people besides the security of the state or its land.[501] Currently, national security typically includes 'all matters which may adversely affect the nation, including not only defence but also foreign policy and economic issue'.[502]

In times of emergencies and catastrophes, governments will likely value security over rights. Rights are sometimes considered to be a luxury when compared to security in

[495] Segun Osisanya, 'National Security versus Global Security' United Nations.
[496] Lucia Zedner, *Security* (Routledge 2009) 36.
[497] ibid 27.
[498] Robert Ward, Rupert Jones and Caroline Stone, *National security: law, procedure, and practice* (Oxford University Press 2021) 1.35.
[499] Philip Zelikow, 'The Transformation of National Security: Five Redefinitions' (2003) 71 The National Interest 25.
[500] Bahgat Korany, Paul Noble and Rex Brynen, *The Many Faces of National Security in the Arab World* (Palgrave Macmillan London 1993) 2.
[501] Zedner, *Security* (n 496) 40.
[502] Evan J. Wallach, 'Executive Powers of Prior Restraint over Publication of National Security Information: The UK and The USA Compared' (1983) 32(2) The International and Comparative Law 427.

these circumstances.[503] Shocking events, like sudden fatal terrorist attacks, might result in overreaction by the government, leading to the adoption of severe security measures. When a state is subject to terrorist attack, the government starts to react immediately and maybe aggressively to safeguard its security. The massacre of Charlie Hebdo in France is an example of this scenario. Charlie Hebdo is a magazine which was attacked by terrorists in 2015. The attack resulted in the murder of twelve victims. The attack was followed by other attacks in the following days in other places to raise the number of victims into seventeen, including editors and policemen.[504] Post this event, the French President insisted on the fundamental importance of freedom of expression. Nevertheless, fifty persons have been accused of glorification of terrorism in France few days after the President's declaration.[505]

It is argued that there are two different approaches of government's response to terrorism. These approaches are 'preventive' approach and 'pre-emptive' approach.[506] The difference between the 'preventive' and the 'pre-emptive' approaches could be illustrated as follows:

> '[P]revention takes place when, for example, someone knows a house will catch fire today and tries to prevent it happening even if that includes infringing property rights. Pre-emption would mean that one occupies the house, arguing that a fire could break out any time'. In this example, pre-emption entails a greater intervention without concrete evidence of harm.[507]

Cian Murphy claims that following the events of 11th of September, governments tend to move from 'preventive' to 'pre-emptive' policy to counteract terrorism. This highlights the governments' intolerance to accept even minimal levels of terrorist risk.[508]

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[503] Stefan Sottiaux, *Terrorism and the limitation of rights: The ECHR and the US Constitution* (Hart Publishing 2008) 26-27.
[504] Richard Lough, 'Five years on, France to try suspects in Charlie Hebdo killings' *Reuters* (France 28 August 2020) <www.reuters.com/article/us-france-charliehebdo-idUSKBN25O21W> accessed 30 March 2022.
[505] Jacob Mchangama, 'Freedom of Expression and National Security' (2016) Springer 364.
[506] Cian C. Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Expanded edn, Hart Publishing Ltd 2015) 11.
[507] ibid 11.
[508] ibid 11.

Another feature of the 'pre-emptive' approach is that it relies on the Executive's discretionary power rather than strictly defining the Executive's power via precise laws and fixed sanctions with clearly described criminal acts. Thus, expanding the Executive's control powers might in turn negatively affect good governance and the rule of law.[509]

This leads us to the following questions. Is there a tension between freedom and security? Does the protection of freedoms and rights result in higher degrees of security or the contrary? Is the relationship between freedom of expression and national security positive relationship or negative relationship?

Indeed, there are contradictory answers to all of these questions. On the one hand, it is argued that the promotion of freedom of expression lowers security risks, because people are confident that they can express their opinions freely and peacefully in a democratic environment. Accordingly, this eliminates the attempts of resorting to violence for opposing governments or expressing controversial opinions on the variety of social topics. Based on this opinion, freedom of expression and national security can sometimes serve the same aims.[510] It is even claimed that overprotection of national security through massive restriction of human rights could negatively affect national security rather than guaranteeing its protection. For example, the excessive use of power by the United States in its invasion of Iraq to fight terrorism and maintain security resulted in boosting the growth of ISIS,[511] rather than eliminating terrorism.[512]

On the other hand, we cannot ignore the fact that the restriction of freedoms expands the control and power of the government, which can be easily abused for achieving political interests beyond the protection of national security. The risk of creating government dictatorship is by no means lesser than the risk of security threats emanating from terrorism.

[509] ibid 47.
[510] Sottiaux (n 503) 118.
[511] Islamic State of Iraq and Syria, a terrorist organisation.
[512] Liora Lazarus and Benjamin J Goold, 'Security and Human Rights: Finding a Language of Resilience and Inclusion' in Benjamin J Goold and Liora Lazarus (eds) *Security and Human Rights* (2nd edn, Bloomsbury 2019) 7.

This is something which should be taken into consideration when balancing freedom of expression and national security.[513] The broadness of the term 'national security' makes it easy for states to use it as a tool to misuse its power.[514] Cian Murphy stressed that 'while terrorism is a rejection of the rule of law, the real threat for liberal democracies often comes from the state's response to the violence and not the violence itself'.[515]

People understand that they have to sacrifice something to enjoy some sort of rights in return. Accordingly, people are willing to bear a degree of sacrifice of their security to enjoy their freedoms and rights. If this degree of sacrifice is raised for any reasons, people might accept lower space of freedoms and rights rather than increasing their degree of sacrifice. This is simply how the link between freedom of expression and national security can be established.[516] A clear example of the degree of sacrifice people are willing to exert to enjoy freedoms is the attitude of the Egyptian people in the Arab Spring in 2011 and then in the revolution of 2013 after two years of chaos, instability and insecurity. People in 2011 called for freedom and social justice, while in 2013 they weighted more security and stability which motivated them to choose the military's intervention over democratic transition of power under the MB's regime.[517]

Consequently, governments tend to use security justifications to tighten freedom of expression for political reasons like controlling government's opposers.[518] Fiona de Londras observed that 'states continue to push the boundaries of what is permissible, (...) that 'pushing' seems to be effective at expanding the boundaries, bringing more and more state action within human rights compatibility regardless of the pernicious effect it has on the

[513] Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) The Journal of Political Philosophy 208.
[514] David Cameron and Nick Clegg, 'A Strong Britain in an Age of Uncertainty: The National Security Strategy' (*HM* Government, October 2010) 62-63.
[515] Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (n 506) 5.
[516] Fiona de Londras, 'Counter-terrorist Detention and International Human Rights Law' in Ben Saul, *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 416-17.
[517] Zaid Al-Ali, 'The Arab Spring Constitutions: for Whose Benefit?' in Tom Ginsburg and Aziz Z. Huq (eds.), *Assessing Constitutional Performance* (Cambridge 2016) 372-73.
[518] Londras (n 516) 416-17.

enjoyment of liberty'.[519] Accordingly, it is very likely that governments try to maximize the fear from threats to national security to encourage public consensus on restriction of rights and freedoms. Invoking national security also makes it hard on opposers to express their opinion to avoid being perceived as acting against the public interest of the country.[520]

4.2.1. National security in the UK

In the UK, the absence of a strict statutory definition of national security can be justified by the need to provide flexibility over time, and ensure that the law can adjust to any potential or future threats which might be unforeseen at the moment.[521] In *Kennedy v the United Kingdom*,[522] the European Court of Human Rights (the "**ECtHR**") states 'threats to national security may vary in character and may be unanticipated or difficult to define in advance'.[523] The ECtHR supports the view that there is no essential need for defining the term 'national security'. As affirmed in *David Esbester v the United Kingdom*,[524] '[m]any laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice'.[525]

The UK Security Service Act 1989 (the "**SSA**") defined the function of the 'Security Service' as follows:

> [T]he protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.[526]

[519] ibid 416-17.
[520] Cameron and Clegg (n 514) 191-94.
[521] Ward, Jones and Stone (n 498) 1.54.
[522] (2011) 52 EHRR 4.
[523] ibid [159].
[524] (1994) 18 EHRR CD72.
[525] ibid.
[526] The UK Security Service Act 1989, art 1(2).

> [T]o safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands. [527]
>
> [T]o act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.[528]

National security is not defined under the UK SSA. The meaning of national security, as inferred from the definition of the UK Security Service's functions, is broad, given the multiplicity of threats enumerated and the breadth of its terms. Accordingly, threats include not only physical threats, but also the disturbance of the UK parliamentary democratic system.[529] In *Secretary of State for The Home Department v Rehman (AP)*,[530] the court held that:

> [A] person may be said to offend against national security if he engages in, promotes, or encourages violent activity which is targeted at the United Kingdom, its system of government or its people. This includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals. National security extends also to situations where United Kingdom citizens are targeted, wherever they may be.[531]

It has also been confirmed in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* that:

[527] The UK Security Service Act 1989, art 1(3).
[528] The UK Security Service Act 1989, art 1(4).
[529] Ward, Jones and Stone (n 498) 1.58.
[530] [2001] UKHL 47, [2003] 1 AC 153.
[531] ibid [2].

> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.[532]

The UK has adopted a National Security Strategy (the "**NSS**") to set the framework for protecting national security.[533] Yet, the UK NSS does not include a definition of national security. It puts terrorism as a top priority risk for the UK's national security. The UK NSS acknowledges the difficulties of maintaining national security in light of the openness and the connection of people worldwide. The UK NSS also highlights the challenges facing the intelligence forces which require secrecy in most of its work to keep the safety of its members. In addition, this sheds light on the challenges faced by the judiciary in adjudicating cases involving national security aspects.[534]

[532] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, as approved on 1 October 1995 in Johannesburg, principle (2); *Secretary of State for The Home Department v Rehman (AP)* (n 530) [14].
[533] Cameron and Clegg (n 520) 9.
[534] Cameron and Clegg (n 420).

4.2.2. National Security in Egypt

There is no specific definition of 'national security' stipulated in Egyptian law or in the Egyptian Constitution. However, the meaning of the term 'national security' can be inferred from different sources. The terms 'national security' and security or safety have been mentioned in various instances in the current Egyptian Constitution of 2014 as follows:

- The preamble 'we believe that every person has the right to live on the land of this homeland in security and safety'.
- Article 31 'cyberspace security is a fundamental part of the economic system and national security. The state is obliged to take all the required measures to protect it, in accordance with the applicable law'.
- Article 59 'secure life is a right to every person. The state is obliged to provide security and tranquility for its citizens and residents'.
- Article 86 'preserving national security is a duty, and the obligation of all to observe it is a national responsibility, guaranteed by law. Defending the homeland and protecting its territory is an honor and a sacred duty'.
- Article 205:

> A National Security Council shall be established headed by the President of the Republic, with the membership of the Prime Minister, the Chairman of the House of Representatives, the Ministers of Defense, Interior, Foreign Affairs, Finance, Justice, Health, Communications, and Education, the Chief of General Intelligence, and the Chairman of the Defense and National Security Committee of the House of Representatives.

Pursuant to this article, the Egyptian National Security Council (the "**NSC**") was established by virtue of Law no. 19 of 2014. Amongst other responsibilities, the Egyptian NSC is entitled to (i) approve security strategies; (ii) approve the Egyptian

government's development plan; (iii) take decisions to protect the nation's identity, sovereignty, independence, and regional and international position; (iv) identify enemies, threats, and risks; (v) deal with internal threats and national catastrophes and crises; and (vi) direct international polices and cooperation to serve the Egyptian national security.[535]

- Article 237 of the Egyptian Constitution considers terrorism as a threat to the nation and the nationals, which the state is obliged to encounter while guaranteeing rights and freedoms. Law no. 25 of 2018 established the Egyptian Supreme Council for Countering Terrorism and Extremism (the "**SCCTE**"). The Egyptian SCCTE aims at countering all types of terrorism, tracking the sources of its financing, limiting its causes, and curing its consequences.[536] The Egyptian SCCTE shall convene 'in cases when the state, its civil system, its constitutionality, the security and safety of its land and its presidential system are subject to imminent danger'.[537]

  The Egyptian SCCTE is entitled to (i) put a national strategy for countering national and international terrorism and extremism; (ii) coordinate with religious, security and media institutions to spread correct moderate religious norms to counter all types of extreme religious ideologies; (iii) work on programs to raise the awareness against terrorism and extremism; (iv) recommend plans to develop the areas from which extremism originates, allocate job opportunities to its residents and give it priority; (v) make recommendations for required legislative amendments in relation to counter-terrorism laws; (vi) make recommendations for international cooperation plans in the fields of terrorism and extremism and establish an affiliation between Arab countries for security coordination against terrorism; (vii) publish an

[535] Article 4 of Egyptian Law no 19 of 2014 concerning the foundation of the National Security Council.
[536] Article 1 of Egyptian Law no 25 of 2018 concerning the foundation of the Supreme Council for Countering Terrorism and Extremism.
[537] Article 4bis of Egyptian Law no 25 of 2018 concerning the foundation of the Supreme Council for Countering Terrorism and Extremism.

annual report to show the international communities the terrorist organizations which pose threats to Egypt and the Arab world and their violations; and (viii) suggest a plan to develop educational curricula to support accepting diversity and oppose violence and extremism.[538]

In addition, threats to security are referred to under the Egyptian Anti-Terrorism Law which defines a 'terrorist act' as follows:

> [A]ny use of force, violence, threat or intimidation locally or abroad, for the purpose of (...) endangering the safety, interests or security of the society, harming individuals or terrorizing them, endangering their lives, freedoms, public or private rights or security, or (...) harming national unity, social peace or security (...).[539]

During parliamentary debates on article 86 of the Law no. 97 of 1992 amending the Egyptian Penal Code,[540] the term 'national security' was defined as 'social peace and stability and measures that the State can take to protect its independence and territory from any harmful activity and confront any internal or external danger'.[541] This definition was introduced in 1992 and that is why it might seem outdated and does not reflect the contemporary threats to national security. In addition, the current criminal provisions of terrorism give national security broader meaning and dimensions which might render this definition of national security as ineffective or non-comprehensive.

The Egyptian Emergency Law no. 162 of 1958 (the "**Emergency Law**") enumerates cases which threaten the Egyptian national security and public order. These cases are wars, domestic instability, catastrophes, and epidemics.[542] In cases of declared state of emergency,

[538] Article 1 of Egyptian Law no 25 of 2018 concerning the foundation of the Supreme Council for Countering Terrorism and Extremism.
[539] Article 2 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).
[540] The Egyptian Penal Code no 58 of 1937.
[541] 'Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice' (*United Nations Human Rights Office of the High Commissioner*, 10 March 2021) HRC/NONE/2021/SP/16, para 24.
[542] Article 1 of the Egyptian Emergency Law no 162 of 1958.

the Egyptian President shall have the power to protect national security and public order by restricting freedoms of persons in relation to association, travel, residency, and passage in specific places and times. The Egyptian Emergency law also allows arresting suspects and conducting searches of persons and places.[543]

It is worth mentioning that previously this article stipulated that in the above cases no need to abide by the provisions of the Egyptian Criminal Procedures Law.[544] This means that it removed all the protections provided for suspects against unlawful arrest or unauthorized searches.[545] However, the Egyptian Supreme Constitutional Court (the "**SCC**") held that this provision is unconstitutional. In its judgment, the Egyptian SCC confirmed that:

> Authorizing the arrest and search of persons and places without a reasoned judicial warrant is a violation of citizens' personal freedoms and the freedom of their homes, which represents a violation of the principle of the supremacy of law, which is the basis of governance in the state.[546]

Examples of national security threats could also be discerned from court judgments. The Cairo Summary Court justified its order to confiscate the assets and moneys of the Muslim Brotherhood Group (the "**MB**") for the protection of national security by stating that this group has affiliations extending beyond the Egyptian borders. They work for their global affiliates irrespective of the interests of Egypt. Their acts threaten national security, public order and public morality. They used children and women as human shields. They committed terrorist bombings all over the country. They also convey these acts in a religious veil conceiving less educated and more vulnerable people.[547]

Egyptian courts also expand in the interpretation of national security to the extent

[543] Article 3 of the Egyptian Emergency Law no 162 of 1958.
[544] The Egyptian Criminal Procedures Law no 150 of 1950.
[545] Sadiq Reza, 'Endless Emergency: The Case of Egypt' (2007) 10 New Criminal Law Review 538-39.
[546] Case no 17 of 15J (Egyptian Supreme Constitutional Court).
[547] Case no 2315 of 2013, dated 23 September 2013 (Cairo Summary Court, 3rd circuit) 3-4.

that protection of national security was invoked in the 'Queens boat case' which is concerned with prosecuting homosexuality.[548] A number of gay men were tried before the Egyptian State Security Courts due to national security concerns. It was established that some of these gay men had ties with foreign elements which represent national security risks as it targets to breakdown male solidarity in Egypt.[549]

Militant threats are on top of the list of threats facing national security and safety in Egypt. There are three main challenges to security in Egypt. Islamist terrorism, jihadist groups in Sinai and border threats from several wars in border countries. Accordingly, Egypt tends to prioritize the militant solution and put much effort in the army to maintain the security of the state. The use of power against power is the main strategy used to counter these threats.[550]

According to the World Bank's index on political stability and absence of terrorism, Egypt's ranking declined from 19.43% on 2010 to 6.64% in 2011, which is the year of the Arab Spring revolution in Egypt. The percentage started to raise gradually but very slowly until it reached 14.15% in 2022.[551]According to the Global Terrorism Index in 2023, Egypt is ranked the 20th out of 89 countries in terms of the countries most affected by terrorism. Currently, Egypt is within the medium category.[552] Egypt was within the high category in 2022,[553] which shows the high intensity of terrorism faced by Egypt during the last decade that stands as an obstacle in front of the government's efforts to effectively and rapidly improve stability.

Although the above does not provide a uniform definition of national security in Egypt, which is hard to ascertain given the absence of such definition in laws, it helps the

[548] Nicola Pratt, 'The Queen Boat case in Egypt: sexuality, national security and state sovereignty' (2007) 33 Review of International Studies 137-38.
[549] ibid 137-38.
[550] Hebatalla Taha, 'Militarisation and security challenges in Egypt' (2016) 55(453-454) Adelphi series 177.
[551] Daniel Kaufmann and Aart Kraay, 'Worldwide Governance Indicators 2023 Update' (*World Bank*, 2023).
[552] '2023 Global Terrorism Index' Vision of Humanity (*Institute for Economics & Peace*) 6-8.
[553] ibid 6-8.

reader to understand how national security is perceived in the context of the Egyptian Constitution and the Egyptian laws. It also gives insights on the meaning of national security in broad terms and what it encompasses. Additionally, it demonstrates that freedoms could be restricted in favor of national security under the Egyptian Emergency Law and the Egyptian Anti-Terrorism Law. According to the International Covenant on Civil and Political Rights (the "**ICCPR**") approved by the UN General Assembly and signed by Egypt, freedom of expression could be restricted based on the provisions of law and in cases of necessity for the purpose of protection of national security, public order, public health, or morals.[554] It also allows restricting peaceful assembly for the same purposes.[555]

4.3. Constitutional Law Principles

In this section, I explore the application of constitutional law principles including the rule of law, the separation of powers, and judicial review and its accommodation with national security issues. I also provide practical examples on national security issues in the context of public law from the UK and Egypt.

4.3.1. The rule of law

The rule of law means that 'no one is above the law'.[556] It requires that 'the law binds everyone, including the government. The government must be able to point to a valid legal basis for its conduct (…). The law must also be impartial and applied impartially, and all should have access to its protection'.[557] 'Therefore, if the law is to be obeyed it must be capable of guiding the behavior of its subjects. It must be such that they can find out what it is and act upon it'.[558] The UN Security Council defines the rule of law as follows:

[554] Article 19 of the International Covenant on Civil and Political Rights ratified by the Egyptian Presidential Decree no 536 of 1981.
[555] Article 21 of the International Covenant on Civil and Political Rights ratified by the Egyptian Presidential Decree no 536 of 1981.
[556] Tom Bingham, *The Rule of Law* (Allen Lane 2010) 4.
[557] Jack Beatson, *Key ideas in the rule of law and the separation of powers* (Bloomsbury Publishing 2021).
[558] Joseph Raz, 'The Rule of Law and Its Virtue' in Aileen Kavanagh and John Oberdiek (ed), *Arguing About Law* (Routledge 2009) 183.

> [A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[559]

The rule of law necessitates the separation of powers between the legislative, the executive and the judicial branches of the government, in addition to independence of the judiciary, which is essential to guarantee effective checks and balances.[560] The state should be governed by law and by leaders who abide and are restricted by law, rather than those who prioritize and serve their personal interests.[561] The rule of law imposes equality before law. This means that people should all be subject to the same treatment, whether they are public officials or ordinary citizens. Public officials should not enjoy privileged treatment or get exempted of punishment just because of their title or position.[562] However, this rule is subject to some exceptions. For instance, Parliament members are not subject to litigation for what they say during parliamentary sessions. Diplomats and judges also enjoy immunity. These types of immunities are granted for practical reasons and are accepted within the framework of the rule of law.[563]

Despite the mandatory nature of law, citizens may object to the law and disobey it if they believe that the law does not achieve justice and morality. This does not contradict with

[559] 'UNRIC Library Backgrounder: Rule of Law' (*United Nations in Western Europe*, 23 August 2004).
[560] Beatson, *Key ideas in the rule of law and the separation of powers* (n 557).
[561] Raz (n 558) 212.
[562] Bingham (n 556) 55-56.
[563] Mark Ryan and Steve Foster, *Unlocking Constitutional & Administrative law* (3rd edn, Routledge 2014) 127-29.

the rule of law because the law which is enacted by the government should always serve the interests of the public and achieve their will.[564] Accordingly, for citizens to be able to comply with law, it must fulfill some conditions. Many scholars expressed these conditions in different terms while including more or less the same content. Lon Fuller clarifies eight pre-requisites of the rule of law, in which the failure to fulfill any of them, affects the foundational characteristics of the law or the legal rule. Consequently, citizens would be discharged from the obligation to be bound by such law or legal rule. These eight failures are as follows:

> The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[565]

While in Lord Bingham's influential account, the rule of law consists of the following eight requirements:

(1) 'The law must be accessible and so far as possible intelligible, clear and predictable.

[564] Bradley, Ewing and Knight (n 489) 85.
[565] Lon L. Fuller, *The Morality of Law* (Yale University Press 1964) 39.

(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

(3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

(4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

(5) The law must afford adequate protection of fundamental human rights.

(6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

(7) The adjudicative procedures provided by the state should be fair.

(8) The rule of law requires compliance by the state with its obligations in international law as in national law'.[566]

The substantive requirement of the rule of law represents the respect of human and constitutional rights, which is the fifth requirement in Lord Bingham's list. However, the substantive requirement of the rule of law is controversial between scholars.[567] One opinion is that the rule of law comprises only the formal requirements. Accordingly, a law is in conformity with the rule of law as long as it fulfils the formal requirements despite its violation of human rights. The other opinion supports the substantive component of the rule of law. According to this view, the respect of human and constitutional rights must be fulfilled. Otherwise, its absence renders the law deficient even if it fulfills all the formal

[566] Bingham (n 556).
[567] Paul P. Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (Routledge 2005) 467.

requirements.[568] In my opinion, the latter view makes more sense. Otherwise, arbitrary laws would be respected under the principle of the rule of law, as Paul Craig explains:

> On this view a law which was properly enacted by Parliament, in compliance with all correct procedures, which was pristinely clear in its application, and which was applied by an impartial judiciary, might none the less be tainted as arbitrary if it was thought to infringe certain fundamental rights, or if it entailed excessive punishment.[569]

A significant challenge arises when the respect of fundamental rights needs to be balanced with public interests of the state, like protection of national security. This is due to the absence of an agreed interpretation of the degree of respect of constitutional rights and fundamental freedoms. Therefore, the question of adherence to the rule of law becomes subject to debate when it is not clear if the substantive aspect of the rule of law has been fulfilled or not.[570]

Timothy Endicott argues that complete adherence to the conditions of the rule of law is impossible.[571] Endicott states that:

> Legal systems necessarily contain vague laws. They typically allow for change in the law, they typically provide for unreviewable official decisions, and they never regulate every aspect of the life of a community. It may seem that the ideal can never be achieved because of these features of legal practice'. [572]

He challenges the notion of full compliance with the conditions of the rule of law. Alternatively, he advocates that the existence of some vagueness in the law does not necessarily constitute a breach of the rule of law. Otherwise, discretion would be contrary

[568] Bradley, Ewing and Knight (n 489) 88.
[569] Craig (n 567) 470-71.
[570] Bingham (n 556) 84.
[571] Timothy Endicott, 'The impossibility of the rule of law' (1999) 19(1) Oxford Journal of Legal Studies 1.
[572] ibid 1.

to the rule of law. Accordingly, the question is whether the amount of vagueness is reasonable and so complies with the rule of law or is excessive in a way which makes it deficient.[573]

The rule of law does not preclude the Executive from having discretionary power. However, the discretionary power should be granted by the law and exercised within the limits determined in the law. Such discretionary power is sometimes required to guarantee the fair application of law based on the surrounding circumstances. In addition, such discretion remains subject to judicial review to avoid abuse of power by the Executive and ensure that it abides by the limits stipulated under the law.[574]

In the context of national security, it is argued that counter-terrorism laws retain an 'exceptional' nature because terrorism is an extraordinary phenomenon, even if it is regulated under ordinary rather than emergency or temporary laws. Otherwise, terrorism would have been subject to the general criminal and penal laws without the need for specific counter-terrorism laws.[575] The phenomenon of regulating counter-terrorism under permanent counter-terrorism laws is described by some scholars as 'permanence of the temporary'.[576] Regulating counter-terrorism under emergency laws might expand the scope of powers of the Executive at the expense of restraining the scope of judicial review. Nevertheless, regulating counter-terrorism under ordinary permanent counter-terrorism laws returns counter-terrorism measures within the scope of judicial review and encourages judges to interfere and invoke the rule of law. The Executive then will have one of two options. Either to try to abide by the rule of law to discourage judicial intervention, or to insist on the exceptional nature of counter-terrorism laws which requires some derogation

[573] ibid 17.
[574] Bingham (n 556) 50.
[575] Paul F. Scott, *The National Security Constitution* (Hart Publishing 2018) 11.
[576] David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 Australian Journal of Legal Philosophy 28.

from the general requirements of the rule of law.[577] However, it remains a very challenging task to evaluate the necessity of the Executive's measures in national security matters due to its specific nature.[578]

Open justice is a feature of the rule of law. Open justice assumes that courts operate with transparency and openness. The essence behind open justice is to allow people to monitor the application of justice and scrutinize the branches of government and its adherence to the rule of law. It aims at ensuring equality before the law and the application of fair criminal procedures. It is also essential to guarantee the awareness of defendants of all the details about their accusation to allow them to properly defend themselves.[579] However, open justice is also subject to exceptions, whereby in national security cases, judges might not be able to fully comply with the principle of open justice.[580] Many factors could hinder open justice in similar matters, including disclosure of confidential materials, state secrets and considerations of relationships with other states, which could be affected due to disclosure of classified materials in trials. For example, special procedures are followed in the UK to overcome these difficulties, such as appointing Special Advocates to review confidential materials or convening closed trials. Despite the development of judicial practices in adjudicating national security cases, the issue persists with the lack of transparency in national security cases given that the public and the media are not allowed to see the full picture to ensure the correct balance is employed.[581]

If we compare the level of the rule of law in the UK and Egypt, of course there will be multiple differences. However, the limited scope of this research does not allow such detailed discussion. But as a general insight on the gap between both countries in accordance

[577] ibid 28.
[578] Scott (n 575) 61.
[579] Nicola Mcgarrity and Edward Santow, 'Anti-Terrorism Laws: Balancing National Security and Fair Hearing' in Victor V. Ramraj, Michael Hor, Kent Roach and George Williams (eds) *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012) 123.
[580] ibid 123-24.
[581] Zedner (n 496) 139-40.

with the World Bank ranking in relation to adherence to the rule of law in 2022, the UK's percentile rank is 89.2%, while Egypt's percentile rank is 42.5%.[582]

4.3.2. Separation of powers

The separation of powers requires that the powers of the State are divided amongst different institutions i.e. the Executive, the Legislature, and the judiciary.[583] The legislative function is carried out by Parliament and includes law making. The executive function is performed by administrative bodies including the President of the state (as applicable) and the cabinet of ministries and encompasses the implementation of laws and policy making. The judicial function is undertaken by courts and includes resolving disputes arising from the implementation of laws.[584] Each branch of government should not interfere with the functions of the other branches. Whereby, any one person shall not combine two or more of the three functions of the government.[585] This separation is essential to avoid concentration of powers in one person or body which runs counter to liberal democracy and leads to corruption and oppression.[586] There is no guarantee that separation of powers would prevent corruption and misuse of power, given that the three branches of government could align together and act against the will of the people. However, separation of powers strives to prevent the concentration of powers and counteract corruption or other forms of collusion between powerful actors.[587]

Like all constitutional principles, there are differing views about what the separation of powers requires. It ranges from a strict insistence on firm functional differentiation

[582] 'Data Bank: Worldwide Governance Indicators' *World Bank Group*.
[583] Mark Elliott and Robert Thomas, *Public Law* (Oxford University Press 2024) 109-10; Bradley, Ewing and Knight (n 557) 89-90; Eric Barendt, 'Separation of Powers and Constitutional Government' in Richard Bellamy, *The Rule of Law and the Separation of Powers* (Routledge 2005) 601.
[584] ibid.
[585] Andrew Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkens, *Public Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2019) 131.
[586] Beatson, *Key ideas in the rule of law and the separation of powers* (n 557) 5.
[587] Elliott and Thomas (n 583)114.

moving forward to a more lenient or flexible approach where the powers overlap between the governing bodies of the state.[588] It is argued that strict separation of powers is not practically functionable. It requires that each branch of the government should have its own defined functions which are completely separate from other branches without any interaction between these branches. It also requires that the members of one branch cannot hold posts in any of the other two branches. Accordingly, the more prevalent approach is to adopt a flexible definition of separation of powers, which allows checks and balances between the three branches of government to prevent abuse and maintain supervision.[589] 'There may, therefore, be some tension between the implications of a separation principle based on the avoidance of tyranny, and the implications of a principle geared to the efficiency of government'.[590]

Aileen Kavanagh advocates 'the relational conception of separation of powers'.[591] Whereby, each branch needs the other branch given that they do not work in isolation. Accordingly, the law which is enacted by Parliament needs to be implemented by the government and the judiciary. Similarly, court judgments need to be respected and applied by the government and Parliament. This collaboration requires that each branch must respect the legitimacy of the other branch. Combining separation and interrelation could seem to be contradictory. Nevertheless, if we look at it from the perspective of the existence of varying levels of separation or 'partial separation' rather than strict separation, we could accept the conception. Especially that separation requires that each branch should respect the other, which in turn requires interaction.[592]

The constitutional status of the separation of powers principle in the UK is subject to debate and controversy. Separation of powers is not stipulated in the UK Constitution

[588] Barendt (n 583) 601.
[589] Bradley, Ewing and Knight (n 557) 91-92.
[590] Barendt (n 583) 602-03.
[591] Aileen Kavanagh, 'Towards a relational conception of the separation of powers' (2022) 4(10) Public Law 538.
[592] ibid 538-39.

either on the institutional level or on the personnel level.[593] The separation of powers in the UK exists as a result of practical needs and has been developed on the same basis by virtue of several reforms, rather than by virtue of constitutional obligation.[594] The UK applies a less strict approach of separation of powers with checks and balances interrelated between the three branches of government to ensure efficiency and practicality.[595] The UK Parliamentary Executive is an example of the relaxed separation of powers applicable in the UK. Whereas members of the UK Executive are appointed from the elected members of the UK Parliament. This contradicts with the principle of separation of powers and might cause the UK Parliament to be controlled by the UK Executive.[596] Lord Windlesham commented that:

> The theory of the separation of powers was primarily a French invention. It had never been part of the British Constitution, or the Westminster model. If it were, the executive, including the Prime Minister, would have to be removed from the House of Commons.[597]

There are also some instances where the UK Executive is allowed to cross the limits of its executive functions and exercise legislative powers without or with less scrutiny from the UK Parliament. This is clear in the UK Executive's use of Henry VIII clauses. According to which, the UK Executive can amend or revoke an Act of Parliament by virtue of a secondary legislation, which is not always subject to the UK Parliament review. Although these exceptional legislative powers are sometimes essential in emergencies, like the COVID pandemic, to ensure efficient and swift functioning of the Executive, it could be used by the UK Executive to intentionally overstep the UK Parliament.[598]

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[593] Roger Masterman, *The separation of powers in the contemporary constitution: judicial competence and independence in the United Kingdom* (Cambridge University Press 2011) 16-17.
[594] ibid 18-19.
[595] Le Sueur, Sunkin and Murkens (n 585) 131-36.
[596] Bradley, Ewing and Knight (n 557) 92.
[597] Lord Windlesham, 'The Constitutional Reform Act 2005: ministers, judges and constitutional change: Part 1' (2005) Public Law 813.
[598] Jack Beatson, 'The rule of law and the future of democracy' (2022) 4(10) Public Law 526.

The UK Executive's attempt to marginalize the UK Parliament was obvious in *R. (on the application of Miller) v Prime Minister* and *Cherry v Advocate General for Scotland*.[599] The UK Supreme Court held that the prorogation of the UK Parliament in 2019 to avoid legislative action against withdrawal from the European Union by the UK is unlawful. The UK Supreme Court emphasized the substantial importance of political accountability exercised by the UK Parliament over the UK Executive to protect the people from the Executive's abuse of power.[600]

Similarly, the principle of supremacy of the UK Parliament could be seen as contradicting with the separation of powers and preventing supervision over the UK Parliament. The supremacy of Parliament in the UK means that the UK Parliament can make any law it wishes, and no authority shall have the right to invalidate laws enacted by the UK Parliament.[601] However, the flexibility of the UK Constitution allows those two principles to co-exist without strict application.[602] In addition, the degree of separation can vary so that it is not necessarily precluded by the principle of parliamentary sovereignty. According to the Human Rights Act 1998 (the "**HRA**"), the court may issue a declaration of incompatibility of a law if the court believes that the law violates rights and liberties protected by the HRA.[603] Nevertheless, the declaration of incompatibility does not have binding effect on the UK Parliament or the parties of the dispute, and it does not invalidate the law in respect of which it is issued.[604]

An example of the development of the separation of powers principle in the UK is the restructure of the jurisdiction of the Lord Chancellor by virtue of the Constitutional

[599] [2019] UKSC 41.
[600] Beatson, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (n 557) 13.
[601] Masterman, *The separation of powers in the contemporary constitution: judicial competence and independence in the United Kingdom* (n 593) 20.
[602] ibid 17.
[603] The UK Human Rights Act 1998, s 4(4).
[604] The UK Human Rights Act 1998, s 4(6).

Reform Act 2005 (the "**CRA 2005**").[605] Although the Lord Chancellor was responsible for upholding judicial independence, the holder of this post used to combine all of judicial, executive and legislative powers. The Lord Chancellor was (i) a minister responsible for courts and appointments of judges; (ii) the president of the House of Lords Appellate Committee and the Privy Council Judicial Committee; and (iii) a speaker in the House of Lords Legislative Committee.[606] The UK CRA 2005 limited the jurisdiction of the Lord Chancellor to the executive jurisdiction only and replaced the House of Lords Appellate Committee and the Privy Council Judicial Committee by the UK Supreme Court. While preventing the Lord Chancellor from working as a judge. The responsibility to appoint judges was also shifted to a Judicial Appointment Commission.[607]

In the context of human rights law, it is the role of the court to maintain the respect for human rights protected under the European Convention on Human Rights (the "**ECHR**") without encroaching on the powers of the democratically elected branches of government.[608] Philip Sales emphasizes that:

> Perhaps it is this dual role of the courts, as enablers of majorities and as protectors of individual and minority rights in the sphere in which majorities come to be formed, which allows one to speak of them as being one of the guardians of the constitution.[609]

However, Timothy Endicott argues that the Executive plays a leading role in protecting human rights.[610] Although it is typically perceived that:

> [A] legislature is ok because it is democratic, and courts are ok because the independent judges act on principle, but the executive is not ok: it is neither

[605] Diana Woodhouse, 'United Kingdom - The Constitutional Reform Act 2005 - Defending Judicial Independence the English Way' (2007) 5(1) International Journal of Constitutional Law 155.
[606] ibid 154-55.
[607] ibid 155.
[608] Roger Masterman, 'Rebalancing The Unbalanced Constitution' in Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-terrorist Judicial Review* (Cambridge University Press 2014) 211-213.
[609] Philip Sales, 'The interaction of the rule of law and the separation of powers' (2022) 4(10) Public Law 535.
[610] Timothy Endicott, 'Human Rights and The Executive' (2020) 11(4) Jurisprudence 606-07.

> democratic nor principled; it acts in its arbitrary self-interest. But in fact, in every decent political community, it is the executive that takes the lead in respecting human rights.[611]

Due to the flexibility of the principle of separation of powers, not all the functions of the Executive are purely executive as falsely inferred from its name. The Executive is the primary actor of the government, as the Executive sometimes has the authority to create law by virtue of delegation. It is also the branch which initially proposes laws. The role of the Executive in adjudication cannot be ignored as well. When a plaintiff challenges an executive decision on the grounds that it is based on a law which violates human rights, the Executive performs the role of the defendant of the law on behalf of Parliament which enacted the law. In addition, it has a substantial role as prosecutor, which is essential for prosecuting human rights violations.[612]

By all means, the roles of the three branches are all crucial to achieve a 'just government'. Even if one branch might have more substantial role than the others, the responsibility is shared between the three branches. In addition, the principle of 'comity' requires that there must be ongoing reciprocal respect between all branches of government. Each branch of government must recognize the role of the other branches and cooperate together to undertake these roles. However, they are not required to agree or maintain trust between each other.[613] For example, Parliament must respect court judgments even if Parliament does not agree with it. The Executive as well proposes bills to Parliament while accepting the outcome of the political accountability which could be against the will of the Executive.[614]

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[611] ibid 607.
[612] ibid 605-09.
[613] Timothy Endicott, 'Habeas Corpus and Guantánamo Bay: A view from abroad' (2010) 50 American Journal of Jurisprudence 8; Timothy Endicott, ''International Meaning': Comity in Fundamental Rights Adjudication' (2001) 13(3) International Journal of Refugee Law 288.
[614] Kavanagh, 'Towards a relational conception of the separation of powers' (n 591) 538-40.

The primary responsibility for decisions in relation to national security and intelligence is vested in the Executive. Accordingly, the relevant Minister or the Prime Minister is held accountable for the work of the intelligence agencies before the UK Parliament. Ministers are the primary decision makers in relation to the assessment of what constitutes a threat to national security and the degree of that threat.[615]

Turning to Egypt, consecutive Egyptian Constitutions, including the current Egyptian Constitution of 2014, recognize the principle of separation and distribution of powers between the executive, judicial and legislative branches.[616] However, there is no strict adherence to the principle in practice.[617] The Egyptian system is perceived as presidential rather than parliamentary, due to the vast powers granted to the President of the state.[618] The President of the state is authorized to (i) appoint and dismiss the cabinet and the Vice President of the state;[619] (ii) set the general policy of the state in collaboration with the cabinet;[620] (iii) represent the state in its international relations and conclude treaties;[621] (iv) declare war and is the chief officer of the Military Forces;[622] (v) declare a state of emergency;[623] (vi) grant presidential pardons to fully or partially discharge criminals;[624] (vii) issue presidential decrees having the force of law in cases of urgency in the absence of a convened Parliament;[625] and (viii) call for public referendums. In some of these cases, the President of the state shall secure the approval of the Egyptian Parliament or pre-discuss with the cabinet.[626]

Previously after the Egyptian revolution of 2013, Adly Mansour, the former

[615] Ward, Jones and Stone (n 498) 2.16.
[616] Article 5 of the Egyptian Constitution of 2014 (as amended).
[617] Awad Mohammad El-Morr and Adel Omar Sherif, 'Separation of Powers and Limits on Presidential Powers under the Egyptian Constitution' in Kevin Boyle and Adel Omar Sherif, *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (Kluwer Law International 1996) 63-64.
[618] ibid 63-64.
[619] Article 146-147, 150 (bis) of the Egyptian Constitution of 2014 (as amended).
[620] Article 150 of the Egyptian Constitution of 2014 (as amended).
[621] Article 151 of the Egyptian Constitution of 2014 (as amended).
[622] Article 152 of the Egyptian Constitution of 2014 (as amended).
[623] Article 154 of the Egyptian Constitution of 2014 (as amended).
[624] Article 155 of the Egyptian Constitution of 2014 (as amended).
[625] Article 156 of the Egyptian Constitution of 2014 (as amended).
[626] Article 157 of the Egyptian Constitution of 2014 (as amended).

President of the Egyptian SCC held all judicial, executive and legislative powers. He was the President of the Egyptian SCC when he was selected to temporarily hold the position of the President of the state during a transitional period until the election of a new President.[627] Given his position as the President of the state, he was also entitled to issue presidential decrees having the value of laws. Former President Mansour in fact used this power to issue several presidential decrees.[628]

The constitutionality of these decrees was later challenged for several reasons, yet these challenges were declined by the Egyptian SCC. It was claimed that the presidential decrees were issued in the absence of the Egyptian Parliament without urgency to justify its issuance. However, the Egyptian SCC discarded this claim on the basis that the country was in an economic sensitive situation which needed these presidential decrees to stabilize the investment environment. It was also claimed that there is a conflict of interest because the judges who were reviewing the case in the Egyptian SCC were previously working under the leadership of former President Mansour when he presided the Egyptian SCC. Accordingly, they could be biased which might affect the neutrality of their judgment on the issue. However, this claim was also disregarded on the grounds that this is not one of the cases stipulated under the law for judges to step down in cases of conflict of interest.[629]

A recurring theme of Arab constitutions is that they empower the Executive more than they restrict it. Even with the admission of the principle of separation of powers, Arab regimes are able to find a way around it when needed.[630] Zaid Al-Ali argues that, in Arab countries post the Arab Spring 'the future's main challenge will be to break away from these elitist governance constructions to more inclusive forms, in ways that meet the demand for

[627] Nathalie Bernard-Maugiron, 'A Clash of Institutions: Judiciary vs. Executive in Egypt' in Eva Bellin and Heidi E. Lane (eds), *Building rule of law in the Arab world: Tunisia, Egypt, and beyond* (Lynne Rienner Publishers 2016) 29.
[628] Nimer Sultany, 'Law's ideology: Neoliberalism and developmentalism in Egyptian jurisprudence' (2024) moae043 International Journal of Constitutional Law 33-34.
[629] ibid 33-34.
[630] Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press 2002) 143.

social justice. Ending hyperpresidentialism means freeing legislature and judiciary from overbearing executive control'.[631]

Additional example of the blurred boundaries between the three branches of government in Egypt is the Egyptian Ministry of Justice (the "**MoJ**"). The judicial character of the members of the Egyptian MoJ - who mostly possess or have possessed judicial posts - causes confusion in the application of separation of powers. Although the Egyptian MoJ is part of the executive branch, the monopoly of judicial members of the MoJ posts and the interference of the MoJ with the judiciary goes in contrast with the separation of powers principle.[632]

Nevertheless, the principle of separation of powers is clearly respected in other instances. For example, The Egyptian judiciary proved its respect to the rule of law and separation of powers in a significant judgment after the ouster of former Egyptian President Mubarak. Although, after the Arab Spring, the Legislature was absent and the Executive was not stable, the judiciary did not make use of this gap to violate the principle of separation of powers.[633] The Egyptian National Democratic Party (the "**NDP**"), which was the governing party during Mubarak's presidential period, was dissolved after Mubarak has stepped down. Subsequently, a lower administrative court issued a judgment depriving the Egyptian NDP members from their political rights in contradiction with another administrative court judgment. The Egyptian Supreme Administrative Court settled this controversy by confirming that depriving members of political parties of their political rights lies within the jurisdiction of the Egyptian Parliament. Accordingly, the court cannot decide on this matter and the members of the Egyptian NDP shall have their political rights

[631] Robert Poll, 'Review of Zaid Al-Ali, Arab Constitutionalism: The Coming Revolution' (2022) 20(2) International Journal of Constitutional Law 935.
[632] Shams Al Din Al Hajjaji, 'Reform of Judicial Independence Rules in Egypt' (2018) 5(1) Indonesian Journal of International & Comparative Law 124.
[633] Ahmed Eldakak, 'Approaching Rule of Law in Post-Revolution Egypt: Where We Were, Where We Are, and Where We Should Be' (2012) 18(2) University of California Davis Journal of International Law and Policy 297-98.

untouched.[634] The judiciary in this case proved to stick to moral values of separation of powers and was not affected by the public sentiment against the Egyptian NDP after the Arab Spring.[635]

It has been argued that the Egyptian judiciary is characterized by 'autonomy' rather than 'independence'.[636] Independence of the judiciary does not contradict with checks and balances, yet judicial autonomy does. When the judiciary is independent, the other branches of government do not interfere with its court judgments or its operation. However, it retains some sort of checks to avoid judicial autocracy. Though, autonomy does not allow any kind of judicial accountability to other branches.[637]

However, in 2019 some amendments were introduced to the Egyptian Constitution of 2014 by virtue of a public referendum. Pursuant to these amendment, the President of the state became responsible for the appointment of the Chief Justices of high courts and presidents of judicial authorities from within the oldest seven of deputies.[638] In addition, the President of the state became the Chairman of the Egyptian Supreme Judicial Council (the "**SJC**").[639] The Egyptian SJC is responsible for reviewing the required conditions for the appointment of members of judicial posts, their promotion and the disciplinary actions taken against them. The Egyptian SJC shall also be consulted in laws and regulations concerning judicial institutions. Decisions of the Egyptian SJC must be approved by the majority of its members provided that the Chairman of the Egyptian SJC has a veto power.[640]

It could be argued that this might negatively affect the independence of judiciary. On the contrary, granting the judiciary full autonomy might affect the balance of powers, whereas the judiciary would be self-accountable. Accordingly, retaining this power by the

[634] Case no 2408 of 58J (Egyptian Supreme Administrative Court).
[635] Eldakak (n 633) 297-98.
[636] Hajjaji (n 632) 102-03.
[637] ibid 102-03.
[638] Article 185 of the Egyptian Constitution of 2014.
[639] Article 185 of the Egyptian Constitution of 2014.
[640] Article 185 of the Egyptian Constitution of 2014.

President of the state could enhance the system of checks and balances.[641] On the other hand, to prevent abuse of power and maintain balance, the Egyptian Constitution guarantees that 'judges cannot be dismissed'.[642] Granting the power of appointing judges to the President of the state is common in other democratic systems as well, like the United States. Whereby, the President of the state nominates judges of the US Supreme Court, subject to the approval of the Senate. However, the US President can overlook the Senate's approval in case of recess.[643] The independence of the Egyptian judicial system is further bolstered by the existence of Public Prosecution service, which is part of the judicial system. The Public Prosecution is entitled to make investigations, prosecutions and refer cases to courts.[644] The Public Prosecution is independent from the Executive, which guarantees justice and promotes judicial independence.[645]

4.3.3. Judicial review

'[H]ow can constitutional democracies control the exercise of emergency powers?'.[646] The answer is that courts exert legal control through the review of human rights' violations. While political players exercise political control by scrutinising emergency powers and counter-terrorism measures in political and parliamentary fora. Mark Tushnet suggests that judicial control over the Executive's emergency powers is weak due to slow proceeding and unavailability of information. In emergencies, the Executive typically tends to delay court proceedings and intentionally refrains from cooperating in providing information. This inhibits the work of judges and even raises concerns about the

[641] Nathan J. Brown, 'Caught in the Cross Fire: Egypt's Judiciary in a Revolutionary Age' (2010) 6(1) Yearbook of Islamic and Middle Eastern Law Online 40-42.
[642] Article 186 of The Constitution of 2014.
[643] Barry J. McMillion, 'Supreme Court Appointment Process: President's Selection of a Nominee' (*Congressional Research Service*, 8 March 2022) 1, 21.
[644] Article 189 of The Egyptian Constitution of 2014.
[645] Lisa Hilbink, 'Reforming Judiciaries in Emerging Democracies' in Eva Bellin and Heidi Lane (eds), *Building Rule of Law in the Arab World* (Lynne Rienner, 2016) 14.
[646] Mark Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation' (2007) 3(4) International Journal of Law in Context 276.

completeness of the provided information.[647] Accordingly, Tushnet argues that:

> Even in settings seemingly quite unfavourable to the development of constraints on the flow of power to executive government during emergencies, political controls can work, and sometimes might work in real time more effectively than judicial controls do in real time.[648]

Judges are often viewed as guardians of the rule of law. This role of judges is limited by the separation of powers principle.[649] Judges are entitled to interpret the statute and extract the meaning intended by the Legislature. The issue arises when the case involves other aspects than law, like lack of information due to secrecy in national security matters. In this case, would it be logic to say that accepting the act of the Executive without scrutiny is respecting the separation of powers, and the judge will be adhering to the rule of law? But what if there were human rights violations involved in the Executive's act? Before whom will the Executive be held accountable? How would injured persons claim their rights?[650]

Judicial review is one of the tools to uphold the rule of law. Judicial review holds the Executive accountable for its actions and evaluates the Executive's adherence to law.[651] This requires that courts interpret the law according to the rules set out in the law not according to the judges' desires.[652] Additionally, the independence of judiciary and the accessibility of courts are main requirements for proper rule of law. This is to ensure fair judicial review which achieves the anticipated supervision of the Executive so that it acts according to law.[653] In the UK, deference represents the respect of the court to decisions taken by the elected branches of the government including the UK Parliament and the UK Executive. The reason behind judicial deference to the UK Executive or the UK Parliament

[647] ibid 277.
[648] ibid 287.
[649] Dyzenhaus (n 576) 26-28.
[650] ibid 26-28.
[651] Bingham (n 556) 60-61.
[652] Fuller (n 565) 82.
[653] Bingham (n 556) 87,91.

is the 'respect of their superior competence, expertise and/or democratic legitimacy'.[654]

Separation of powers entails that the UK Parliament, and the UK Executive are the 'primary decision-makers', while the UK courts are the 'secondary decision-makers'. Accordingly, the UK courts' task is reviewing the legality of the primary decisions rather than reviewing its appropriateness. The court is not supposed to object to a primary decision just because of the existence of another alternative which is more suitable or appropriate. A violation of right and the absence of any exemption justifying such violation must be the reason for the court's intervention.[655] Tom Bingham commented on the role of judges as 'they are not independent decision-makers, and have no business to act as such. They have, in all probability, no expertise in the subject matter of the decision they are reviewing. They are auditors of legality: no more, but no less'.[656]

In terms of expertise, the UK court held in *David Miranda v Secretary of State for the Home Department*,[657] that it must defer to the experience of the police to some extent when evaluating proportionality of their acts for the purpose of protection of national security. The police capabilities cannot be disregarded in the area of national security given that they already have duties to apply proportionality in the first place and are accountable for their duties before the UK Parliament.[658] It is argued that there is a distinction between questions of law and questions of policy. According to this argument, courts are supposed to evaluate question of law, while defer questions of policy to the other branches of the government. In other words, courts shall be concerned with matters of 'justice', 'fairness' and 'morality', while exclude matters of policy concerning the development of 'economic, political or social' standards.[659] However, this argument is opposed on the basis that the

[654] Kavanagh, *Constitutional Review Under The UK Human Rights Act* (n 491) 168-170.
[655] Timothy Endicott, *Administrative law* (5th edn, Oxford University Press 2021) 246.
[656] Bingham (n 556) 60-61.
[657] [2016] EWCA Civ 6.
[658] ibid [79].
[659] Kavanagh, *Constitutional Review Under The UK Human Rights Act* (n 491) 183-84.

judge does not apply law in isolation of the impact of its application socially, economically, and politically. Accordingly, this distinction between law and policy might not be helpful in this context.[660]

Regarding democratic legitimacy, it is claimed that the decisions taken by an elected body must be respected by judges who are not elected, as way of respect to the democratic legitimacy of the elected body. Further to this argument, the UK Executive might seem to be less privileged by this aspect than the UK Parliament given the popularly electoral nature of the members of the UK Parliament.[661] However, this argument is claimed to be inaccurate as well. Judicial review is a pre-requisite for the rule of law and deference is a substantive exercise done by judges based on the evaluation of all the conditions together. Deference is sometimes the right option in circumstances of uncertainty, but it cannot be decided in advance for selective subject matters. The degree of deference will vary based on the 'gravity, urgency, sensitivity, and (…) impact' of the decision under review.[662]

It is important to note that judicial deference does not contradict with the rule of law.[663] The challenge is for judges to establish a uniform approach towards deference which gives the Executive the room to take primary decisions based on its expertise without giving it much discretion which allows abuse of power. Judicial interference is justified by unlawful acts of the Executive. The rule of law is violated if judges expanded in deference in a way that gives the government a green light for abuse without judicial supervision in cases of illegality.[664]

This raises the question of appropriate calibration and management of intensity of review.[665] Cora Chan emphasizes that '[i]n a broad sense, the intensity of review denotes

[660] ibid 183-84.
[661] Endicott, *Administrative law* (n 655) 254-55.
[662] Kavanagh, *Constitutional Review Under The UK Human Rights Act* (n 491) 196-97.
[663] Endicott, *Administrative law* (n 655) 255.
[664] ibid 255.
[665] See Mark Elliott, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in Mark Elliott and Hanna Wilberg (eds), *The Scope and Intensity of Substantive Judicial Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015);

the extent to which the court scrutinises the government's decisions'.[666] The level of intensity of judicial review is not uniform. It varies from low to high degree of scrutiny of the government. Even judges may disagree on the appropriate level of intensity of review within the same court.[667] 'When applying the proportionality standard, the courts *calibrate* the intensity and intrusiveness of their review depending on the severity of the interference with rights, and "the expertise, position and overall competence of the court as against the decision-making authority"'.[668] Therefore, the court does not replace or substitute the other branches of the government by exercising proportionality, rather it calibrates the intensity of review depending on the different factors of each case.[669] Aileen Kavanagh describes the role of the court as exercising 'calibrated constitutional review' rather than 'judicial supremacy'.[670]There are three main difficulties for judges when adjudicating cases involving claims about national security. Firstly, Secrecy which is a substantial obstacle faced by a judge when reviewing a national security case. The Executive does not disclose intelligence information, which typically affects the facts of the case presented before courts and is essential for understanding the background behind the acts of the Executive. Secondly, the grave consequences that could result from any mistake in cases of this type. Judges would be more meticulous and careful when issuing a judgment in this field. Thirdly, the uncertainty surrounding the concept of national security. Such uncertainty entails evaluation of future dangers and prediction of all possible scenarios. This becomes way harder when it is associated with the secrecy aspect discussed above.[671] Aileen Kavanagh acknowledges that '[j]udicial uncertainty created by being prevented from seeing relevant

Mark Elliott, 'Justification, calibration and substantive judicial review: putting doctrine in its place' (2013)33 University of Cambridge - Faculty of Law.

[666] Cora Chan, 'Proportionality and invariable baseline intensity of review' (2013) 33(1) Legal Studies 5.

[667] Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) Federal Law Review 118.

[668] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023) 289.

[669] ibid 290.

[670] ibid 290-91.

[671] Cora Chan, 'Business as usual: deference in counter-terrorism judicial review' in Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-terrorist Judicial Review* (Cambridge University Press 2014) 239-46.

information is a recurring theme of the national security case law, and is often a key factor generating deference in this area'.[672]

Judicial deference is characterised by the following: (i) judicial deference is variable, rather than uniform. Judges may decide to defer or not to the Executive according to their assessment on a case-by-case basis.[673] In Cora Chan's account, there are two approaches of deference by judges, i.e. 'dilution' and 'business as usual'.[674] In the 'dilution' approach, judges tend to hold back their role of scrutinizing the government in cases of balancing between national security and human rights and prefer to defer to the Executive. While the 'business as usual' methodology does not adopt special treatment for national security cases. Judges exercise the same level of judicial review like in any other human rights case;[675] (ii) judicial deference could also be 'partial' in the meaning that the judge reviews the case but, in such review, the judge defers to the Executive in evaluating the suitability of its decision;[676] and (iii) judicial deference is not automatic in national security matters. The decision of deference remains within the discretionary power of the judge according to the circumstances of the case. The judge takes the decision of deference after evaluating the rights involved, the violations committed and the available expertise.[677]

Some scholars differentiate between 'internal and external features' which affect deference. The 'internal features' relate to the concerned right (i.e. freedom of expression). The 'external features' relate to the surrounding circumstances taken into consideration during the decision-making process (i.e. the administrative body's expertise in national security threats).[678] TRS Allan supports the argument that deference should be dependent

[672] Aileen Kavanagh, 'Defending deference in public law and constitutional theory' (2010) 126 Law Quarterly Review 235.
[673] ibid 224.
[674] Chan (n 671) 228-29.
[675] ibid 228-29.
[676] Kavanagh, 'Defending deference in public law and constitutional theory' (n 672) 224.
[677] ibid 226.
[678] Alison L Young, 'Will You, Won't You, Will You Join the Deference Dance?' (2014) 34(2) Oxford Journal of Legal Studies 392-93.

on the 'internal features' only.[679] On the contrary, Tom Hickman argues that deference is dependent on 'external features' only.[680]

In the same context, it is argued that the court must apply a 'substantive evaluation' which means the evaluation of the existence of human rights violations. Rather than an 'institutional evaluation' which is based on the evaluation of 'competence, expertise and democratic legitimacy'.[681] However, these arguments are challenged as judges are responsible for applying 'institutional evaluation' along with the 'substantive evaluation' including 'internal and external features'. This is to make sure that judges act within their judicial jurisdiction. The 'institutional evaluation' is essential to guarantee the respect of the principle of separation of powers.[682] In addition, 'the HRA has ushered in a 'culture of justification'. Under such culture, courts are no longer expected to take the government on blind trust and must require the government to demonstrate its claims with cogent and sufficient evidence'.[683] Based on this two-stage approach, the judge will reach one of two conclusions. First, that the court is confident that a violation of human rights has occurred. Second, that the 'institutional evaluation' raises concerns which hinder the 'substantive evaluation', in this case the court decides to defer to the Executive.[684]

However, it is suggested by Cora Chan that when the government claims the existence of justifiable reasons for its act which nevertheless includes classified non-disclosable information, the court should not assume the honesty of the government. Alternatively, the court should review the track record of the relevant governmental department in past precedents to assess its tendency to overstress national security threats or to unduly use intelligence information claim to bar judicial review. If the government has a

[679] ibid 392-93; TRS Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) Law Quarterly Review 96; TRS Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65(3) The Cambridge Law Journal 671.
[680] Young, 'Will You, Won't You, Will You Join the Deference Dance?' (n 678)141–45.
[681] Kavanagh, 'Defending deference in public law and constitutional theory' (n 672) 229-30.
[682] Kavanagh, 'Defending deference in public law and constitutional theory' (n 672) 230-32.
[683] Chan (n 671) 236.
[684] Kavanagh, 'Defending deference in public law and constitutional theory' (n 672) 231-32.

bad track record, it should demonstrate that it has improved such bad record.[685] Practice shows that the government tends to disclose as less as possible even if not necessary and accordingly using pressure and requesting justification could lead to obtaining more information from government. Therefore, judges should not easily surrender when the government claims lack of expertise of the judiciary due to the existence of classified information.[686]

In the UK before the enactment of the HRA, it was believed that the Executive had full domain in national security matters. Judicial review of executive decisions concerning national security matters was not very encouraged by judges. However, the UK HRA changed this practice, where judges started to engage in judicial review of human rights cases concerning national security matters.[687] The UK judge evaluates the proportionality of the executive decision in balancing between the competing interests of the concerned individual and the public.[688] Nevertheless, the UK courts still hold back and exercise restraint when adjudicating some cases involving national security and prefer to defer to the Executive.[689]

The Executive's discretionary power limits judicial review. If the Executive acted using its discretion in a matter, judges are not allowed to review such act except in cases of extreme unreasonableness. Accordingly, 'error in the use of a discretionary power is not a ground for judicial review'.[690] 'The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered'.[691]

[685] Chan (n 671) 247-48.
[686] ibid 250.
[687] Ward, Jones and Stone (n 498) 2.61.
[688] ibid 2.71.
[689] ibid 2.62.
[690] Endicott, *Administrative law* (n 655) 48.
[691] Bingham (n 556).

In *Regina v Ministry of Defence Ex Parte Walker*,[692] Sergeant Trevor Walker, a British soldier of the United Nations Peace Keeping Forces serving in Bosnia was subject to an attack. As a result, Walker lost his leg. Walker applied for compensation based on the UK Ministry of Defence discretionary compensation scheme. However, Walker's claim was dismissed on the grounds of an exception in the compensation scheme. Walker filed a lawsuit against the UK Ministry's decision, but his claim was dismissed as well. The UK court justified its decision stating that '[i]t is not for the courts to consider whether the scheme with its exclusion is a good scheme or a bad scheme, unless it can be said that the exclusion is irrational or so unreasonable that no reasonable minister could have adopted it'.[693] Given that the UK Ministry issued the compensation scheme based on its discretionary power without having an obligation to do so, the court is restrained from interfering with the UK Ministry's discretionary power in the application of such scheme.[694] The role of the court is to review the lawfulness of the issuance of the scheme based on the government's discretionary power, but it is not authorized to assess whether the scheme could have been applied in a better way than the one adopted by the government.[695]

The meaning of reasonableness is established in the UK case law in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation*.[696] Lord Greene states that 'if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere'.[697] Lord Greene explained the meaning of unreasonableness as 'there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority'. He added '[i]t is so unreasonable that it might almost be described as being done in bad faith'.[698] It is argued that the

[692] [2000] 1 WLR. 806.
[693] ibid.
[694] Endicott, *Administrative law* (n 655) 48.
[695] ibid 48.
[696] [1948] 1 KB 223.
[697] ibid [230].
[698] ibid [229].

Wednesbury test and the proportionality test are two faces of the same coin. The purpose behind both tests is to evaluate human rights' violations by administrative authorities. However, it might be common understanding that the *Wednesbury* test promotes higher degrees of deference than the proportionality test.[699]

Lord Steyn explained the difference between proportionality and other traditional tests, in *Regina v Secretary of State For The Home Department, Ex Parte Daly*,[700] as follows:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* (...) is not necessarily appropriate to the protection of human rights. (...) In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.[701]

The proportionality test is sometimes distinguished from the reasonableness test by the fact that proportionality provides a structured analysis which contains multiple sequential stages of justifications.[702] First, proving the existence of violation of human right.

[699] Kavanagh, *Constitutional Review Under The UK Human Rights Act* (n 491) 246.
[700] [2001] UKHL 26, [2001] 2 AC 532.
[701] ibid [27].
[702] Bradley, Ewing and Knight (n 557) 646.

The burden of proof is on the claimant. Second, proving the existence of a legitimate aim. It is usually hard for the claimant to prove the absence of a legitimate aim. Third, the Executive will then have to prove the necessity of the interference with the claimant's right. Fourth, proving that the measure taken to restrict the claimant's right did not exceed the requirements for achieving the legitimate aim. The burden is on the Executive to prove the third and fourth tests which represent the core work of the proportionality test.[703]

Moving forward to judicial review in Egypt, the Egyptian administrative courts of the Council of State, which are responsible for adjudicating administrative disputes, apply the principle of deference as well. The Egyptian Council of State Law no. 47 of 1972 (as amended) (the "**Law 1972**") stipulates that acts of sovereignty are not subject to judicial review of the administrative courts of the Egyptian Council of State.[704] It is worth mentioning that previous laws regulating the Egyptian Council of State courts provided for examples of acts of sovereignty such as 'the government's relationship with the two houses of parliament, actions related to the national security and external security of the state, political relations or war actions'.[705] However, this was criticized because it might be inferred by judges as if these were exhaustive examples of acts of sovereignty or cause issues in interpretation due to the broadness of the used terms. Accordingly, these examples were removed from the current Law 1972.[706]

The case of the Egyptian government's sale of natural gas to Israel is a practical example of judicial deference in relation to acts of sovereignty.[707] Whereas the Egyptian Court of Administrative Judiciary (the "**CAJ**"), which is a court of first instance, issued a judgment against the government. The Egyptian CAJ was in the view that the government

[703] Bradley, Ewing and Knight (n 557) 646.
[704] Article 11 of the Egyptian Council of State Law no 47 of 1972 (as amended).
[705] Karem Aboelazm, 'The Role of Judicial Review on the Acts of Sovereignty in Egypt' (2023) 31(1) Central European Management Journal 488.
[706] ibid 488.
[707] Sultany (n 628) 24.

must stop the sale of natural gas to Israel. The Egyptian CAJ justified its judgment by lack of transparency of the government given that these deals were surrounded by secrecy and did not follow the requirements of public contracting, and the sale price was extremely short of the international market price.[708]

However, the Egyptian Supreme Administrative Court (the "**SAC**") repealed the judgment of the Egyptian CAJ in relation to the request for omission of the sale of natural gas to Israel. The Egyptian SAC held that the sale of natural gas to Israel, which is based on the Peace Treaty between Egypt and Israel, is a matter of state sovereignty and national security. Accordingly, the Egyptian SAC deferred to the government and confirmed that such matter lies outside of the court's scope of judicial review.[709] Nevertheless, the Egyptian SAC upheld the judgment in relation to reviewing the sale price of natural gas due to the lack of mechanism for periodic price review based on market price fluctuation. The Egyptian SAC made a distinction between the government decision concerning the determination of the sale price of natural gas and the sovereign decision to sell natural gas to Israel. The Egyptian SAC held that the former decision lies within the scope of administrative contracts and is subject to judicial review, unlike the latter decision which is not.[710]

There is no uniform definition of acts of sovereignty despite numerous attempts by scholars and judges.[711] Nevertheless, the following characteristics could be inferred from extensive scholarship on the theory of acts of sovereignty (i) it has political nature;[712] and (ii) the Executive conducts such acts in its capacity as 'a governing authority rather than an administration authority'.[713] Another attempt to define acts of sovereignty has been to extract a list of non-exhaustive examples of those acts from judicial precedents. This list

[708] ibid 24; Cases no 5546 and no 6013 of 55J dated 27 February 2010 (Egyptian Supreme Administrative Court).
[709] Case no 33418 of 62J dated 18 November 2008 (Egyptian Court of Administrative Judiciary).
[710] ibid.
[711] Sabah Mousa Al Momani, 'Acts of Sovereignty as a Restriction on Judicial Control' (2020) 13(1) Journal of Politics and Law 112.
[712] Aboelazm (n 705) 490.
[713] Case no (5/587) dated 26 June 1951 (Egyptian Administrative Court); Momani (n 711) 112.

includes the examples previously mentioned in past laws regulating the Egyptian Council of State. However, all these criteria failed to precisely define the dimensions of acts of sovereignty.[714] Recently, it seems like the Egyptian judiciary moved towards the restriction of the scope of acts of sovereignty. Whereby, in 2013 the Egyptian CAJ held that declaration of a state of emergency by the President of the state is an administrative act rather than an act of sovereignty and accordingly is subject to judicial review.[715]

One commentator observed that the conduct of the Egyptian Criminal Courts in Egypt post 2013 favors security over rights.[716] It mirrors the theory which advocates that judges tend to marginalize human rights protection when they agree with the government on the necessity for extensive security measures. This is understood in light of the prevalence of insecurity and terror attacks in Egypt at that time.[717] For example, judges did not differentiate between terrorist groups like the Muslim Brotherhood and other political activists like 6th of April Movement. Though, both groups were banned in spite of providing for different justification in each case.[718]

In Egypt, the administrative courts of the Council of State constitute a fundamental safeguard for the maintenance of the rule of law. Citizens can file lawsuits, through easy and low-cost procedures, against governmental bodies challenging unlawful administrative decisions. The existence of these courts confirms the accountability of the government and emphasizes the importance of the separation of powers.[719] The practice of the Egyptian administrative courts of the Council of the State shows that it gives more weight to social rights and equality than civil and political rights like property rights. This is contrasted with the practice of the Egyptian SCC which does not likely appreciate the social effect in its

[714] Momani (n 711) 115-18.
[715] Case no 74029 of 67J (Egyptian Court of Administrative Judiciary); ibid 119.
[716] Kristel Manal Tonstad, 'Politics on Trial? Criminal Justice and Egypt's Political Opposition in the Aftermath of July 2013' (2021) 8(1) Oslo Law Review 60-61.
[717] ibid 60-61.
[718] ibid 60-61.
[719] Ellis Goldberg and Hind Ahmed Zaki, 'After the Revolution: Sovereign Respect and the Rule of Law in Egypt' (2010) 6(1) Yearbook of Islamic and Middle Eastern Law Online 27-28.

judgments.[720] Nimer Sultany expressed this as follows:

> In such cases the apparent tension between a strict application of the formal rule of law (requiring enforcement against illegal construction and possession of state-owned land) and social justice (the right to home, the social function of property, the state's obligation to provide safety and security to its citizens, and social solidarity) is resolved by subordinating the former to the latter by preventing eviction and homelessness.[721]

Sultany was referring to the Egyptian Administrative Court's judgment in relation to un-authorized buildings constructed by homeless people on public lands owned by the state. In this case, the court valued the right of housing and security of those people over the state's interest in retaining its land and enforcing the law.[722]

4.3.4. Case study from the UK on the controversy of state secrecy in national security cases

The protection of national security is often shrouded in secrecy, with governments keen to ensure that intelligence-gathering is kept secret. Secrecy is a fundamental characteristic of national security matters. This leads us to question the balance between open justice and secrecy in national security cases. Some mechanisms, like closed material procedures, are introduced in the UK to mitigate the side effects of secrecy on open justice.[723] Paul Scott stressed that:

> National security relies upon secrecy: secrecy as to those things which might be the target of terrorist activities, at home and abroad, secrecy as to the methods and the strategy of the executive in combatting the various threats,

[720] Sultany (n 628) 20.
[721] ibid 21.
[722] ibid 21.
[723] Scott (n 575) 193.

secrecy—sometimes—as to the very content of legal rules themselves.[724]

People are not made aware of what happens on the national security level, including the work of the intelligence. This leads to excluding part of the government's work from accountability either by other branches or by the public. Accordingly, secrecy opens the door for unsupervised human rights violations. It leads to lack of transparency and contradicts with the rule of law. The Executive may cover up violations like torture, unlawful detentions, or any other restrictions to rights and freedoms under justification of secrecy without being accountable for those violations.[725] 'Secrecy in a democracy (…) can be a drug which creates in the patient the symptoms of the disease it is designed to prevent'.[726]

Binyam Mohamed v The Secretary of State for Foreign and Commonwealth Affairs,[727] provides a significant example of the UK judicial activism even when national security, confidentiality, and foreign affairs are invoked. It shows how courts could still function as an effective accountability tool of the Executive in national security cases. Mr. Mohamed was charged with terrorism crimes before the US courts. The evidence against Mr. Mohamed included his confessions. However, Mr. Mohamed claimed that these confessions were obtained by using diverse methods of torture against him.[728]

The UK and the USA have in place a regime of intelligence cooperation called 'the control principle'. Pursuant to this regime, both governments are allowed to share intelligence information, provided that the information are kept confidential and cannot be disclosed except with the approval of the disclosing party. Mr. Mohamed ordered the UK government to release confidential documents obtained from the US government under 'the control principle'. These documents are supposed to help Mr. Mohamed in his defense

[724] ibid 193.
[725] Sudha Setty, *National security secrecy: comparative effects on democracy and the rule of law* (Cambridge University Press 2017) 11.
[726] Wallach (n 502) 424.
[727] [2010] EWCA Civ 65, [2011] QB 218.
[728] ibid [60]-[64].

before the US courts. The UK government declined to release the documents on the basis of confidentiality and protection of national security. Mr. Mohamed filed a lawsuit in the UK courts against the UK government's decision.[729]

Although the UK's Divisional Court was convinced with Mr. Mohamed's claim, it did not allow the release of documents, waiting for the Foreign Secretary to decide if it will claim public interest immunity.[730] The Divisional Court also removed from the judgment redacted paragraphs which summarized the facts of interrogation of Mr. Mohamed by the US officials.[731] The Foreign Secretary emphasized that the disclosure of these documents would have great national security implications. It would negatively affect the intelligence cooperation relationship between the UK and the USA.[732] The US government then released the documents, and the US court issued a judgment in favor of Mr. Mohamed in relation to the gravest accusation.[733]

It was then claimed that the Divisional Court is supposed to make the redacted paragraphs public.[734] The Divisional Court had to balance between two competing interests. First, the public interest in releasing the redacted paragraphs for the interest of the rule of law, freedom of expression and accountability. Second, the risk that the US government might change its policy towards the UK and reduce the shared intelligence information due to such release. Based on the Foreign Secretary advice, the Divisional Court gave priority to the second interest and refused to release the redacted paragraphs.[735] The Foreign Secretary added that the effect of the disclosure of the redacted paragraphs might extend to other foreign partners who might lose confidence in the UK government and limit their intelligence cooperation which will directly threaten the UK's national security.[736]

[729] ibid [60]-[64].
[730] ibid [71].
[731] ibid [69].
[732] ibid [80].
[733] ibid [78].
[734] ibid [85].
[735] ibid [87].
[736] ibid [96]-[97].

However, the Divisional Court re-evaluated its decision and concluded that there is not enough basis for refusing to disclose the redacted paragraphs. Along with other justifications, the Divisional Court stated that the information included in the redacted paragraphs relate to interrogation techniques used by US officials which were already disclosed by the US President. The Divisional Court clarified that the US President mentioned that these techniques must be disclosed for the interest of the rule of law. Accordingly, it does not make sense to expect that the US government would negatively react to the UK's disclosure of similar information for the same reason of respect of the rule of law.[737] Nevertheless, the Foreign Secretary based his argument on the fact that the details of interrogation of Mr. Mohamed were not in public domain. Accordingly, the concern of disclosing the redacted paragraphs remained until the issuance of the US court judgment confirming the correctness of Mr. Mohamed's evidence in relation to his treatment during the interrogations.[738] The UK Court of Appeal upheld the judgment of the UK Divisional Court and held that 'the principles of freedom of expression, democratic accountability and the rule of law are integral to the principle of open justice and they are beyond question'.[739] The Court of Appeal also confirmed that its judgment could have been different if it classified the redacted paragraphs as confidential material because at this instance it could have constituted a risk on national security.[740]

Accordingly, the following principles are extracted from the judgment: 'decisions in connection with national security are primarily entrusted to the executive, ultimately to Government Ministers, and not to the judiciary. That is inherent in the doctrine of the separation of powers'.[741] '[A]ny decision of the executive is subject to judicial review, and it would seem to follow that a minister's opinion that a document should not be disclosed in

[737] ibid [108].
[738] ibid [192]-[193]
[739] ibid [41].
[740] ibid [57].
[741] ibid [131].

the national interest is, in principle, reviewable by a court'.[742] Finally, the court also acknowledged that:

> [I]t is ultimately for a judge, not a minister to decide whether a document must be disclosed, and whether it can be referred to, in open court. That decision is for a judge, not a minister, not least because it concerns what goes on in court, and because a judge is better able to carry out the balancing exercise.[743]

Therefore, secrecy does not prevent judicial review entirely. However, it puts obstacles in the route of judges in carrying out their balancing role. The primary decision-making lies within the Executive, but it remains subject to judicial review.

4.4. Conclusion

It is commonplace that efforts to protect national security will interfere with each constitutional principle discussed in this chapter. The broad definition of national security raises the question of adherence to the rule of law when the protection of national security is used by the Executive to justify excessive security measure. While in terms of separation of powers, national security leads to the expansion of the discretionary power of the Executive at the expense of other branches. Judicial review is sometimes restricted in national security matters due to secrecy and lack of expertise of judges, which leads to judicial deference to the executive authority. As Paul Scott emphasized:

> The nature of national security law is such that it is in practice very difficult for any actor— courts, Parliament, NGOs—to challenge executive claims as to what substantive powers are necessary. For that reason, the formal elements of the relevant powers, those which fall most obviously under the

[742] ibid [132].
[743] ibid [132].

> heading of the rule of law, are generally the most direct focus of legal challenge.[744]

It is clear that national security expands the power of the Executive in most cases and might facilitate escaping checks by other branches of the government. Accordingly, this chapter lays down the background on national security and its reflection on constitutional law principles. It paves the way to exploring executive accountability mechanisms in the field of public law in the next two chapters. Finally, I will conclude with Cian Murphy's observation as follows:

> The more important question is not which model of counter-terrorism, or which level of governance, is preferable. It is how political and legal orders can maintain, without violence, spaces for contestation over local and global public goods. For it is to this effort that the state, and its rule of law, owe their existence.[745]

[744] Scott (n 575) 61.
[745] Cian C. Murphy, 'Terrorism and Transnational Law: Rules of Law Under Conditions of Globalisation' (2019) The Bristol Law Research Paper Series 22.

CHAPTER FIVE

HORIZONTAL ACCOUNTABILITY ARCHITECTURE IN THE UNITED KINGDOM

5.1. Introduction

Accountability 'is a principle which requires public authorities to explain their actions and be subject to scrutiny. It may also entail sanctions, such as resignation from office or censure'.[746] An effective system of accountability encompasses both political and legal accountability working in tandem. The debate of which type of accountability works best is an ongoing one, but ultimately it is the responsibility of all constitutional actors working together. There is no need to vest the whole responsibility in either judges or Parliament. Rather, having the two mechanisms of accountability promotes democratic representation of Parliament and independence of judges which should achieve balance.[747] '[A]ll departments of the state, the government, Parliament and the courts have a shared responsibility to uphold the rule of law'.[748]

Constitutionalism consists of judicial and political elements. Judicial constitutionalism is imposed through courts, by applying the law to prohibit the abuse of power by the government and guarantee the enjoyment of human rights by citizens. While political constitutionalism takes the form of democratic deliberation by different sectors of the public to reach a mechanism by which citizens can enjoy their rights without encroaching on each other's rights. Such deliberation is a continuous process to formulate the governing rules and prevent the domination of one sector over the other.[749]

[746] Andrew Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkens, *Public Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2019) 151.
[747] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023) 57.
[748] Murray Hunt, 'The Joint Committee on Human Rights' in Alexandre Horne, Gavin Drewry, and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013) 249.
[749] Richard Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 22.

In addition, the government could be held accountable by other non-state actors like international organizations, international courts, media, civil society, and non-governmental organizations ("**NGOs**"). Recently, the institutions carrying out this kind of review have been regarded by some scholars as representing a 'fourth branch' of the government.[750] These institutions, as will be shown, can put pressure and expose the Executive forcing it to respond and interact with them.

Therefore, this chapter evaluates the effectiveness of institutions, either state or non-state actors, which can hold the government to account in relation to counter-terrorism and human rights matters. The aim of this chapter is to assess the power of each body against the government and whether the whole accountability system achieves balance of powers and guarantees the respect of human rights while combating terrorism. Each section shall provide an overview to be able, by the end of the chapter, to arrange the institutions by order of the most influential to the least.

5.2. Horizontal Accountability

'Horizontal accountability (…) refers to the capacity of state institutions to check abuses by other public agencies and branches of government'.[751] This type of accountability extends beyond traditional accountability conducted by virtue of checks and balances between the three branches of government. The 'agents of accountability' encompass governmental and non-governmental institutions capable of scrutinizing the government to guarantee good governance.[752]

There are three main types of governmental accountability: (i) political

[750] Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press 2021); Tarunabh Khaitan, 'Guarantor Institutions' (2021) 16(1) Asian Journal of Comparative Law 40-59; Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21(1) Review of Constitutional Studies 85-113.
[751] Larry Diamond, Marc F. Plattner and Andreas Schedler, 'introduction' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 3.
[752] ibid 3.

accountability, exercised by Parliament as representative of voters, and by voters who threaten the governing party of giving their votes to some other party in the next elections, if the governing party did not comply with good governance; (ii) legal accountability, mainly exercised by courts which review the acts of the government to warrant its compliance with law and human rights guarantees; and (iii) administrative accountability, exercised internally in administrative authorities to review policy implementation. Administrative accountability is vertical accountability whereby the inferior is accountable to the superior.[753] However, this chapter is concerned with horizontal accountability only and therefore administrative accountability is outside the ambit of this discussion. Besides governmental accountability, there are other accountability actors which are independent from government. Those actors derive their power from their ability to influence public opinion and affect state reputation rather than inflicting sanctions. Examples of those actors are international bodies, national advisory bodies, media, special purpose committees, …etc.[754]

Political and legal accountability mechanisms work in tandem.[755] Accordingly, counter-terrorism measures are evaluated based on some criteria including:

> [L]egal criteria, principles of good administration, fundamental rights, political questions (such as whether a particular measure is wise, prudent, or in the public interest), and bureaucratic standards (for example, whether a measures offers value for money, is fit for purpose, and meets standards set).[756]

For effective accountability, the following factors shall be satisfied: (i) provision of information from the body subject to accountability to the body exercising accountability;

[753] Mark Elliott and Robert Thomas, *Public Law* (4th edn, Oxford University Press 2020) 406-07.
[754] Tushnet (n 750); Khaitan (n 750) 40-59; Pal (n 750) 85-113.
[755] Jessie Blackbourn, 'Accountability, Counter-Terrorism and Civil Liberties' (2018) 29(2) King's Law Journal 300.
[756] ibid 300.

(ii) justification of the acts of the body subject to accountability to the body exercising accountability; (iii) periodic and organized provision of information and justification to specific bodies rather than being unsystematic; (iv) compulsory obligation of provision of information and justification rather than being optional; (v) existence of deliberation, discussion and explanation of the conduct subject to scrutiny; and (vi) existence of sanction when required in case of breach of obligations.[757] The following sections will show different examples of accountability actors and their points of strengths and weaknesses. It will also measure the fulfilment of the requirements of accountability effectiveness supported by evidence from case law and precedents.

5.3. Parliament

The UK is a parliamentary democracy. Parliamentary elections are the most significant act of representative democracy in the UK.[758] Whereby the public chooses the members of the House of Commons. The majority party or coalition of parties then form the government.[759] One of the main roles of Parliament is to scrutinize the government and hold it accountable. There are many mechanisms for undertaking this role by Parliament through oral and written questions, debates, asking for information, and Parliament select committees' inquiries. [760]

Parliament has ample of powers to hold the Executive to account. Parliament can make inquiries which should be responded to by the government or the ministers. The ministerial responsibility puts an obligation on ministers to provide sensible justifications for governmental acts under question. Political accountability is also exercised by Parliament select committees which scrutinize policy and administrative decisions of the

[757] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) European Law Journal 452.
[758] Le Sueur, Sunkin and Murkens (n 746) 151-52.
[759] Elliott and Thomas (n 753) 186.
[760] Le Sueur, Sunkin and Murkens (n 746) 253-54.

government and prepare reports criticizing the behavior of the government when required. If the government conduct is not satisfactory to Parliament, it can vote for government distrust. However, securing such vote is not an easy task or may be unattainable given that the governing party usually dominates Parliament.[761] Though, the effectiveness of this scrutiny is questioned given the loyalty of the majority of the members of the House of Commons to their party which forms the Executive. Accordingly, strong governments usually secure Parliament's approval on its proposed bills and dominates the legislative process. Nevertheless, Parliament remains an effective political arena for continuous legislative deliberations and party competitions.[762]

Parliament should not be seen as controlled by the government through remote control. The relationship between Parliament and the government is one of intensive interaction and politics. Parliament can put pressure on government and can enforce amendments to proposed government bills. On the other side, the government takes into consideration the opposition in Parliament which affects its decision-making process, for instance, the timing of proposing a bill.[763]

The accountability of the security and intelligence departments of the government could be more difficult given the nature of secrecy surrounding the work of these departments for the protection of national security. However, this does not mean that these departments are not subject to scrutiny. There are two parliamentary methods of scrutinizing these departments as follows (i) they are accountable before ministers who have ministerial responsibility before Parliament. So, security and intelligence departments will be indirectly accountable to Parliament. In addition, the Prime Minister is accountable for security and intelligence work before Parliament; and (ii) scrutiny exercised by Parliament select

[761] Elliott and Thomas (n 753) 408.
[762] ibid 231-32.
[763] ibid 242; Le Sueur, Sunkin and Murkens (n 746) 253-54; Kavanagh, *The Collaborative Constitution* (n 747) 126-28; Bernard Crick, *The reform of Parliament* (Littlehampton Book Services Ltd 1970) 80.

committees, for instance, the Intelligence and Security Committee (the "**ISC**") which oversees the work of the security and intelligence agencies independently in secret and has access to confidential information.[764] Intelligence agencies could also be scrutinized by the Independent Reviewer who is entitled to access classified materials and confidential information within the scope of his exercise of counter-terrorism legislation.[765]

5.3.1. Intelligence and Security Committee (ISC)

The ISC is a statutory committee established to function as an oversight body of the intelligence agencies by virtue of the Intelligence Services Act 1994. It is entitled to oversee administrative, policy, and financial matters. The ISC obtains information from intelligence agencies. However, those agencies, supported by ministers, were not always cooperative in providing required information. The ISC prepares annual reports on its work to be presented to Parliament.[766]

Historically, the Home Affairs Committee (the "**HAC**"), which is Parliament select committee entrusted with oversight of government regarding selective matters through inquiries,[767] initiated the idea of establishing the ISC. The rationale behind this idea was to subject intelligence agencies to parliamentary accountability. Intelligence agencies are surrounded with secrecy fence and tend to refuse access to intelligence information requested by select committees. This was obvious especially in relation to the war in Iraq, which caused the Trade and Industry Committee to submit a complaint to the Prime Minister due to the government denial of access to information by the committee. After the establishment of the ISC, the intelligence agencies used to justify their refusal by stating that scrutiny of intelligence is exclusive to the ISC excluding any other Parliament select

[764] Elliott and Thomas (n 753) 474, 477-78
[765] David Anderson, 'Terrorism Prevention and Investigation Measures in 2012' (*Crown*, 14 March 2013) 14.
[766] Hugh Bochel, Andrew Defty and Jane Kirkpatrick, *Watching the Watchers: Parliament and the Intelligence Services* (Palgrave Macmillan UK 2014) 75-76.
[767] 'Committees' (*UK Parliament*, 2024).

committees.[768] Accordingly, the HAC supported the opinion to reform the ISC to be a Parliament select committee rather than a statutory committee to guarantee proper parliamentary accountability independent from the influence of the government.[769]

When the ISC was first established, the Prime Minister was entitled to appoint the ISC members among the government officers. The ISC used to report to the Prime Minister. The reports are then presented to Parliament, which undermines the value of the ISC as powerful accountability actor for intelligence agencies.[770] However, after recommendations for reform of the ISC, the Justice and Security Act 2013 implemented the suggested reform by granting Parliament the right to compose the members of the ISC.[771] However, the Prime Minister retained the power to nominate the members of the ISC who are then appointed by Parliament.[772] Though, Parliament has the right to oppose the nominations of the Prime Minister. It has been noticed that the majority of the appointed members have previously held ministerial positions which raised concerns about their affiliations with the intelligence agencies as many of them have been closely working with intelligence agencies.[773]

In addition, the ISC has been granted more powers and its reporting obligation to the Prime Minister has been modified to report to Parliament to enhance its independence and impartiality.[774] However, the ISC remained obliged to send its reports to the Prime Minister first. This stipulation renders the change of reporting mechanism unclear given that the Prime Minister can manipulate the report before submitting it to Parliament.[775] Another obstacle which hinders the ISC's ability to function properly is the delay in reappointment

[768] Hugh Bochel, Andrew Defty and Jane Kirkpatrick, ''New Mechanisms of Independent Accountability': Select Committees and Parliamentary Scrutiny of the Intelligence Services' (2015) 68(2) Parliamentary Affairs 321-322.
[769] Peter Gill, 'Evaluating intelligence oversight committees: The UK Intelligence and Security Committee and the 'war on terror'', (2007) 22(1) Intelligence and National Security 27.
[770] Bochel, Defty and Kirkpatrick, *Watching the Watchers: Parliament and the Intelligence Services* (n 766) 75-76.
[771] Jessie Blackbourn, Fiona de Londras, and Lydia Morgan, *Accountability and Review in the Counter-Terrorist State* (Bristol University Press 2019) 162.
[772] Andrew Defty, 'Coming in from the cold: bringing the Intelligence and Security Committee into Parliament' (2019) 34(1) Intelligence and National Security 27.
[773] ibid 29.
[774] Bochel, Defty and Kirkpatrick, *Watching the Watchers: Parliament and the Intelligence Services* (n 766) 75-76
[775] ibid 82.

of the ISC members, which reached six months in some instances. In addition to declining requests for information by the ISC.[776] The main aim of the government behind accepting the reform of the ISC through the Justice and Security Act 2013 was to limit judicial review of intelligence work. The government preferred to expand Parliament oversight over intelligence agencies rather than having strong judicial review within this area.[777]

Due to secrecy of the materials investigated by the ISC, the government is allowed to redact any part of the ISC's reports before submitting it to Parliament, if it believes that such parts are confidential. The ISC members complained about the intelligence agencies' abuse of the power of redaction and argued that the government tends to over-redact while many redactions do not seem to be needed. Sometimes it has been even controversial inside the government department, whereby senior officers see that redaction is not required unlike junior officers who have more restrictive point of view.[778] The ISC also is not financially independent from government which as well undermines its strength. The National Security Secretariat, which falls within the ambit of the ISC's jurisdiction of investigation, supplies the ISC with IT and communication services.[779]

5.3.2. Joint Committee on Human Rights (JCHR)

Parliamentary committees play an important role in reviewing bills. The Joint Committee on Human Rights (the "**JCHR**") enjoys pre-legislative competences. The JCHR is composed of twelve members of both Houses of Parliament, six of each. This composition guarantees non-domination of the governing party over the JCHR, which enhances its independence and strengthens its position as accountability tool for the government. The JCHR is supported by an appointed permanent high raking legal advisor. The privilege of

[776] Defty (n 772) 30-32.
[777] ibid 27.
[778] Bochel, Defty and Kirkpatrick, *Watching the Watchers: Parliament and the Intelligence Services* (n 766) 89.
[779] Defty (n 772) 29.

the diversity of the members composing the JCHR is that it exercises legal and political accountability through the same body.[780] However, given that the members of the JCHR are members of Parliament who could have affiliations with the government, the independence of the JCHR could be undermined and it might become controlled by the government. Accordingly, it is suggested that the JCHR works on collaborating with NGOs to enhance its independence through scrutiny of the JCHR's work by NGOs.[781]

The functions of the JCHR are 'enhancing rights protection, increasing Government accountability and improving legislative deliberation about rights'.[782] The JCHR is entitled to review the conformity of governmental bills with human rights before presenting it for Parliament approval. The JCHR gives the government the opportunity to be prepared before Parliament, either by revising the Bill before submission or at least by preparing responses to the JCHR's challenges of the Bill.[783]

Pre-legislative review of Bills by the JCHR is helpful given the difficulty to make any modification to Acts after its publication. Ministers tend to extremely oppose modifications of Acts unless there is persistent reason which can hardly be challenged. Pre-legislative review is conducted by ad-hoc sub committees composed for this special purpose. Sometimes the JCHR exercises its review a bit earlier at the stage of policy setup by the government before drafting a Bill.[784]

The government is obliged to submit an acknowledgement of compatibility with the European Convention on Human Rights (the "**ECHR**") along with any proposed Bill. The JCHR proposed that the government shall submit a memorandum on the compatibility of the Bill with human rights. Such memorandum could be based on other similar human rights

[780] Kavanagh, *The Collaborative Constitution* (n 747) 157-58.
[781] Anjali Sakaria and Stephanie Aiyagari, 'The Parliamentary Committee as Promoter of Human Rights: The UK's Joint Committee on Human Rights' (*Commonwealth Human Rights Initiative*, 2007) 16.
[782] Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Bloomsbury Publishing 2015) 131.
[783] ibid 121.
[784] Hunt, 'The Joint Committee on Human Rights' (n 748) 230-35.

reports already prepared by the government for other purposes in order not to overwhelm teams drafting Bills with extra work. At the beginning, the JCHR's proposal has not been welcomed by the government. By time, Bill teams started to apply the JCHR's proposal that it almost becomes a common practice. Bills which have undergone this process have more tendency to be balanced and survive judicial challenge, which highly increases the quality of laws.[785]

The JCHR occasionally exercises post-legislative review of laws and provides fruitful feedback. For instance, the JCHR provided reports raising concerns about the system of control orders which was subject to annual renewal. The JCHR's reports were based on risks arising from the practical application of the regime. David Anderson QC, the former Independent Reviewer, suggested that the system of Terrorism Prevention and Investigation Measures (the "**TPIMs**") shall be subject to the same annual renewal mechanism. The system of annual renewal will allow similar useful review by the JCHR.[786]

The JCHR is also entitled to oversee and follow up with the government in relation to its exerted efforts to implement adverse European Court of Human Rights (the "**ECtHR**") judgments. The JCHR does the same in relation to national courts' declarations of incompatibility. It has been noticed that the government is much more proactive in taking action to implement declarations of incompatibility than the ECtHR judgments.[787]

The JCHR is playing an active role to improve human rights practices through many ways as follows (i) the JCHR forces the government to engage Parliament with its action plans to implement court judgments. The JCHR questions ministers and follow up on the progress of court judgments implementation. It also criticizes the government's deficiencies in responding to judgments including delayed responses. The JCHR established a guide for

[785] ibid 230-35.
[786] ibid 236.
[787] Sakaria and Aiyagari (n 781) 14.

the government in relation to good practices of responding to court judgments; (ii) the JCHR focuses on bringing to debate controversial human rights issues and encourages deliberative dialogue to reach solutions. This includes topics like prisoners voting and the rights of terrorist suspects; (iii) The JCHR also provides legislative reform proposals for defective legislation; (iv) It engages civil society by keeping the public informed of the government's drawbacks; and (v) the JCHR tries to enhance the fulfilment of the UK's human rights international obligations under international conventions. It holds sessions to follow up on the progress achieved in implementing received recommendations by monitoring international bodies like the UN bodies.[788]

If the success of the scrutiny exercised by the JCHR is measured by the rate of changes or amendments applied to Bills based on the JCHR's recommendations to the government, the result would be significantly far from successful. Alternatively, the progress of the JCHR shall be evaluated in accordance with the effectiveness and influence of the JCHR's reports.[789] It has been noticed that the JCHR's reports on counter-terrorism related matters are on top of the reports referenced in parliamentary debates and by courts.[790] The JCHR's inquiries on human rights compatibility proved to be more effective than section 19 of the HRA which requires the government to issue a confirmation that the bill is compatible with human rights. That is because the JCHR' inquiries provide more justification and reasoning based on which the confirmation is granted.[791]

5.4. Courts

Judicial review in the UK could be perceived as weak given that courts are not entitled to strike down Acts of Parliament. However, with close scrutiny of the issue, it

[788] Murray Hunt, 'The impact of the Human Rights Act on the legislature: a diminution of democracy or a new voice for Parliament?' (2010) 6 European Human Rights Law Review 604-05.
[789] David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) Public Law 345-47.
[790] Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 782) 128.
[791] Feldman (n 789) 345-47.

appears that courts have much more influential role than inferred from their inability to issue unconstitutionality judgments.[792] According to section 4 of the HRA, courts may declare an Act of Parliament as incompatible if the court is satisfied that the act contradicts with the HRA. Accordingly, the court enjoys discretionary power to declare incompatibility. In applying such discretion especially in controversial cases, the court will take into consideration tensions which might arise with the government or Parliament.[793]

Aileen Kavanagh stressed that '[t]hus far, there have been thirty-four final declarations of incompatibility and there has been a near-perfect – if not perfect – pattern of compliance with those declarations'.[794] Of course, Parliament's high rate of compliance with declarations of incompatibility could be due to the fact that the mechanism of declaration of incompatibility by courts is effective and productive. However, it could also indicate that the courts anticipate the expected reaction of Parliament and issue judgments in accordance with such anticipation. Accordingly, if the court anticipates that Parliament could tolerate a declaration of incompatibility, it issues it and vice versa. Therefore, judicial review could be regarded strong because most of the declarations are accepted, but it can also be regarded as weak in cases where the court will be reluctant to grant a declaration of incompatibility due to the low probability of being accepted by Parliament.[795] The government would not also want to ignore declarations of incompatibility to avoid bad consequences. 'The social and political costs' which could be incurred by the government in case of non-compliance with declarations of incompatibility are mainly (i) undermining the confidence and reputation of the government; (ii) the risk of appeal before the ECtHR; and (iii) violating international human rights obligations and igniting opposition through media.[796]

[792] Elizabeth Adams, 'Judicial discretion and the declaration of incompatibility: constitutional considerations in controversial cases' (2021) 2 Public Law 315.
[793] ibid 311-12.
[794] Kavanagh, *The Collaborative Constitution* (n 747) 365.
[795] Adams (n 792) 314-15.
[796] Chintan Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' (2014) 4 Public Law 635.

It is argued that granting the court the power to declare incompatibility rather than unconstitutionality promotes 'democratic dialogue' and deliberation. However, this argument might not be very accurate due to different reasons. Courts often defer to Parliament to reconsider the compatibility of the statute with the HRA without expressing their opinion or explaining their normative views about the issue. In other instances, Parliament just accepts the court's submission without adding any emphasis in relation to balancing rights. In both cases, deliberation is absent.[797]

It is also argued that courts dominate Parliament due to its high tendency to accept courts' declarations of incompatibility. However, there is a counter argument that Parliament's attitude reflects the respect of judicial independence and the value of judicial review. Accordingly, Aruna Sathanapally described the relationship between courts and Parliament as 'cooperative rather than conflictual'.[798] It is worth noting that Parliament plays the most significant role in relation to rights analysis, while courts' work is limited to cases referred to it only.[799]

One of the famous case law precedents in terms of effective declarations of incompatibility is the *A and Others v Secretary of State for the Home Department* case, which is also known as *Belmarsh Prison* Case.[800] In this case, the court reviewed section 23 of the Anti-Terrorism, Crime and Security Act 2001 (the "**ATCSA**"), which allows detention of foreign terrorist suspects without trial.[801] The court declared section 23 as incompatible with articles 5 and 14 of the HRA. The court based its judgment on the fact that this section allowed discrimination based on nationality and permitted discretionary detention of foreign nationals who are suspected of terrorism. Such declaration was

[797] Jeff King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Bloomsbury Publishing 2015) 174-77.
[798] Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012) 224.
[799] King (n 797) 174-77.
[800] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68.
[801] Conor Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2007) 42(3) Government and Opposition 27.

accepted.[802]

The House of Lords held that the detention of foreign terrorist suspects indefinitely due to the inability to deport them anywhere given that there would be risk of violation of their rights, is breaching their right of liberty. The issue arising in this case is the existence of evidence that those suspects were involved in terrorism. However, this evidence cannot be proved before courts for national security reasons.[803] The UK government is convinced that 'intercept evidence cannot and should not be used in criminal proceedings as this would risk compromising intelligence sources.[804]

The court did not accept to leave this issue to be decided by the Home Secretary outside the ambit of the court's review. Hence, the UK government decided to derogate from the ECHR in accordance with article 15 on the basis of 'a public emergency threatening the life of the nation'. However, the discrimination between British and foreign terrorist suspects weakened the position of the Home Secretary who was unable to justify such preferential treatment based on nationality under the detention scheme.[805] The government was in a weak position and had to accept the declaration of incompatibility for several reasons which are (i) the government did not want the claimants to resort to the ECtHR and get a judgment in their favor, which was highly likely; (ii) the government could not justify the discrimination between nationals and foreigners; and (iii) the government feared from opposition.[806]

To solve the issue, the government equated between national and international terrorist suspects under the regime of control orders, which was established by the Prevention of Terrorism Act 2005 (the "**PTA**") to substitute the detention scheme under

[802] Chandrachud (n 796) 626.
[803] Conor Gearty, 'Terrorist Threats, Anti-Terrorism and The Case Against The Human Rights Act' in Frederick Cowell (ed), *Critically Examining The Case Against The 1998 Human Rights Act* (Routledge 2018) 3-4.
[804] Mark Elliott, 'United Kingdom: The "war on terror," U.K.-style—The detention and deportation of suspected terrorists' (2010) 8(1) International Journal of Constitutional Law 132.
[805] Gearty, 'Terrorist Threats, Anti-Terrorism and The Case Against The Human Rights Act' (n 803) 3-4.
[806] Aileen Kavanagh, 'Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape' (2011) 9(1) International Journal of Constitutional Law 185.

section 23 of the ATCSA. However, the system of control orders was not free from criticism as well. The PTA has not been subject to sufficient deliberation as it was enacted in a hurry including encroachment of rights and liberties of nationals and foreigners.[807] The PTA has been subsequently challenged for violating the right of liberty and the right of fair trial in *Secretary of State for the Home Department v. JJ*, *Secretary of State for the Home Department v. E*, and *Secretary of State for the Home Department v. MB and AF*.[808] It has been observed that criminal prosecution is the UK's first resort and favored approach after being subject to terrorist risk. This is evidenced by its tendency to derogate from the ECtHR or the ICCPR.[809] During the time of application of control orders, the Home Secretary applied it on fifty-two persons. Despite the great risk on human rights accompanying control order, it was argued however that it could not be confirmed that control orders have prevented terrorism in practice.[810] Accordingly, the control orders regime was replaced by the TPIMs regime, to be less intrusive on liberties.[811]

The TPIMs is mainly distinguished from control orders by the following: (i) the need for 'reasonable belief' rather than 'reasonable suspicion' of being involved in terrorism; (ii) maximum duration of two years; (iii) relocation or confinement in specific place are not allowed; (iv) decreased powers relating to 'curfew, communications and police searches';[812] and (v) no allowed derogation from the ECHR.[813] However, Adrian Hunt argues that:

> Many of the key features of the control order regime remain, and some of the changes are cosmetic rather than real. Further, other features of the new regime were necessitated by case law concerning control orders and therefore

[807] King (n 797) 179-80.
[808] Kavanagh, 'Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape' (n 806) 186-87.
[809] Walker, 'Terrorism Prosecutions and The Right to A Fair Trial' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing Limited 2014) 419-20.
[810] Andrew Lynch, 'Special Measures: Terrorism and Control Orders' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014) 508.
[811] Gearty, 'Terrorist Threats, Anti-Terrorism and The Case Against The Human Rights Act' (n 803) 7.
[812] David Anderson, 'Control Orders in 2011: Final Report of The Independent Reviewer on The Prevention of Terrorism Act 2005' (*Crown*, March 2012) 7.
[813] Anderson, 'Terrorism Prevention and Investigation Measures in 2012' (n 765) 104.

do not really represent concessions to civil liberties on the Government's part'.[814]

According to section 3(1) of the HRA 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. This stipulation allows the court to interpret clear and unambiguous statutes contrary to its apparent meaning if it violates the HRA. There are no interpretation guidelines in the HRA, but it could be inferred from courts' practice. The court applies two-stages mechanism for interpretation. First, the court reviews the subject provision and identifies the underlying violation of human rights. Second, the court applies its interpretation which is in conformity with the HRA.[815] In *Regina v A*,[816] the court states 'to adopt an interpretation which linguistically may appear strained. The techniques to be used will include the reading down of express language in a statute but also the implication of provisions'.[817]

Lord Steyn explained the breadth of application of section 3 of the HRA in *Ghaidan v Godin-Mendoza*,[818] as follows 'section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two possible meanings. The word "possible" in section 3(1) is used in a different and much stronger sense'.[819] Therefore, the court has the right to interpret law provisions to the contrary of the Legislature's intention, which promotes the power of interpretation to the level of impliedly amending legislation. Although some scholars claim that the UK represents 'weak-form judicial review' because it does not possess the power to strike down incompatible statutes, practically it is very

[814] Adrian Hunt, 'From control orders to TPIMs: variations on a number of themes in British legal responses to terrorism' (2014) 62 Crime, Law and Social Change 289.
[815] Aileen Kavanagh, 'What's so weak about "weak- form review"? The case of the UK Human Rights Act 1998' (2015), 13(4) International Journal of Constitutional Law 1015-16.
[816] [2001] UKHL 25, [2002] 1 AC 45 [44].
[817] ibid [44].
[818] [2004] UKHL 30, [2004] 2 A.C. 557 [44].
[819] ibid [44].

powerful that it goes beyond nullifying the statute to amending the statute.[820] Otherwise, if the court fails to find a compatible interpretation to the statute, it can declare its incompatibility under section 4 leaving the cure to Parliament. This option allows more deliberation, but it does not have legally binding effect on Parliament. Courts will usually resort to this second option if the aimed amendment is extensive.[821] Aileen Kavanagh illustrated the use of section 3 and section 4 very clearly by stating that:

> The remedial center- piece of the UK system is actually § 3 (not § 4) and the declaration of incompatibility is used as a measure of last resort. Therefore, rather than being the central or defining feature of the UK system of rights-protection, the declaration of incompatibility is in fact a subsidiary one.[822]

It is clear that the system of the UK does not depend purely on the legal text. Many political considerations must be taken into account to be able to correctly assess the effectiveness of the system. This is so obvious in the evaluation of whether the UK represents a week or strong form of judicial review. However, the application of section 3 and section 4 of the HRA as explained above might cause uncertainty. It would be hard for people to predict the interpretation of the court which could derogate from the initial intention of Parliament. The rejection of Parliament of declaration of incompatibility is not common but still could occur, which raises the degree of uncertainty regarding the final destiny of a provision violating human rights in the court's opinion.[823]

In *Ghaidan v Godin-Mendoza*, Lord Millett opposed the majority of judges in their broad interpretation of section 3 of the HRA. Lord Millett questioned if we agree with the majority judges to allow interpretation of clear provisions against the primary intention of

[820] Kavanagh, 'What's so weak about "weak- form review"? The case of the UK Human Rights Act 1998' (n 815) 1018-20.
[821] ibid 1018-20.
[822] ibid 1032.
[823] Tom Campbell, 'Incorporation through Interpretation' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 100-01.

Parliament, on which date shall the new interpretation start applying on the provision.[824] Lord Millett held that:

> If we were to decide this question we would be usurping the function of Parliament; and if we were to say that it was from the time when the European Court of Human Rights decided that such discrimination was unlawful we would be transferring the legislative power from Parliament to that court. It is, in my view, consonant with the Convention for the Contracting States to take time to consider its implications and to bring their laws into conformity with it. They do not demand retrospective legislation'.[825]

Despite the above, the ECtHR does not recognise declaration of incompatibility a sufficient remedy for litigants. The JCHR stated in one of its reports that:

> The ECtHR confirmed that applicants may not be required to pursue their claim in the domestic courts if the only possible remedy is a declaration of incompatibility under the Human Rights Act. As it is for the Government to decide whether or not to amend the legislation which has been declared to be incompatible, and whether to change the law in a way which provides an adequate remedy for the individual applicant, the ECtHR concluded that the declaration of incompatibility cannot be considered an effective remedy for the purposes of the requirement that domestic remedies be exhausted.[826]

The JCHR reached the conclusion that the government has to establish the practice of responding to all declarations of incompatibility swiftly and reasonably in a way sufficiently acceptable to Parliament. In this case, may be the ECtHR will be convinced to consider declarations of incompatibility a sufficient remedy and requires its exhaustion

[824] *Ghaidan* (n 818) [99].
[825] ibid [99].
[826] 'Joint Committee on Human Rights Sixteenth Report' (*UK Parliament*, 28 June 2007) [111].

before resorting to the ECtHR.[827] While, Alison Young applauds the judicial mechanisms of scrutinizing the government which are available under the HRA. Nevertheless, she criticizes these mechanisms as might not be effective tools for proper accountability due to the possibility of being overridden or disregarded by the government or Parliament. Even though, the common practice of the government is to comply with declarations of incompatibility in most cases.[828]

5.5. International Community and International Organizations

In this section, I will provide a brief overview on some of the international bodies dedicated for oversight of counter-terrorism measures and human rights. These include European Union and United Nations institutions.

5.5.1. European Union (EU)

The European Union (the "**EU**") believes that the main responsibility to counter terrorism lies within national efforts of European countries. The EU's role is limited to coordination to aid Member States in their fight against terrorism.[829] The EU has many subsidiary bodies and policy for countering terrorism. Additionally, the European Parliament established the Special Committee on Terrorism (the "**TERR**") in 2018 to review existing counter-terrorism laws and enhance cooperation between Member States in combating terrorism.[830] The TERR is composed of thirty members.[831] However, the lack of effectiveness of the EU bodies can be traced to several reasons which are (i) duplication of bodies with similar objectives; the existence of several bodies with intersecting goals leading

[827] ibid [111].
[828] Alison L. Young, 'Accountability, Human Rights Adjudication, and the Human Rights Act 1998' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 159.
[829] Lauri Lugna, 'Institutional Framework of the European Union Counter-Terrorism Policy Setting' (2006) 8 Baltic Security & Defence Review 121.
[830] Piotr Bąkowski, 'Understanding EU counter-terrorism policy' (*European Parliamentary Research Service*, March 2023) 1.
[831] 'Fighting terrorism: turning off the money tap' (*Multimedia Centre: European Parliament*, 30 October 2017).

to the distraction of focus among different bodies; (ii) poor implementation of treaties by Member States; (iii) insufficient resources which are required for policy implementation; and (iv) lack of coordination and cooperation between Member States to achieve the objectives of counter-terrorism policies.[832]

Cian Murphy criticises the EU counter-terrorism law for having three deficiencies which consists: '(i) of ineffectiveness; (ii) of anti-constitutionalism; (iii) of contrariness to human rights and the rule of law'.[833] Murphy also stresses that the EU counter-terrorism policy might not be able to properly fulfil the main elements of the rule of law, which are certainty and accountability.[834] The UK refused to engage in the EU Directive on Combating Terrorism and Framework Decision on Combating Terrorism to avoid extending the jurisdiction of the European Court of Justice to adjudicate national security matters in UK's counter-terrorism cases. The UK preferred to retain its independence from the EU's supranational oversight.[835]

5.5.2. European Court of Human Rights (ECtHR)

One of the most important international bodies scrutinizing the UK's government acts is the ECtHR. The value of the ECtHR's review of human rights takes credit at three levels. First, the 'individual level'. The ECtHR provides claimants a second level of review after exhausting all levels of local review. The edge of the ECtHR is its international nature which isolates it from local politics and provides the claimant with confidence in its impartiality. It represents the last resort for unrepresented or marginalized sectors and empowers them to claim their rights before the government.[836] Second, the 'global level'.

[832] Lugna (n 829) 116-17.
[833] Cian C. Murphy, 'EU Counter-terrorism Law: What Kind of Exemplar of Transnational Law?' (2019) 21 Cambridge Yearbook of European Legal Studies 222.
[834] Cian C. Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Expanded edn, Hart Publishing Ltd 2015) 32.
[835] Murphy, 'EU Counter-terrorism Law: What Kind of Exemplar of Transnational Law?' (n 833) 240-41.
[836] Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28(3) The European Journal of International Law 766-68.

The ECtHR sets benchmark for all contracting states including the UK for the definition of the minimum requirements of human rights. It helps in establishing a common understanding based on precedents from all contracting states which widens its area of practice and experience.[837] Thirdly and more importantly, the 'local level'. The ECtHR enhances government's adherence to human rights standards knowing that the ECtHR will not uphold any violation, and the government eventually will need to abide by the ECHR. This additional layer of review strengthens the accountability of the government which would not want to find itself in breach of international human rights law.[838]

It took time for the ECtHR to establish its current prominent position in the European community. Initially, the UK resisted the idea of creating a supreme European court for human rights adjudication with binding judgments in fear of undermining the UK's sovereignty. By time, the ECtHR managed to earn the respect of the European countries including the UK.[839] The ECHR and the Strasbourg court have significant influence on the UK's government. Parliament would accept a declaration of incompatibility under section 4 rather than ignore it and get an unfavorable judgment from Strasbourg. The reputation of the government is also a key which would be at risk if the government is regarded in breach of human rights and, moreover, is not willing to respect the court judgment. It is the avoidance of embarrassment which motivated the UK government to enact the HRA in the first place.[840] The Guardian newspaper listed many ECtHR judgments which had significant effect on the UK's law under the headline 'The European court of human rights' judgments that transformed British law',[841] which evidences the role of the ECtHR in developing human rights law in the UK.

[837] ibid 769-70.
[838] ibid 770.
[839] Ed Bates, 'British sovereignty and the European Court of Human Rights' (2012) 128 The Law Quarterly Review 411.
[840] Kavanagh, 'What's so weak about "weak- form review"? The case of the UK Human Rights Act 1998' (n 815) 1024.
[841] Owen Bowcott, 'The European court of human rights' judgments that transformed British law' *The Guardian* (3 October 2014) <www.theguardian.com/law/2014/oct/03/landmarks-human-rights-echr-judgments-transformed-british-law> accessed 12 March 2024.

According to the HRA, judges must 'take into account' the ECtHR judgments in relation to human rights questions.[842] Judges and scholars have been debating about the degree of bindingness of the ECtHR judgments on the UK local courts. Lord Hoffmann held in *Secretary of State for the Home Department v F*, [843] that:

> [T]he United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.[844]

To the contrary, Lord Irvine of Lairg disagreed with Lord Hoffmann. In his opinion, Parliament used the phrase 'take into account' to give domestic courts the final say in deciding the case after considering the ECtHR judgments. If Parliament intended to restrict the power of local courts as interpreted by Lord Hoffmann, Parliament could have used more decisive phrases like 'must follow' or 'be bound by'.[845] Granting courts the power to interpret provisions of law contrary to the initial intention of Parliament goes beyond interpretation. It is likely to be perceived as amendment rather than an interpretation, which violates the principle of sovereignty of Parliament.[846]

The international nature of the ECtHR can limit its power, given that it needs the cooperation of the local authorities to enforce judgments. This fact could discourage Strasbourg judges to push much against governments to maintain the responsiveness and respect of the ECtHR judgments by states.[847] However, the degree of deference to local governments should remain within reasonable level given that:

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[842] Article 2(1)(a) of the Human Rights Act 1998; Roger Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act' (2005) 54(4) International and comparative law quarterly 907-31.
[843] [2009] UKHL28, [2010] 2 AC 26 [70].
[844] ibid [70].
[845] Le Sueur, Sunkin and Murkens (n 746) 684-85.
[846] Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act' (n 842) 907-08.
[847] Kavanagh, 'What's so weak about "weak- form review"? The case of the UK Human Rights Act 1998' (n 815) 1024.

> If the courts become too deferential to the executive or legislature then the rule of law, though ostensibly upheld, will be effectively eroded. Thus, even though a particular level of human rights protection may not be mandated by the rule of law a systematic lowering of the level of protection would represent an erosion of the rule of law.[848]

In a famous case in Strasbourg, *Hirst v the United Kingdom (no. 2)*,[849] the court held that indiscriminate ban of prisoners from voting, irrespective of their crime or sentence, is not proportionate and violates the ECHR.[850] The ECtHR emphasized its role by stating 'the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights (...)'.[851]

Subsequently, the UK's government confirmed its intent to abide by the ECtHR judgment and duly amend the relevant law. However, during parliamentary debates, members of Parliament intensely criticized the ECtHR judgment claiming that this issue should remain within the scope of the Legislature to decide.[852] The UK's government did not take action and played the strategy of wasting time. In *Smith v Scott*, a domestic court of Scotland issued a declaration of incompatibility, after two years of *Hirst* judgment, in relation to the same issue of prisoners voting. But it did not grab much attention and the UK's government remained on its position. Accordingly, the Council of the European Union urged the UK's government to enforce the *Hirst* judgment.[853] However, it took the UK's government around ten years after the *Hirst* judgment to amend the banning of prisoners voting regime after facing international pressure. Nevertheless, the modifications were

[848] Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (n 834) 45.
[849] (2006) 42 EHRR 41 [82].
[850] ibid [82].
[851] ibid [84].
[852] Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14(3) Human Rights Law Review 511-15.
[853] Kavanagh, *The Collaborative Constitution* (n 747) 392.

insignificant allowing only some exceptions in limited cases.[854]

What happened in the *Hirst* judgment elaborates the relationship between the UK's government and the ECtHR. This precedent shows that the ECtHR inflicts power and can put pressure on the UK's government given that refusing to implement the judgment would have led to (i) breaching the UK's international obligations; and (ii) weakening or even bringing an end to the ECHR, as such non-compliance by the UK could have been taken by other countries as ground to commit human rights violations and ignore the ECtHR judgments. However, the influence of the ECtHR is not absolute given that it took the UK government about a decade to respond to the ECtHR judgment and with minimal modifications to the statute under review.[855]

One of the aspects which caused the frustration of the UK Parliament and delayed its response is that the ECtHR was seen as encroaching on the UK Parliament's legislative sovereignty. The ECtHR was setting a new standard whilst 'the lack of an existing 'consensus' amongst European states over voting rights in the prison context'.[856] The ECtHR might be powerful but far less than a national constitutional court like for example the US Supreme Constitutional Court.[857]

The ECtHR played a prominent role also in relation to the issue of UK's deportation of terrorists. In *RB (Algeria) v Secretary of State for the Home Department and OO v Secretary of State for the Home Department*,[858] the House of Lords was satisfied with the workaround introduced by the UK government to allow deportation of Jordanian (called Abu Qatada) and Algerian nationals into their home countries despite the risk of ill-treatment. The UK signed a Memorandum of Understanding with Jordan and Algeria

[854] ibid 395-96.
[855] Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (n 852) 504.
[856] CRG Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom' (2011) 22(3) King's Law Journal 310.
[857] ibid 315.
[858] [2009] UKHL 10, [2010] 2 AC 110.

including an acknowledgement by these states that the deportees will not be subject to human rights violations. Although, such acknowledgement could be regarded insufficient for different reasons, it was accepted by the House of Lords as guarantee for the rights of the deportees.[859] Some of the reasons which could have raised concerns about the safety of the deportees, but nonetheless were ignored by the House of Lords were as follows: (i) Algeria refused to allow external review of the treatment of the deportees; and (ii) there was a precedent that previously Abu Qatada was subject to torture in Jordan and applied for asylum in UK. These facts undermine the credibility of the acknowledgements signed by Jordan and Algeria.[860]

Subsequently, the ECtHR issued a judgment, in *Abu Qatada*,[861] which was one of the cases highly opposed by the UK government. The ECtHR held that the deportation of Abu Qatada, who is a radical preacher, to Jordan violates human rights. The ECtHR based its decision on the following: (i) the memorandum of understanding signed by Jordan fails to constitute a sufficient guarantee for compliance by Jordan with the respect to Abu Qatada's rights; and (ii) Jordan is not a party to the ECHR and accordingly might not apply the same standards of fair trial required by the ECHR. It was believed that Abu Qatada might be subject to torture in Jordan.[862] This judgment was perceived by the UK's government as encroaching on the UK's supremacy of Parliament. The Home Secretary criticised the interpretation of the ECtHR to the UK's human rights law to the point that it could open the gate for serious consideration of adopting a national bill of rights instead of the HRA.[863] Finally Abu Qatada was deported to Jordan in 2013.[864]

[859] Elliott (n 804) 139-41.
[860] ibid 139-41.
[861] *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1.
[862] Mariagiulia Giuffré, 'The Renaissance of Non-Refoulement? The Othman (Abu Qatada) Decision of The European Court of Human Rights' (2012) 61(3) International and Comparative Law Quarterly 751.
[863] Murray Hunt, 'Introduction' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Bloomsbury Publishing 2015) 3-4.
[864] Bowcott (n 841).

In *Chahal v the United Kingdom*,[865] Chahal claimed that he was denied the right of fair trial as he had no right to appeal the deportation order or to review the evidence obtained against him. Chahal also claimed that he would be subject to a risk of being killed if he was deported back to India. Therefore, the ECtHR held against the deportation order by the Home Secretary in favour of Chahal. As a result of this ECtHR judgment, the UK's government has established the SIAC to review appeals of deportation orders due to national security reasons. Within the SIAC regime, Special Advocates are allowed with specific procedures to see confidential evidence produced against appellants.[866]

5.5.3. UN Universal Periodic Review (UPR)

Another international accountability tool is the United Nations Universal Periodic Review (the "**UPR**"), which is a periodic review conducted every four and half years by the UN Human Rights Council. The aim of the review is to evaluate the degree of respect of human rights in the Member States. The outcome of the review is typically a set of recommendations in relation to weak areas to enhance Member States' commitments to their human rights obligations. Each Member State shall work on implementing the recommendations accepted from its side. However, those recommendations are not binding. That is why some scholars describe the UPR as 'toothless'. In relation to the UK, history shows that it did not give much care to the recommendations received following the UPRs of 2012 and 2017.[867]

Despite the low rate of implementation of the UPR recommendations, the UK tries to commit by engaging the JCHR with the UPR. This mechanism aims at enhancing human rights practices and grabbing the attention of members of Parliament and the select

[865] (1997) 23 EHRR 413.
[866] Le Sueur, Sunkin and Murkens (n 746) 731-32.
[867] Michael Lane, 'The UK Joint Committee on Human Rights and the United Nations Universal Periodic Review: A Critical Appraisal' (2022) 14(3) Journal of Human Rights Practice 928-29.

committees to the weak areas of human rights based on the UPR recommendations. Consequently, this process is supposed to spot the light on weak areas of human rights and initiate discussions, investigation and queries with the government in Parliament session in relation to these issues. The JCHR gave the UPR priority in its list of tasks.[868] However, in practice the percentage of focus on the UPR recommendations in the JCHR's reports did not exceed 3% which does not reflect the promised priority at all. Accordingly, the UPR does not seem to put sufficient political pressure on the government. The reason behind this failure of effectiveness is due to the lack of resources to inform and raise awareness about the UPR recommendations and insufficient expertise in the JCHR. This is in addition to the high flow of work in the JCHR coupled with limited number of members.[869]

5.5.4. UN Special Rapporteur

The UN Special Rapporteur is a position established based on the UN Human Rights Charter rather than a treaty. The role of this post is to supervise member states' human rights practices to spot and report violations. The Special Rapporteur reports to the UN Human Rights Council. The Special Rapporteur functions as an advisory rather than enforcement body. Its advice is characterized by a non-binding nature.[870] The current mandate holder of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression is Irene Khan. This mandate 'was created by the Human Rights Council to protect and promote freedom of opinion and expression, offline and online, in light of international human rights law and standards'.[871]

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression criticised the Counter-Terrorism and Border Security Bill for

[868] ibid 934-36.
[869] ibid 940-42.
[870] Surya P. Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33(1) Human Rights Quarterly 203.
[871] 'Special Rapporteur on freedom of opinion and expression' (*United Nations human rights Office of the High Commissioner*).

encroaching on freedom of expression and putting rights and liberties at risk. The Bill introduced new crimes within the category of crimes of thought and increased penalties.[872] However, the UK government responded on these claims with disagreement of most of it. The government stated that given the risks imposed by terrorism, the provisions of the Bill are seen to be proportionate and suitable and provided justification for each provision subject to criticism.[873] The Counter-Terrorism and Border Security Act 2019 was issued accordingly. This method of the UN Special Rapporteur's review promotes deliberation on one hand and uses the mechanism of 'naming and shaming' on the other hand. This can put some pressure, though little, on governments to at least respond with reasonable justifications if not willing to make modifications to their policy or statute under review.

5.5.5. UN Counter-Terrorism Committee (CTC)

The UN Counter-Terrorism Committee (the "**CTC**") is a committee established by the UN to promote cooperation between states in the fight against terrorism. It oversees the implementation of states of the relevant UN resolutions which aims at formulating effective counter-terrorism strategies and legislation. Similar to the EU's counter-terrorism bodies, the CTC does not employ resources to combat terrorism directly. Instead, it focuses on empowering states to collaborate and stand against terrorism. The CTC depends mainly on responses reported by states and state visits to assess the progress of the UN resolutions' implementation by domestic governments of Member States.[874] The UK is one of the countries encouraging the imposition of sanctions on non-complying states. However, the UN Security Council does not seem to support this direction at least in the meantime. The

[872] David Kaye, 'Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' OL GBR 6/2018, 17 July 2018.
[873] Rt Hon Ben Wallace MP, 'Joint Communication from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression – Government Response'.
[874] David Cortright et al, 'Global Cooperation Against Terrorism: Evaluating the United Nations Counter Terrorism Committee' in David Cortright and George A. Lopez (eds), *Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat* (MIT Press 2007) 23-29.

CTC retains its international cooperative rather than coercive nature.[875]

The UN suffers from the same pitfalls of the EU's policy. Whereby, there are other three bodies under the auspices of the UN besides the CTC whose main aim is combating terrorism. Although each body has different objective, the functions of those bodies overlap leading to overwhelming duplication of Member States' obligations toward each body, which leads to inefficiency and waste of efforts.[876]

5.6. Independent Terror 'Watchdogs'

In this section, I will examine diverse institutions which are sought to be independent from the government and function as terror 'watchdogs'. Those are the Independent Reviewer of counter-terrorism legislation, media, and public inquiries.

5.6.1. The Independent Reviewer

The Independent Reviewer is entitled to advise on the application of specific counter-terrorism laws in force and provide an annual report thereof. The evaluation of the proportionality and appropriateness of counter-terrorism laws by the Independent Reviewer must take into consideration the volume and risk of terrorism faced by the UK at the time of evaluation. The role of the Independent Reviewer of counter-terrorism legislation starts after the enactment of the law. David Anderson, a former Independent Reviewer, explained the role of the Independent Reviewer as 'to inform—so far as is possible within the necessary constraints of secrecy—the parliamentary and public debate over anti-terrorism powers and civil liberties in the UK'.[877]

The Independent Reviewer is appointed for a term of three years subject to renewal. There is no maximum limit to the tenure of the Independent Reviewer. This is a downfall of

[875] ibid 33.
[876] ibid 43-44.
[877] Blackbourn, 'Accountability, Counter-Terrorism and Civil Liberties' (n 755) 299-300.

the recruitment system of the Independent Reviewer, given that the government may appoint and retain a person who is known for support of government policy with no obligation to replace him. For instance, Lord Carlile retained the position of Independent Reviewer for around nine and half years and used to acknowledge most of the government's policies including control orders.[878] The JCHR criticized the unrestricted renewal of the Independent Reviewer's term and recommended that the appointment of the Independent Reviewer shall be limited to a five-year term without renewals.[879] The current Independent Reviewer of terrorism legislation is Jonathan Hall KC. He was initially appointed in 2019, and his appointment was renewed in 2022.[880]

The role of the Independent Reviewer is praised by the former Special Rapporteur Fionnuala D. Ni Aolain. She mentioned the Independent Reviewer's role as an example of good practice for counter-terrorism regimes' oversight. She also encouraged more states to consider appointing a domestic independent body to carry out similar role.[881] Ireland has already followed the UK's model of Independent Reviewer and established an office of Independent Examiner of Security Legislation. However, the regime in Ireland is different that it limits the appointment in such role to current or former judges. This recruitment system as well was criticized because judges are not the most suitable candidates for similar political positions, which might weaken oversight. It is not to say that judges should be banned from appointment, but at least the appointment should be open for other candidates than judges.[882]

The main two characteristics which distinguish the role of the UK Independent

[878] Jessie Blackbourn, 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom' in Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014) 175-76, 179.
[879] 'Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In, Sixteenth Report of Session 2009–10' (*The Stationery Office Limited*, 25 March 2010) 36.
[880] 'Welcome to the Independent Reviewer's website' (*Independent Reviewer of Terrorism Legislation*).
[881] Bruno Demeyere, 'Interview with Fionnuala D. Ni Aolain: Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2021) 103 International Review of the Red Cross 13-14.
[882] Donncha O'Connell, 'Weak Oversight of Security a Fatal Flaw in Policing Act' *Irish Times* (14 February 2024).

Reviewer are (i) independence, as the Independent Reviewer works separately and independently from the government; and (ii) secrecy, as the Independent Reviewer gets access to classified materials and confidential information to help him build a comprehensive judgment based on the full image on the ground.[883] David Anderson commented that:

> By accepting review of this kind, Ministers make it harder for themselves to use the age-old brush-off: "If you had seen what I have seen ...". The Independent Reviewer has seen what they have seen and, unconstrained by the disciplines or loyalties of office, has every reason—unless he has gone rogue or gone native—to tell it as it is'.[884]

However, the Independent Reviewer is appointed by the government. Two of the appointed Independent Reviewers were counsels of the Queen. David Anderson suggested to change the process of appointment into a call for applications to ensure more independence from government.[885] The fact that the Independent Reviewer's office is located in and funded by the Home Office raises questions on its independence. Given the sensitivity of the information and confidentiality of materials reviewed by the Independent Reviewer, it could be essential to remain close in office to the departments subject to review. However, more separation of the Independent Reviewer would guarantee more independence. Additionally, it is suggested to change the reporting mechanism to be directly to Parliament without passing by the Prime Minister to enhance transparency and independence.[886]

The advantage of post-enactment review is that the Independent Reviewer makes judgment based on what happens in practice rather than anticipation of the future, which

[883] Anderson, 'Terrorism Prevention and Investigation Measures in 2012' (n 765) 14.
[884] David Anderson, 'The Independent Review of Terrorism Laws' (2014) Public Law 403.
[885] Blackbourn, 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom' (n 878) 173-74.
[886] ibid 177-78.

increases the efficiency of review. David Anderson previously refused to give opinion on a Bill. He emphasised that it is necessary that the Independent Reviewer shall not be involved in the preliminary stages of drafting a bill in order not to hinder or affect its post review exercise. If the Independent Reviewer gave green light to the Bill then afterwards some issues arose in practice, the Independent Reviewer might be reluctant to raise these issues contrary to his initial opinion. Moreover, the government might be laid back to abide by the Independent Reviewer's comments if it has obtained his approval at an earlier stage.[887]

The Independent Reviewer's position is not regulated under a specific statute, instead it is included as part of counter-terrorism statutes which require review. This lack of uniform regulation is criticized for causing the fluctuation of the degree of influence of the Independent Reviewer based on the personality of the appointed person rather than the institutional system governing it. Each person will have wide discretion to interpret their mandate as they wish.[888]

Jessie Blackbourn analyzed the government's responsiveness to recommendations given by the Independent Reviewer, the JCHR, and courts in relation to pre-charge detention policy in counter-terrorism matters. Blackbourn found that the recommendations of the Independent Reviewer were the most accepted by the government being eight accepted recommendations against only one rejected recommendation. Nevertheless, upon more accurate examination of the recommendations of each body, Blackbourn concluded that the high rate of recommendation acceptance does not relate to the identity or force of the body issuing the recommendation. However, it was clear that the government tends to accept recommendations which support the government policy or suggest slight modifications and reject recommendations which significantly oppose the government's policy.[889]

[887] Blackbourn, 'Accountability, Counter-Terrorism and Civil Liberties' (n 755) 307.
[888] Blackbourn, 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom' (n 878) 171.
[889] Jessie Blackbourn, 'Evaluating the Independent Reviewer of Terrorism Legislation' (2014) 67(4) Parliamentary Affairs 963-65.

It was also observed that the change of policy might be caused by coincidence as a result of change of the government. The new government's policies sometimes coincide to be compatible with the proposed recommendations. It is worth noting however, that these statistics are based on the analysis of one policy or law and does not lead to the generalization of this conclusion on all cases. Whereby in other cases, external bodies, like courts, had much influence on the change of government policy, for instance, in case of control orders.[890]

The effectiveness of the Independent Reviewer's influence on the government shall not be assessed based on the rate of accepted recommendations. A deeper look would be more realistic. The Independent Reviewer's role is reliable and credible in the UK's accountability system. An evidence from practice could be the continuous cross reference of the Independent Reviewer's outcomes by courts and Parliament. This phenomenon highlights the inter-relationship between the Independent Reviewer and other institutions as complementary cooperative rather than competitive. This could be described as a system of institutions working towards the same aim of achieving the balance between human rights and security. Whereby the Independent Reviewer, as an advisory institution, highlights issues to more coercive institutions like the judiciary and Parliament to take action accordingly.[891]

Similarly, in relation to the effectiveness of the JCHR, Murray Hunt emphasized that there is no standard mechanism to measure effectiveness nor a yes or no answer to this question. However, the effectiveness of the JCHR can be inferred from the increasing tendency to cross reference to its outcomes in parliamentary debates. The JCHR contributed to enhancing the quality of parliamentary debates enriching it with a thorough and focused

[890] ibid 963-65.
[891] David Anderson, 'Analysis and Opinions: The Independent Review of UK Terrorism Law' (2014) 5(4) New Journal of European Criminal Law 436-440.

source of information on human rights.[892]

5.6.2. Media

The role of the media in terms of accountability can be described as an awareness tool for people. It is the main source through which people get their information about political parties and about the government. It also has a significant role in uncovering the government's scandals and corruption.[893] Media sources are diverse in the UK providing citizens with multiplicity of options ranging from TV and radio channels, newspapers and the internet. The ownership of media is not concentrated in one body. Rather, there are many broadcasters including foreign owners.[894]

'Naming and shaming' is a tool used by international organizations, NGOs and media to shed light on human rights violations, and to put pressure on governments to change abusive practices in order to preserve their reputations. This method depends on publicity as an accountability tool. However, this tool is not always effective and depends on the specific circumstances of each case. One reason behind its inability to make a difference is the lack of the power to enforce sanctions or abide governments. Another reason is that sometimes this 'naming and shaming' ignites local opposition which causes governments to use more oppression to silence the opposition voice.[895]

The HAC found in media a method to strengthen its influence. The HAC used the media to put pressure on the government and give effect to its work by publicity and engagement of the public. The HAC even prioritized its investigations of topics based on the topics covered by the media. This is also to spread the feeling among the public that the

[892] Hunt, 'The Joint Committee on Human Rights' (n 748) 244-45.
[893] Alison L. Young, *Unchecked Power?: How Recent Constitutional Reforms Are Threatening UK Democracy* (Bristol University Press 2024) 169.
[894] Lars Nord, Josef Trappel and Hannu Nieminen, *The Media for democracy Monitor: A Cross National Study of Leading News Media* (Nordicom 2011) 320, 326.
[895] Emilie M. Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) International Organization 691-92.

HAC works on matters of interest and for the benefit of the public, which in turn positions it more strongly as an accountability actor.[896]

According to the UK Freedom of Information Act 2000 (the "**FOIA**"), people can have access to information held by public authorities, with some exceptions, by submitting a request for information to the relevant public authority.[897] The right of freedom of information gives journalists privilege of obtaining credible resources and promotes transparency. However, in practice journalists face obstacles which might affect their benefit of this privilege. Journalists do not usually have the luxury of time to wait for the regulatory twenty working days or so until the request for information is processed. Especially that the government might not be very cooperative in relation to sensitive information which could expose the government. So, it can delay the request or ask for extra information. Journalists sometimes hide their identity when they apply for request for information because they noticed that they are receiving a different treatment than ordinary citizens. This is probably because the government's fear of exposure by journalists who scrutinize the government acts and spendings and would rely on any information provided to uncover violations committed by the government.[898]

Secrecy has been a legacy in the UK's government. The move to openness and freedom of information faced some resistance from the government at the beginning. Accordingly, the UK was delayed from other European countries to normalize access to public information.[899] Even after the FOIA, public authorities may reject requests for information based on costs grounds if the provision of such information will incur high costs. This exemption provides public authorities with an exit from compliance with the FOIA

[896] Hannah White, 'Select Committees under Scrutiny: Case studies from the 2010-15 parliament' (*Institute for Government*, 9 October 2015) 16-17.
[897] Article 1 of the UK Freedom of Information Act 2000.
[898] Mária Žuffová, 'Fit for Purpose? Exploring the Role of Freedom of Information Laws and Their Application for Watchdog Journalism' (2023) 28(1) The International Journal of Press/Politics 302-03, 311-12.
[899] ibid 304-06.

leaving the requester unable to verify if the rejection is based on true or fake cost claim.[900]

5.6.3. Public Inquiries

Kent Roach examined the role of public inquiries commissions as 'watchdogs'. Public inquiries are appointed by the Prime Minister. Roach examined the public inquiry appointed to scrutinize the government's conduct in relation to terrorist suspects detainees. The chairman of the inquiry was a judge to ensure the inquiry's independence. However, this was not enough because the chairman has been involved in Intelligence Service Commission, which raised questions about his impartiality. Accordingly, civil society organizations and former detainees refused to cooperate with the inquiry which also increased the chances of its failure.[901] Although the inquiry had access to intelligence and security materials, it was required to obtain the government approval before publication of any information concerning its work. The inquiry's final outcome is the issuance of non-binding recommendations to the government, which can be easily ignored with no consequences.[902]

Therefore, Roach concluded that this inquiry failed to gain credibility or be perceived as independent due to the above reasons which contributed to its failure to function as a 'watchdog'. The inquiry had some characteristics of non-coercive 'watchdogs' like media and NGOs while benefiting from judicial expertise and access to classified materials. However, this form of accountability could be enhanced in the future by gaining the trust of the public and credibility. This could be achieved by picking the right personnel to chair the inquiry who could prove impartiality and independence. As a result, civil society organizations and media would show more interest in cooperating with such inquiries which

[900] ibid 316.
[901] Kent Roach, 'Public inquiries as an attempt to fill accountability gaps left by judicial and legislative review' in Fergal F. Davis and Fiona de Londras (eds), Critical Debates on Counter-Terrorism Judicial Review (Cambridge University Press 2014) 183-205.
[902] ibid 183-205.

will in turn strengthen their role and influence as independent 'watchdogs'.[903]

5.7. Conclusion

The UK Parliament and judiciary are the most powerful accountability tools in the UK. They represent legal and political accountability which are the main pillars of accountability in the UK and work in correlation. In addition, the JCHR and the Independent Reviewer are very effective mechanisms to enhance deliberation on human rights issues. International bodies and the media come in the second place in terms of their power to inflict a change in the government's practice. They still can put pressure and expose the government, but they lack coercion to enforce their views. These institutions gain their power from the fear of the UK on its reputation. The UK would not risk of being perceived in the international community as breaching human rights and accordingly will have to take into account the comments of these institutions. In my opinion, the ECtHR is the most influential on the UK's counter-terrorism law amongst international bodies. Historically, it managed to force the UK to change its counter-terrorism laws to abide by human rights standards enforced by the ECtHR.

The main takeaways from this chapter are the following: (i) Parliament, courts and the government are not always in confrontation, they also work in correlation and cooperate to achieve best practices; (ii) the cooperation between different institutions achieves higher levels of accountability oversight and empowers these institutions. For instance, the HAC's utilization of the media to position itself as a public rights' defender, the cooperation between the Independent Reviewer and the JCHR, the cooperation between NGOs and public inquiries, …etc. This type of cooperation between institutions increases its credibility and independence especially bodies like the JCHR or public inquiries when it is associated

[903] ibid 183-205.

with media coverage or NGOs scrutiny; and (iii) the common issues facing many of the examined national and international bodies scrutinizing counter-terrorism policies are lack of resources and expertise and overlap between the functions of several bodies.

Finally, it is to conclude that horizontal accountability is an effective tool for scrutinizing the government's counter-terrorism policies and enhancing compliance with human rights in the UK. However, there still much more developments needed to enhance the current system of accountability. David Anderson described the relationship between the various accountability actors as follows 'they make the case for seeing different channels of influence not as competitors to each other but as subtly inter-related, often divergent but at their most effective when influencing and flowing alongside each other'.[904]

[904] Anderson, 'The Independent Review of Terrorism Laws' (n 884) 415.

CHAPTER SIX

HORIZONTAL ACCOUNTABILITY ARCHITECTURE IN EGYPT

6.1. Introduction

The best guarantee for preventing misuse of extraordinary competencies is the existence of independent institutions of review over the Executive, like the judiciary. Sometimes, it could be an international body, for instance, the European Court of Human Rights (the "**ECtHR**"), which provides better safeguard of neutrality and justice given the absence of domestic common interests unlike the local judiciary which could be manipulated by the Executive.[905]

In this chapter I will explore not only the Executive's accountability before the judiciary, but also horizontal accountability exercised by all institutions which can, either individually or allied, hold the Executive to account. I will focus on the Executive's abuse of exceptional powers in the course of fighting terrorism. I will evaluate the ability of these institutions in Egypt by testing whether they are powerful enough to stand in the face of the Executive. These institutions are the judiciary, the military, the Parliament, political parties, civil society organizations, the media, and international organizations.

As illustrated in the previous chapter, horizontal accountability is different from vertical accountability. The later supposes the existence of hierarchy whereby the higher holds the lower accountable. Vertical accountability mechanism is used internally within an administrative authority. While the former means the exercise of accountability by third party alien from the Executive. This third party should be capable of putting pressure on the Executive, whether alone or in collaboration with others, to force the Executive to justify its acts. It also requires the ability of this third party to inflict direct or indirect sanctions on the

[905] Samuel Issacharoff, 'Fragile Democracies' (2007) 120(6) Harvard Law Review 1454.

Executive in cases of violation. These sanctions could be invalidation of acts by the judiciary, removing the regime by the military, distrusting the government by the Parliament or mobilizing the public opinion against the government by the media, civil society organizations, political parties, or international community. Accordingly, horizontal accountability includes public participation in the evaluation of the government performance.[906]

This chapter examines the major influential actors in the Egyptian political scene which could be in a position to exercise horizontal accountability of the Executive. It evaluates the institutions which are able to impose real pressure on the government and can affect decision making in matters related to national security, liberty, and freedoms. It also highlights the practices of the government to limit the power of these institutions and assesses the extent of influence each institution or body can achieve. This chapter also seeks to assess the degree of balance achieved in Egypt between protection of human rights and protection of national security through strong institutions. For instance, the judiciary which puts pressure on the government and acts as guardian for human rights. Other less influential actors are also studied as the Parliament, political parties, civil society organizations, the media, and international organizations. The role of the military as well cannot be denied, especially during state of emergency. The Arab Spring revolution is the most recent example of the involvement of the military in politics.

6.2. The Judiciary

The Bureau of Economic and Business Affairs of US State Department confirms in its report on Egypt in 2022 that:

[906] Christopher G. Reddick, Tansu Demir, and Bruce Perlman, 'Horizontal, Vertical, and Hybrid: An Empirical Look at the Forms of Accountability' (2020) 52(9) Administration & Society 1416-18; Thomas Schillemans, 'Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies' (2011) 43(4) Administration & Society 390.

> Judges in Egypt enjoy a high degree of public trust, according to Egyptian lawyers and opinion polls, and are the designated monitors for general elections. The Judiciary is proud of its independence and can point to a number of cases where a judge has made surprising decisions that run counter to the desires of the regime.[907]

It is argued that the 'judicialization' of the political system or in other words establishing an independent judiciary is closely linked to the existence of a democratic government. However, this is not the case in Egypt. The establishment of the Egyptian Supreme Constitutional Court (the "**SCC**") in Egypt contradicts with the previous argument. It raises the question of why an authoritarian regime would allow the existence of a similar court to limit the powers of the Executive. The SCC can strike down unconstitutional laws and operates as supervisory authority on the Parliament and the Executive. It may be assumed that the intention behind the foundation of this court was to maintain good democratic image without granting the court real independence. But if this is true, why would the regime keep the SCC without limiting its power even when it started to exercise its jurisdiction and strike down unconstitutional acts undertaken by the Executive.[908]

It is suggested that the answer to this question relates to the economic conditions which forced the regime to follow this route to attract foreign direct investment and retain its confidence in the judicial system in Egypt.[909] Another reason for maintaining the independence of the judiciary is that the government used to rely on Military Courts and special courts like the State Security Courts to deal with sensitive political issues. These courts are out of the ambit of the ordinary judicial system and its litigation guarantees. By this way, the government had an alternative route to protect its interests without undermining

[907] Elizabeth Stratton, '2022 Investment Climate Statements: Egypt' (*US Department of State*).
[908] Tamir Moustafa, 'Law versus the State: The Judicialization of Politics in Egypt' (2003) 28(4) Law & Social Inquiry 885.
[909] ibid 885.

the independence of the judiciary, which will be illustrated later in this section.[910]

Tamir Mostafa described this situation of courts as 'insulated liberalism' whereby '[c]ourt rulings had an impact upon state policy, but judicial institutions were ultimately bounded by a profoundly illiberal political system'.[911] It is also noted that the governing regime cannot always guarantee the loyalty of the judiciary. Even if the governing regime appoints loyal judges to secure favorable judgments, courts sometimes choose to expand its power and cross the boundaries which are drawn for it at the time of its establishment.[912] This is obvious in the Egyptian SCC practice in expanding from the scope of property rights to political rights as explained further below.[913]

The Egyptian judiciary is a dual judicial system, composing of civil and criminal courts which have the jurisdiction over civil and criminal matters, and administrative courts which adjudicates administrative disputes.[914] Before the foundation of a specialized court for judicial review of constitutionality, courts used to apply what is called 'Abstention Control'. This means that the courts abstain from applying the relevant provision of law in the case under review when the court concludes that such provision contradicts with the constitution. However, such provision of law remains valid and applicable on future cases.[915]

Historically during the presidential period of Gamal Abdel Nasser, the administrative courts started to claim jurisdiction over constitutional matters. Accordingly, Nasser thought of founding a supreme court with false façade outward appearance of independence. This court was named the Supreme Court and was under Nasser's control with nominal power of constitutional review. It looked supreme, but in reality, it was

[910] Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press 1997) 77.
[911] Tamir Mostafa, 'Law and Resistance in Authoritarian States' in Tom Ginsburg and Tamir Mostafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 155.
[912] Ozan O. Varol, 'Constitutional Performance in Transitions from Military to Civilian Rule' in Tom Ginsburg and Aziz Z. Huq (eds.), *Assessing Constitutional Performance* (Cambridge 2016) 152.
[913] Clark B. Lombardi, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally Islamic State' (2008) 3 Comparative and Foreign Law Commons 243-44.
[914] ibid 235.
[915] Awad Mohammed El-Morr and others, 'The Supreme Constitutional Court and its Role in the Egyptian Judicial System' in Kevin Boyle and Adel Omar Sherif (eds), *Human Rights and Democracy: the Role of the Supreme Constitutional Court of Egypt* (Kluwer Law International 1996) 38.

subordinated. By this way, Nasser withdrew the jurisdiction of constitutional review from ordinary and administrative courts to prevent them from issuing unfavorable judgments against the Executive. On the other hand, he granted this jurisdiction to the Supreme Court which is independent from the judiciary and works under Nasser's control so that he can manipulate its judgments.[916]

Former President Anwar Al-Sadat, who succeeded Nasser, started an economic reform plan which led to the independence of the Supreme Court. Investors are usually concerned with the stability of their investments. This is guaranteed when there is no risk in relation to the ownership rights of the investor, the stability of the exchange rate, and the clarity of taxes law. During Nasser's period, the nationalization of the Suez Canal and other companies and the redistribution of land ownership by the Egyptian regime, raised the investors' concerns about their investments in Egypt. Accordingly, Sadat replaced the Supreme Court by the SCC with real independence, to give the investors the confidence that even if the Executive or the Parliament misused its power, the judiciary is there to correct any flaws.[917] 'The SCC is an independent judicial authority in the Arab Republic of Egypt'.[918] 'The President of the Republic selects the chief justice of the SCC from the oldest five vice chief justices of the SCC'.[919] However, 'the members of the SCC cannot be dismissed or transferred to other positions except with their approval'.[920]

The SCC's jurisdiction expanded beyond the protection of property right to encompass political supervision and protection of human rights. Although the chief justice and vice chief justice of the SCC were appointed by the President of the Republic, the judges appointed in the SCC were so powerful in the sense that they were by no means faithful to the Executive. There is no clear justification for the appointment of those judges by Mubarak

[916] Lombardi (n 913) 236.
[917] Moustafa, 'Law versus the State: The Judicialization of Politics in Egypt' (n 911) 887-88.
[918] Article 1 of Egyptian Law no 48 of 1979 concerning the Supreme Constitutional Court.
[919] Article 5 of Egyptian Law no 48 of 1979 concerning the Supreme Constitutional Court.
[920] Article 11 of Egyptian Law no 48 of 1979 concerning the Supreme Constitutional Court.

despite the risk of them threatening his authoritarian power. The SCC started to issue judgments invalidating the Parliament's elections law leading to the dissolution of the Parliament and reconvening elections, which shows its active participation in political life. Consequently, the SCC became guardian for civil and political rights of citizens.[921]

Despite the SCC's landmark judgments against the regime since its foundation, it drew a red line which it did not cross. The SCC avoided aggressive confrontation with the regime by fiercely opposing the regime's interests, which could lead to diminishing its judicial review powers. The SCC historically confirmed the constitutionality of the State Security Courts and dismissed the petitions submitted in relation to the constitutionality of civilians' trials before the Military Courts.[922] The fact that those courts were stipulated under the valid constitution at that time, which is the Constitution of 1971, could also be the justification for the SCC's restraint in this area. In all cases, these backward steps of the SCC towards the Executive's emergency powers coincided with more activism in other areas like political reform and extensive review of elections laws.[923] The Egyptian Constitution of 2014 uses a more restrictive language than the Constitution of 2012 in relation to the jurisdiction of Military Courts. Unlike the Constitution of 2012, the Constitution of 2014 includes a list of the cases in which it is allowed to subject civilians to military trial. However, such list is very broad that it does not make a significant difference if eliminated entirely.[924]

One of the judgments evidencing the SCC's power in reviewing the constitutionality of the Executive's acts is when the SCC declared a presidential decree in relation to family matters to be unconstitutional. The SCC based its judgment on the rule that although the President of the Republic is constitutionally granted the power to issue laws by virtue of

[921] Lombardi (n 913) 243-44.
[922] Tamir Mostafa, *The Struggle for Constitutional Power* (Cambridge University Press 2009) 232.
[923] Sadiq Reza, 'Endless Emergency: The Case of Egypt' (2007) 10 New Criminal Law Review 549.
[924] Varol (n 912) 150-51.

presidential decrees in the absence of the Parliament, the remaining conditions must be fulfilled. Given the absence of absolute necessity, which is one of the required conditions for the validity of the use of emergency power to enact laws by virtue of presidential decrees, the SCC held that the presidential decree is unconstitutional.[925]

During the transitional period after Mubarak's resignation from office as the President of the Republic, the SCC played an important role in directing the sequence of political events. During the transitional period and after the suspension of the Constitution of 1971, many constitutional questions arose in relation to the correct order of procedures. Whether to start by parliamentary elections and then form a constituent assembly to draft the constitution or otherwise? This question was subject to many debates between law scholars and practitioners and led to many conflicting arguments.[926]

According to the Constitution of 1971, the vice president should have possessed power after the resignation of Mubarak until the election of a new President. However, Mubarak did not follow the Constitution and transferred his power to the Supreme Council of the Armed Forces (the "**SCAF**") instead. This act contradicted with the provisions of the Constitution of 1971 and created a situation which does not have constitutional justification. Accordingly, the Constitution of 1971 lost its value and was suspended afterwards. As a result, the transitional period was faced with many complications due to this constitutional gap.[927]

Mohammad Fadel claims that the SCC should have exercised 'constitutional silence'. This means that given the constitutional gap which occurred during the transitional period, the SCC was expected to remain silent in relation to political issues. For instance, issues relating to parliamentary elections and the constituent assembly drafting the

[925] Case no 28 of 2J (Egyptian Supreme Constitutional Court).
[926] Mohammad H. Fadel, 'The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence' (2018) 16(3) International Journal of Constitutional Law 938.
[927] ibid 938.

constitution. Conversely, in practice the SCC seemed very decisive in its judgments during this period despite the absence of a constitution to govern. '[T]he SCC's transitional opinions spoke as though well-established constitutional principles existed that spoke clearly with respect to the very questions that Egyptians were asked to debate during the transition'.[928]

Fadel described the position of the SCC as 'constitutional despotism' which means 'excessive judicial activism, by radically overreading constitutional provisions with the intent of disabling the possibility of democratic politics'.[929] The SCC regarded the constitutional declarations issued by the SCAF during the transitional period and approved through referendums as the governing constitution and made its judgments based on it without hesitation.[930] Fadel suggests that the SCC contributed to overcomplicating the transitional period. He supposes that if the SCC followed the 'constitutional silence' approach, the situation could have been better by allowing political deliberation by other branches of the government which could have ended by reaching an agreement instead of ousting Morsi.[931]

The SCC declared some of the articles of the parliamentary elections law as unconstitutional, which led to the dissolution of the House of Representatives which was elected after the Arab Spring revolution.[932] The strong power and influence of the SCC was evidenced when the members of the Muslim Brotherhood Group (the "**MB**") found no way to stop its influence except by obstructing its work. As the MB gathered in front of the SCC to prevent the judges from reviewing the constitutionality of the formation of the constituent assembly drafting the Constitution of 2012 until it was out. These events show how the SCC

[928] ibid 938.
[929] ibid 939.
[930] ibid 945-46.
[931] ibid 951.
[932] Nathan Brown, 'Egypt: A Constitutional Court in an Unconstitutional Setting' in Justin Frosini, Francesco Biagi (eds), *Political and Constitutional Transitions in North Africa: Actors and Factors* (Routledge 2014) 37.

influences politics, and its judgments define the route for the constitutional developments in Egypt, especially in times of emergencies.[933]

The speedy judgment of the SCC to render the articles of the parliamentary elections law as unconstitutional is not common within the Egyptian judiciary, whereby cases take years to get a final judgment. This also counts as strong evidence of the political influence of the SCC in the Egyptian community. It is obvious that the reason behind this hurry was to slow down the rise of the MB and to restrict their control by dissolving the House of Representatives which was dominated by them.[934]

Yvonne Tew explains different types of judicial empowerment, one of which is 'coalition building'. This strategy entails that the court issues judgments which favors the interests of one branch of the government over the other. The court secures itself from backlash with the less privileged branch of the government by having powerful ally supporting its judgment.[935] In Egypt after the Arab Spring, the most powerful influencers in the political battle were namely the judiciary, the SCAF and the MB. By analogy, I suppose that the judiciary followed the 'coalition building' approach to eliminate the power of the MB which was dominating the Parliament and holding presidency. In this scenario, the judiciary and the SCAF are supposed to have allied against the MB for the purpose of eliminating their power.

The independence of the SCC cannot be denied. However, it could be enhanced by making some changes in the system governing the SCC to guarantee its full independence and non-interference by the Executive. There are some factors which could affect the strength of the SCC as guardian of human and political rights. First, the appointment of the

[933] ibid 39.
[934] Antoni Abat i Ninet, 'The Role of The Judiciary in Egypt Failed Transition to Democracy' in Martin Scheinin, Helle Krunke and Marina Aksenova (eds), *Judges as Guardians of Constitutionalism and Human Rights* (Elgar 2016) 217.
[935] Yvonne Tew, 'Strategic Judicial Empowerment' (2024) 72(1) American Journal of Comparative Law 11.

chief justice of the SCC by the President of the Republic.[936] It is worth mentioning however that the common established practice is the appointment of the most senior judge in the SCC, which eliminates the influence of the President of the Republic in threatening the independence of the SCC.[937] Second, reconsidering the constitutionality of the Military Courts and its trials to civilians.[938]

The constitutionality of the Anti-Terrorism Law no. 94 of 2015 (as amended) (the "**Anti-Terrorism Law**") is currently challenged before the SCC.[939] No judgment has been issued yet regarding this petition, which is still under review by the SCC since February 2018. The whole law is challenged based on claimed deficiencies in the formal procedures, basically the lack of sufficient deliberation on the law by the members of the Parliament. The petition also challenges articles 2, 18 and 29 of the Anti-Terrorism Law based on substantive deficiencies.[940]

The memorandum submitted for the petition based the substantive challenge on several reasons including (i) ambiguity of the provisions of law; (ii) divergence from the purpose of legislation, which is public interest; (iii) violation of the principle of legality due to the use of extremely broad expressions leading to unclarity of the material element constituting the crime. In addition to criminalizing intent in the absence of material element (i.e. criminalizing evil ideas); (iv) non-proportionality between the criminal act and the penalty; and (v) violation of freedom of expression.[941]

According to the established principles of the SCC 'penal law provisions must be narrowly drafted to guarantee its accurate application (...) thus its general statements and broad content could alter its intended purposes, by constraining protected rights under the

[936] Noura Hamdan Taha and Asem Khalil, '"In the Name of the People?" Understanding the Role of Egypt's Supreme Constitutional Court in Times of Political Crisis' (2020) 12(2) Middle East Law and Governance 235.
[937] El-Morr and others (n 915) 45.
[938] Taha and Khalil (n 936) 235.
[939] Case no 31 of 40J (Egyptian Supreme Constitutional Court).
[940] Unconstitutionality petition memorandum of Case no 31 of 40J (Egyptian Supreme Constitutional Court) 4.
[941] ibid 4.

constitution or justifying its limitation'. 'Accordingly, penal law provision must be definitive and accurate preventing any overlap in its meaning'.[942] Additionally, the SCC invalidated an article which considers a person suspect of a crime, if such person is famous for criminal behaviour. The SCC confirmed that this contradicts with the Constitution and the basic criteria for criminalization and penalization. The SCC confirmed that:

> Penal laws put the greatest restrictions over personal liberties. Accordingly, criminalized acts must be defined with definitive clarity and precision to avoid confusion with other acts (…) otherwise, the audience would be left uncertain of the exact criminalized act. This would also leave the court unable to follow a uniform approach in determining the elements of the crime which is the court's core function. The constitution aims at defining the framework within which persons could exercise their rights and freedoms. If this framework is vague, the constitution lacks its aim and opens the door for violations of human rights and abuse of power. Therefore, the legislature shall not use flexible, mysterious, or non-precise terms which could carry more than one meaning contrary to the basics of criminalization to avoid criminalizing acts which were not intended by the legislature from the beginning.[943]

Based on the above established principles of the SCC, it is hardly imaginable that the SCC would regard the current drafting of the provisions of the Anti-Terrorism Law as compatible with these acknowledged penalization concepts. However, this is something to see in the future when the SCC says its word. The SCC has had a significant role in the protection of human rights and maintaining the balance between those rights and the powers of the governing regime. Accordingly, it might be useful if the SCC takes an active role in

[942] Case no 105 of 12J (Egyptian Supreme Constitutional Court).
[943] Case no 3 of 10 (Egyptian Supreme Constitutional Court).

the area of counter-terrorism and try to put some pressure on the government to strike the right balance between conflicting interests.

The SCC's common practice is to rely on international treaties and commitments in its interpretations in the field of human rights. It also examines international practices in well-established democracies like the United States, and the United Kingdom, and other human rights institutions like the ECtHR. Given that the constitution is not a comprehensive legal document, when it provides for the protection of human rights, it might lack the required precision for its application in practice. The SCC fills this gap with judgments and interpretations which take into consideration international practices. The SCC in doing so, it explicitly refers to these international resources and cite them in its judgments.[944]

Besides the SCC, the administrative courts play a vital role in the sphere of protections of rights and liberties and the limitation of the Executive's powers. The administrative courts operate under the auspices of the Council of State (Conseil d'état). It represents a solid safeguard for civilians against unlawful acts of the government. The system of the administrative courts allows any citizen to file a petition against any administrative act challenging its lawfulness.[945]

The Court of Administrative Judiciary (the "**CAJ**") nullified a ministerial decree granting military and intelligence officers the capacity of judicial officer in specific cases. According to this capacity, those officers shall have the right to arrest and search civilians in accordance with the Criminal Procedures Law. The court reasoned its decision on the basis that the Minister of Justice exceeded his authority in a way that could lead to infringement of personal liberties and freedoms which justifies the revocation of his decree.[946]

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[944] Kevin Boyle, 'Human Rights in Egypt: International Commitments' in Kevin Boyle and Adel Omar Sherif, *Human Rights and Democracy: the Role of the Supreme Constitutional Court of Egypt* (Kluwer Law International 1996) 89-91.
[945] Mostafa, *The Struggle for Constitutional Power* (n 901) 84.
[946] Case no 46282 of 66J (Egyptian Court of Administrative Judiciary).

Despite these judicial guarantees, emergency powers remain an imminent danger to human rights. The Emergency Law no. 162 of 1985 (as amended) (the "**Emergency Law**") establishes the State Security Courts.[947] These are exceptional courts and accordingly are subject to exceptional governing rules which are characterized by less guarantees for justice and litigation rights. For instance, 'judgments issued by the State Security Courts are non-appealable by any means and these judgments shall not be considered final except after the ratification of the President of the Republic'.[948] Before ratification, the President of the Republic also has the power to modify the penalty to a lesser one or suspend or cancel the whole penalty. The President may also return the case to the court for retrial.[949]

Judicial history is full of cases challenging the constitutionality of civilians' trials before Military Courts and State Security Courts. Although the SCC was consistent in upholding the constitutionality of military and special courts' trials of civilians, the administrative courts of the Council of State repeatedly referred tens of cases with the same subject to the SCC. This as well frames the role of the Egyptian administrative courts as defender of people's rights and freedoms showing its insistence to put an end to civil liberties' violations caused by the operation of State Security Courts.[950]

The African Commission on Human and People's Rights (the "**African Commission**") held that the State Security Courts do not comply with the guarantees for fair trial which require non-interference by the Executive and independence of judges. The African Commission acknowledged that the current composition of the State Security Courts is dominated by the Executive.[951] In *Egyptian Initiative for Personal Rights and Interights vs Egypt*, the African Commission held that Egypt violated articles 5, 7 (1) (a), (d) and 26 of the African Charter on Human and People's Rights (the "**African Charter**")

[947] Article 7 of the Emergency Law no 162 of 1958.
[948] Article 12 of the Emergency Law no 162 of 1958.
[949] Article 14 of the Emergency Law no 162 of 1958.
[950] Mostafa, 'Law and Resistance in Authoritarian States' (n 945) 152-53.
[951] EIPR v. Egypt, Decision, Comm. 334/2006 (ACmHPR, Mar. 03, 2011) 198.

in relation to human dignity, right to appeal, fair trial by impartial court, and independence of judiciary. The African Commission provided a set of recommendations for Egypt including (i) reforming the State Security Courts' setup to guarantee independence; (ii) respecting the rights of detainees and suspects by the State Security Prosecutors and police; and (iii) amending the Emergency Law to abide by the African Charter and international legal norms.[952]

Nevertheless, the State Security Courts in some cases surprisingly restricted the Executive's authority and ruled against its interests. The State Security Court issued a judgment acquitting the accused due to the use of torture against them.[953] In 1993, the State Security Court dismissed evidence in the case of murder of the speaker of the Parliament. The State Security Court stated that it cannot accept evidence obtained by torture. This was not the only case. In the same year, other members of an Islamist group were also acquitted in a case of murder.[954]

During the declared state of emergency, terrorism suspects were referred to the State Security Courts given that the main reason behind extending the state of emergency was the imminent danger of terrorism.[955] This also justifies the unavailability of many court judgments in terrorism related cases due to the lack of publicity of the judgments issued by the State Security Courts. This is because this type of courts usually work in secret and its procedures and sessions are not easily accessible.[956]

On the 25th of October 2021, current President Abdul Fattah El-Sisi, announced the end of the state of emergency in Egypt.[957] According to the Anti-Terrorism Law, special

[952] ibid 233.
[953] Reza (n 923) 548.
[954] Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (n 910) 99.
[955] Ahmed Ezzat 'Law, Exceptional Courts and Revolution in Modern Egypt' in Robert Springborg and others (eds), *Routledge Handbook on Contemporary Egypt* (Routledge 2021) 18.
[956] Bianca C. Isaias, 'Military Tribunals and Due Process in Post-Revolutionary Egypt' (2015) 49(1) the International Lawyer 203.
[957] Nayera Abdallah, 'Egypt's President Sisi ends state of emergency for the first time in years' *Reuters* (Cairo, 26 October 2021) <www.reuters.com/world/middle-east/egypts-president-sisi-ends-state-emergency-first-time-years-2021-10-25/> accessed 4 October 2023.

circuits in the criminal courts are dedicated for adjudicating terrorism related cases. Those circuits shall review the cases and render judgments as promptly as possible.[958] New terrorism cases are now referred to these circuits instead of the State Security Courts due to the end of the state of emergency.[959]

One of the things to note is that the state's emergency powers are mostly used to curb Islamist's activism (especially the MB) which is typically accompanied with violence. The continuous violence of the MB through centuries led to excessive use of emergency powers against them since the declaration of martial law (which was first declared under the British occupation of Egypt), until more recently, the use of the Emergency Law.[960]

There are some judicial applications of the provisions criminalizing incitement of terrorism. For example, in case no. 3594 of 88J before the Court of Cassation, the defendant was charged with preparation for incitement of terrorist crimes in writing. The police seized the following in the custody of the defendant (i) five printouts stating, 'poverty came', 'revolution of the poor' and 'poor rest in peace'; (ii) eight printouts stating 'set your voice free'; (iii) ten printouts stating 'wake up', '25th of January revolts'; (iv) nine printouts stating 'new 25th of January'; (v) Karl Marx's book 'Value, Price, and Profit'; and (vi) three papers stating 'activating the ouster of the current regime'.

The Egyptian Criminal Court of first instance considered these documents as encouragement of the commitment of violent acts, and evidence for preparation for incitement of terrorist crimes. The Criminal Court sentenced the defendant with five years aggravated imprisonment and confiscation of the seized documents. The Court of Cassation amended the sentence to five years imprisonment instead of aggravated imprisonment and confiscation of the seized documents based on article 28(1) of the Anti-Terrorism Law.

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[958] Article 50 of the Anti-Terrorism Law no 49 of 2015.
[959] Mohamed Farag, 'مصر.. كشف مصير القضايا المنظورة أمام محاكم أمن الدولة طوارئ (Egypt.. unveiling the destiny of cases tried before the emergency State Security Courts)' *Sky News Arabia* (Cairo,26 October 2021) <www.skynewsarabia.com/middle-east/1473739--مصر-كشف-مصير-القضايا-المنظورة-أمام-محاكم-أمن-الدولة-طوارئ> accessed 16 October 2023.
[960] Reza (n 923) 535, 549.

It is not clear from the judgment how the court was convinced that the seized documents are sufficient to prove calls for commission of violence. All the mentioned statements refer to encouragement of speaking up and returning the revolution of 25th of January. The reading of this judgment could be that the court equates revolution with violence. Another reading may be that due to the violence caused as a result of the 25th of January revolution, calling for repeating the revolution is considered as calling for violence. In any case, the penalty might not be proportionate with the committed act of just having those documents in custody.

Another example is case 26806 of 84J before the Court of Cassation, in which some of the defendants seized printouts and recordings inciting the activities of the MB which were prepared for viewing by others. Other defendants spread false news and information about the internal situation in Egypt on websites and TV channels. The defendants aimed at weakening the nation and giving the international community wrong impression that Egypt is having a civil war and domestic unrest causing damage to the national interests. The police seized many documents, cameras, money in foreign currencies, videos, recorded interviews, and other live streaming devices which were all taken as evidence against the defendants. These seized items were proving the defendants' intention to threaten national security by spreading false news and publishing forged videos.

The Criminal Court charged the defendants. However, the Court of Cassation revoked the judgment and returned it to the Criminal Court. This is based on the existence of contradiction in the judgment of the Criminal Court of first instance. As it states at the beginning that the defendants confessed of their crimes while at the end it states the defendants denied all the crimes of which they are accused.

The Court of Cassation explains the elements of a terrorist crime.[961] First, material

[961] Case no 26806 of 84J (Egyptian Court of Cassation) 17.

element which represents force, violence, threat, or intimidation. The Court of Cassation states that due to technological development, force here should be interpreted in its broad meaning to encompass not only physical force. It includes using information technology systems to serve terrorist purposes. Second, criminal intent which represents the awareness of the offender of their act and the elements of the crime.[962] In other words, the Court of Cassation states that criminal intent includes:

> [T]he direction of the offender's intent to use force, violence, threat, or intimidation knowing that these acts causes (…) disturbance of public order or threatening the safety or the security of the community, accordingly it includes all criminal acts committed against the state or which could lead to the creation of state of terror in the minds of specific persons or groups or the general public, or forcing the general authorities to change its position either by forcing it to take or omit to take an action or creating a state of crisis or general rebellion or threatening the political stability, safety or unity or the state's sovereignty. Criminal intent is inferred from the totality of the terrorist acts committed by the offender, which is considered by the legislature the criminal behavior and its result.[963]

It is worth noting that this verdict was issued before the issuance of the Anti-Terrorism Law, based on the provisions of the Penal Code criminalizing terrorism. However, this interpretation shall remain valid given that the definition of terrorism in both laws does not differ much. They both adopt the same broad approach.

6.3. The Military

The political influence of the military and its role in protecting national security is

[962] ibid 17.
[963] ibid 17.

very clear in the Egyptian recent history. The SCAF stood by the public uprisings twice in 2011 and 2013 and managed to take down two Presidents of the state. The SCAF also operated the state for a transitional period after the 2011 Arab Spring revolution. The Egyptians put much trust in the military and consider it the guardian of the people against oppressive ruling regimes. The people called for military's intervention to settle the battle with former Presidents Hosni Mubarak and again with Mohamed Morsi. Demonstrators raised slogans like 'the military and the people are one hand'.[964]

This strong relationship between the military and the people is worth close analysis. Although the military maintains strong ties and enjoyed large benefits under both regimes of Mubarak and Morsi, the military turned its back to both regimes when the publics revolted against them. It is worth mentioning as well that the people criticized the SCAF and sometimes demanded their leave when the SCAF took power after the 2011 Arab Spring revolution. However, this did not hinder the collaboration between the military and the people shortly in 2013 against the MB.[965] 'al-Sisi asserted that the military was not loyal to one political faction or another and was there only to protect national security'.[966] This could clarify the position of the military towards previous regimes after national upheavals despite the military's good relations with these regimes. This supports the fact that the military is only loyal to the people.[967]

Besides the political influence, the military has deep roots in the Egyptian economy. The military owns and operates mega projects in all fields including commodities, construction, tourism, sports, fuel, …etc. These economic activities are not new, it has been growing during the past sixty years.[968] Accordingly, the military is the most powerful

[964] Zeinab Abul-Magd, *Militarizing the Nation: The Army, Business, and Revolution in Egypt* (Colombia University Press 2017) 187.
[965] ibid 187-89.
[966] ibid 220.
[967] Holger Albrecht and Dina Bishara, 'Back on Horseback: The Military and Political Transformation in Egypt' (2011) 3(1-2) Middle East Law and Governance 19.
[968] Abul-Magd (n 964) 228-29.

independent institution in the state with a strong financial position which supports it.[969] The military gained regional trust of Arab countries. The gulf states injected huge funds to the military to support its battle against the MB in fear of extending their rule to the gulf states after dominating other Arab countries. The gulf states provided these funds on the condition that any investment projects financed by these funds must be carried out by the military, for instance, schools, hospitals, …etc. This was another reason of the expansion of the military's private business.[970] Another form of the expanded military power is the appointment of ex-officers in public and administrative posts after their retirement, for example, as governors and counsels of the President or ministers.[971]

The Arab Spring revolution in Egypt led to the collapse of all the institutions of the state, including the police. This left the military as the only organized standing institution capable of operating the transitional period, even though the military was not ready or did not seek to take over this power.[972] The strength and independence of the military were the main reason that made Egypt survive revolutionary chaos and high rates of brutal terrorist attacks all over the country, unlike other Arab countries as Syria and Libya.[973]

Robert Springborg argues that Egypt cannot be regarded as a 'police state' for several reasons. A police state could have been able to control the demonstrations and defeat it in 2011 through the police and intelligence forces. If Egypt was a police state, the military would not have had the chance to intervene the way it did and take down the President. Similarly, I suppose that Egypt is not a military state. Despite the strong influence of the military and its control in different fields, it allowed the MB to take power and dominate the political life during 2012 until the people revolted against their rule.[974] The military's strong

[969] Albrecht and Bishara (n 967) 23.
[970] Abul-Magd (n 964) 240.
[971] Robert Springborg, 'The rewards of failure: persisting military rule in Egypt' (2017) 44(4) British Journal of Middle Eastern Studies 480.
[972] Albrecht and Bishara (n 967) 18-19, 21.
[973] Abul-Magd (n 964) 232.
[974] Springborg (n 971) 483.

intervention in political and economic life is a natural consequence to fill in the gap caused due to the weakness of civil society and political parties, which is discussed later in this chapter.[975]

The US President, Barak Obama, expressed his opinion in a way showing some justification to the military's position as he mentioned that Morsi's government was democratically elected however it was not representative to all Egyptians.[976] In addition, the US Secretary of State supported the argument that the military's intervention in taking down Morsi shall not be considered as a Coup d'état by saying that:

> [T]he military was asked to intervene by millions and millions of people, all of whom were afraid of a descendance into chaos, into violence. And the military did not take over, to the best of our judgment so far. To run the country, there's a civilian government. In effect, they were restoring democracy.[977]

Although the military's action could be justified in Morsi's case, the mechanism of changing regimes by using force, which has occurred in Egypt twice in less than three years, contradicts with democratic governance. Before resorting to military intervention, there should be strong evidence that it was impossible to solve the issue by peaceful transition of power through elections. Accordingly, Egyptian's reliance on the military to intervene and get rid of authoritarian regimes must be decreased moving forward to a political mechanism for transition of power and giving the military the opportunity to step back from politics.[978]

The African Union suspended Egypt's membership due to unconstitutional change of government after the ouster of Morsi in 2013 and until the election of current President El-Sisi. The Action Congress of Nigeria, which is a Nigerian political party, commented on

[975] A. Kadir Yildirim, 'Military, Political Islam, and the Future of Democracy in Egypt' (2013) 15(4) Insight Turkey 68.
[976] Ibrahim J. Gassama, 'Ballots and Bullets: The Right to Democratic Governance in International Law after The Egyptian Coup' (2014) 32(4) Wisconsin International Law Journal 623-24.
[977] ibid 623.
[978] ibid 672.

the situation in Egypt stating that 'even if people make a wrong choice, they are stuck with it until the next elections'.[979] It is worth noting however that the African Union did not suspend Egypt's membership after the ouster of Mubarak. It is suggested that this is because the military was less involved whereby the role of the military did not exceed the protection of the protestors and abstaining from using force against them. Subsequently, Mubarak stepped down the presidency on his own. If the military refused the transition of power to the democratically elected President in 2011, probably the African Union would have taken action against Egypt similar to that of 2013.[980]

6.4. The Parliament

According to the Constitution of 2014, the House of Representatives shall 'oversee the acts of the Executive authority'.[981] Members of the Parliament may ask, interrogate, distrust, debate with, make recommendations or announcements to, or request for information from the Prime Minister or any of the ministers in relation to any topic.[982] The House of Representatives may form a committee to investigate and inspect any general topic or activity of any of the administrative authorities or public bodies. Such committee shall have vast powers in collecting evidence, interrogating employees, and requesting information which facilitates its mission.[983]

The Parliament has constitutional competencies which theoretically situate it in a powerful position vis a vis the government. However, in practice some factors could undermine this power, such as (i) weak political parties; (ii) strong government which threatens and cracks down opposition; or (iii) Parliament dominated by the ruling party. In

[979] Elin Hellquist, 'Regional sanctions as peer review: The African Union against Egypt (2013) and Sudan (2019)' (2021) 42(4) International Political Science Review 457-59.
[980] ibid 457-59.
[981] Article 101 of the Egyptian Constitution of 2014.
[982] Articles 129 - 134 of the Constitution of 2014.
[983] Article 135 of the Egyptian Constitution of 2014.

these cases, the Parliament does not effectively make use of the powers in its hands and the Executive escape parliamentary accountability.[984] An example of the model of the Parliament dominated by the ruling party is the Parliament operating under the rule of Mubarak which was dominated by the National Democratic Party. The MB constituted minority with different percentages participating as individuals not affiliated to a specific party. Despite their continuous efforts, they were unable to form real accountability tool for the government.[985]

Another scenario in which government flee from parliamentary accountability is the complete absence of the Parliament. The House of Representatives was dissolved in 2012 and the elections for new one was postponed several times until finally convened in 2015. During this period, the government operated in parliamentary gap. Even the new Parliament which started its sessions in 2016 was dominated by pro-regime members due to weak political parties, which even decide sometimes to boycott elections like Freedom Egypt Party and Strong Egypt.[986] During the long gap period of the Parliament, the government issued 342 decrees pending Parliamentary approval. This big flow of work kept the Parliament busy distracting it from auditing the government.[987]

On the other hand, the President of the Republic has the power to dissolve the Parliament by virtue of a reasoned decision in case of necessity, provided that the President must obtain the prior approval of the public through public referendum. The Parliament cannot be dissolved for the same reason of its last dissolution.[988] The Constitution of 2012 immunized the Parliament from dissolution by presidential decree in its first year. However, this restriction was removed from the Constitution of 2014.[989]

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[984] Bryce Loidolt, 'Parliamentary Opposition Under Hybrid Regimes: Evidence from Egypt' (2016) 41(4) Legislative Studies Quarterly 997.
[985] ibid 1003-04.
[986] Jan Claudius Völkel, 'Sidelined by design: Egypt's parliament in transition' (2017) 22(4) The Journal of North African Studies 595-96, 608-09.
[987] ibid 608.
[988] Article 137 of the Egyptian Constitution of 2014.
[989] Article 127 of the Egyptian Constitution of 2012; Völkel (n 986) 605.

As long as the political parties stay weak, the Parliament will remain 'rubber-stamp' branch with no or low influence on the government decisions. Political parties must develop their practices and try to participate in the Parliament even as minority to gain experience which could qualify it to dominate in future rounds of parliamentary elections.[990] Zaid Al-Ali stressed that 'the country's ability to break out of its cycle of poverty and deep inequality will depend on its capacity for policy formation and accountability, which itself will depend on having an effective parliament in place'.[991]

6.5. Political Parties

In transitional periods after taking down repressive regimes, people start to exercise rights which were not available before and establish political parties. The surrounding circumstances of establishing these parties greatly affect their future success. This idea is expressed by Shadi Hamid as follows:

> Party systems are products of a country's particular history. Over time, they become entrenched and self-sustaining. What happens at the start of the democratization process is not incidental, nor can it be easily reversed. This is what makes transitional periods particularly tense and polarizing. The stakes over a permanent constitution, separation of powers, and the role of religion in public life—in other words the very shape of institutions—are particularly high. And institutional frameworks are not easily changed.[992]

Since the presidential period of former President Anwar Al-Sadat, political parties have been extensively restrained by issuing laws tailored specifically to exclude certain opposition parties from the political battle. The provisions intended for exclusion stated the

[990] Völkel (n 986) 611-12.
[991] Zaid Al-Ali, 'The Arab Spring Constitutions: for Whose Benefit?' in Tom Ginsburg and Aziz Z. Huq (eds.), *Assessing Constitutional Performance* (Cambridge 2016) 389.
[992] Shadi Hamid, 'Political Party Development Before and After The Arab Spring' in Mehran Kamrava, *Beyond the Arab Spring: The Evolving Ruling Bargain in the Middle East* (Oxford University Press 2014) 131.

following (i) each party must have a program which is recognizable and different from the programs of other parties; (ii) it excluded any person who participated in political life before the revolution of 1952, either by membership in political parties or by holding ministerial position. Accordingly, members of the Wafd Party were restricted. However, this provision was then declared unconstitutional by the SCC; (iii) parties were not allowed to be formed on 'a class, religion, geographical, or on gender, ethnic or religious bases'. Based on this rule, the MB was restricted from forming a party with Islamic background;[993] (iv) anyone who objected Egypt's Peace Treaty with Israel was banned. However, this provision was then declared unconstitutional by the SCC because it violated freedom of expression;[994] and (v) it established a government affiliated committee which was entrusted with granting formation license for political parties. This committee was used to abort any trail to form a strong opposition party, and the license was usually granted through court order after filing a petition before courts.[995]

Despite the corruption of the process and the dominance of the governing regime, this shows the strength of the judicial body and its power to stand as guardian for human and political rights. However, elections laws usually included provisions tailored to facilitate competition for the ruling party and hardens it for opposition parties.[996] Due to these practices which continued during the periods of former Presidents Sadat and Mubarak, the political party's system became fragile. The development of parties and building strong roots in the Egyptian soil was always fought by the regime, killing any popularity for opposition. During Mubarak's regime, there was only democratic image with no real elections or political participation. Accordingly, there was some sort of political parties, but they were operating within the limits permitted by the government just for a democratic appearance in

[993] Ninette S. Fahmy, *The Politics of Egypt: State-Society Relationship* (Routledge, 2010) 67-72.
[994] Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (n 910)105.
[995] Fahmy (n 993) 67-72.
[996] ibid 67-72.

the international community.[997]

The most significant political actor who survived during these centuries is the MB. They have a unique strategy of gaining popularity. 'Most political parties, after all, do not double as states- within-states, with parallel networks of mosques, clinics, banks, businesses, daycare centers, and even Boy Scout troops. Islamist parties do'. [998] They give their most care to education, health, utilities, and other services sustainably for long periods, which broadens their sphere of supporters and makes them ready when allowed by the government to reflect this popularity in the ballot as votes.[999] Other political actors tried to raise their voices through syndicates and civil society and non-governmental organizations.[1000]

After the Arab Spring revolution in Egypt, many political parties were formed representing different sectors of the community. The political competition was in favor of Islamist parties, respectively the MB and the Salafist Group. These groups were more organized and managed to secure electoral majority. They took advantage of the division of other political players and their novelty which made their challenge more difficult to convince voters with their agendas in short time.[1001]

Following the ouster of Morsi, the MB was declared as a terrorist group. Its affiliated political party, namely the Freedom and Justice Party, was also dissolved by court order.[1002] Although this affected the pluralism of the political system, it is worth noting that sometimes the restriction of political rights is essential for public benefit. In case of Egypt, the restriction of the MB is essential for countering terrorism. Samuel Issacharoff states that:

> The international experience also cautions against readily assuming that any restraints in the political process necessarily lead to a collapse of democratic

[997] Hamid (n 992) 135, 139.
[998] ibid 131.
[999] ibid 131.
[1000] ibid 133.
[1001] ibid 145-146.
[1002] Sally Nabil, 'Egypt court bans Muslim Brotherhood's political wing' *BBC Arabic* (Cairo, 9 August 2014) <www.bbc.com/news/world-middle-east-28722935> accessed 17 November 2023.

rights or a fundamental compromising of democratic legitimacy.[1003]

Currently, the formation of political parties is a constitutional right guaranteed under the Constitution of 2014 which states that:

> Citizens have the right to form political parties by virtue of notification pursuant to the law. It is not allowed to exercise any political activity or form any political party according to religious basis or distinction based on sex, origin, sectarian, or geographical or exercise any political activity against democratic principles, in secret or which has military or quasi-military nature.[1004]
>
> Political parties cannot be dissolved except by virtue of judicial verdict.[1005]

6.6. Civil Society and Non-Governmental Organizations

Civil society organizations ("**CSOs**") and non-governmental organizations ("**NGOs**") play an important role in democratic communities. They form part of the opposition group and limit the powers of the government when they are given sufficient space and freedom to exercise their role.[1006] NGOs help in the enforcement of human rights through different approaches including (i) education by raising the awareness of the public about human rights; (ii) uncovering human rights violations committed by the government and publicizing it through the media to mobilize public opinion; and (iii) contribution in setting up policies and systems which are supportive to human rights.[1007] CSOs and NGOs can effectively influence transitional periods and help in the move from dictatorship towards

[1003] Issacharoff (n 905) 1467.
[1004] Article 74(1) of the Egyptian Constitution of 2014.
[1005] Article 74(2) of the Egyptian Constitution of 2014.
[1006] Emmanuel Gyimah-Boadi, 'Civil Society and Democratic Development' in Emmanuel Gyimah-Boadi (ed), *Democratic Reform in Africa: The Quality of Progress* (Lynne Rienner Publishers 2004) 99-100.
[1007] Vaibhav Goel and Manoj Kr. Tripathi, 'The Role of NGOs in The Enforcement of Human Rights: An Overview' (2010) 71(3) The Indian Journal of Political Science 787-788.

liberal democracy.[1008] Despite the occurrence of the Arab Spring revolution which could have been a great opportunity for CSOs and NGOs to flourish and take part in the transition, they failed to have a real influential role in Egypt.[1009]

Contrary to the original role of NGOs as opposition voice and human rights' fighters against the state's abuse of power, NGOs are used in 'liberalized autocracies' to create a façade democratic environment. 'Liberalized autocracies' are '[t]hese states, including many from the Middle East and North Africa, neither moved rapidly and painlessly to democracy nor fell back into outright authoritarianism'. In these states, NGOs are used by the regime to support its image rather than as a strong opposition tool.[1010]

The failure of CSOs and NGOs in Egypt is caused due to long history of restrictions and legal constraints by previous regimes.[1011] This section will detail the benefits of the current legal system governing CSOs and NGOs under the CSOs law no. 149 of 2019 (the "**Law 149**") and its Executive Regulations.[1012] Law 149 was preceded by more restrictive laws. Although the Law 149 is not free from criticism, it solved many problems of the previous laws. Accordingly, this section will analyze the current position of CSOs and NGOs under Law 149 in comparison to its predecessors.

The idea of CSOs started in Egypt in the 19th century in the form of charitable organizations administered by the royal family. During Nasser's presidential period, there were no active opposition groups neither in the form of political parties nor CSOs.[1013] Nasser revoked the articles of the Civil Law which provide for freedom of association leading to the dissolution and re-establishment of all operating NGOs after registration with the

[1008] Nermeen Kassem, 'Which civil society? State-run media and shaping the politics of NGOs in post-uprising Egypt' (2023) Policy Studies 1-2.
[1009] Catherine E. Herrold, 'NGO Policy in Pre- and Post-Mubarak Egypt: Effects on NGOs' Roles in Democracy Promotion' (2016) 7(2) Nonprofit Policy Forum 190.
[1010] ibid 192.
[1011] ibid 195.
[1012] Egyptian Ministerial Decree no 104 of 2021.
[1013] Mohamed Agati, 'Undermining Standards of Good Governance: Egypt's NGO Law and Its Impact on the Transparency and Accountability of CSOs' (2007) 9(2) International Journal of Not-for-Profit Law 58.

relevant administrative authority.[1014] The law governing CSOs at that time allowed excessive administrative interference in NGOs affairs.[1015] Administrative authorities were entitled to reject the establishment of NGOs and dissolve NGOs without the need to court judgment.[1016]

CSOs started to see the light concurrently with the wave of economic reform which took place around the latest years of Sadat's presidential period. However, CSOs' activism remained under restriction due to the absence of legislative reform. Nevertheless, there was a growing tendency towards recognition of some political rights and freedom of expression.[1017]

Under Mubarak's regime, the SCC revoked Law no. 153 of 1999 (the "**Law 153**") which was governing CSOs then. For background, Law 153 was preceded by discussions with coalition of CSOs' representatives to reach an agreement on the drafting of the provisions of the law. However, the outcome of these discussions was completely disregarded, and the government submitted another version of the draft law for the Parliament to approve.[1018] The SCC revoked Law 153 based on formal reason, which is the failure to present the law for the approval of one of the Houses of the Parliament. In its judgment, the SCC states 'the right to form civil society organizations is subsidiary to the right of association and this right shall be free, unilateral, and independent from interference by administrative authorities'.[1019]

NGOs were subject to harassment and surveillance by security bodies, mainly the State Security Investigation and the General Intelligence authorities. These authorities were so powerful and operated under the supervision of the President of the Republic benefiting

[1014] Rana Magdy Salah El Araby, 'The impact of legislation on NGO's role in programme delivery: the case of Egypt' (Master's Thesis, American University in Cairo 2019) 45.
[1015] Law no 32 of 1964.
[1016] Articles 12 and 57 of Law no 32 of 1964.
[1017] Agati (n 1013) 59.
[1018] ibid 60.
[1019] Case no 153 of 21J (Egyptian Supreme Constitutional Court).

from the vast powers granted by the Emergency Law. These security bodies were acting as a guardian to the regime silencing any dissent voices under the justification of protecting national security of the state. '[T]he greater the penetration of intelligence in society and the higher the level of autonomy they enjoy, the more independent they are, and in the most extreme act like a state within a state'.[1020]

NGOs were subject to regulation by the State Security Investigation more than by the Ministry of Social Solidarity, which is the competent authority for supervising NGOs. This included registration and funding requests, dissolution decrees and approvals for events. Each NGO was assigned to a specific officer of the State Security Investigation who contacts it regularly to get updates on the management and activities of the NGO.[1021] On the other side, sometimes the interference of security officers had its bros, whereby the security officers helped NGOs by doing them favors and facilitating procedures through their connections. Some of the NGO representatives testified that security officers were also decent in their interaction and had integrity and, for instance, never accepted bribery.[1022]

It is worth mentioning that the NGOs were working in an environment where they were given a space, but they were not allowed to cross the lines. The tough part of the story is that they were not aware of the exact boundaries which separate the green from the red line. Accordingly, they were to expect the State Security Investigation officers to turn around and crack them at any given time with no prior alert. This restricted freedom for NGOs was granted to bolster the democratic image of the regime in the international community. [1023]

However, NGOs managed to stand in front of the government not only by uncovering its abuses and stirring public opinion but also by judicial means. The leading NGO which managed to be the first to file a lawsuit before the SCC is the Center for Human

[1020] Mariz Tadros, 'The securitisation of civil society: a case study of NGOs–State Security Investigations (SSI) relations in Egypt' (2011) 11(1) Conflict, Security & Development 82-84.
[1021] ibid 90-91.
[1022] ibid 92.
[1023] ibid 94, 97.

Rights Legal Aid (The "**CHRLA**"). The CHRLA pursued this route and filed hundreds of cases challenging laws and government acts, in addition to providing legal advice to injured persons. Subsequently, other NGOs followed the path of the CHRLA, and specialized NGOs emerged focusing for example on women's rights or land issues, to provide legal aid and consultancy to people suffering from human rights violations.[1024] The CHRLA director explained its judicial approach by stating that 'in Egypt, where you have a relatively independent judiciary, the only way to promote reform is to have legal battles all the time. It's the only way that we can act as a force for change'.[1025]

This statement sheds light on two important aspects in this chapter. Firstly, the significance of the judiciary through history as guardian of human rights and effective accountability tool to the government. Secondly, the importance of horizontal accountability in scrutinizing the government. The work of NGOs along with courts succeeded to expose the government and make a difference by challenging laws. Accordingly, what has been impossible to achieve through the NGO solely became possible with the aid of the judiciary.

Subsequently, the law no. 84 of 2000 in relation to CSOs (the "**Law 84**") was promulgated. This law was less restrictive than its predecessors, but it did not remove restrictions completely. Despite the diversity of the operating CSOs including charity, environmental, and human rights organizations, they remained weak given Mubarak's control over any opposition against his regime.[1026] The Law 84 required NGOs to be registered with the Ministry of Social Solidarity, which had the right to reject registration with a broad discretionary power. The Ministry of Social Solidarity was also entitled to review NGOs articles of incorporation and make modifications or erase articles which might be contrary to the law. NGOs were also monitored by the State Security Investigation which

[1024] Mostafa, 'Law and Resistance in Authoritarian States' (n 945) 150.
[1025] ibid 151.
[1026] Agati (n 1013) 59-60.

exercised much interference with the work of NGOs under security justifications.[1027]

The Law 84 was followed by the law no. 70 of 2017 (the "**Law 70**") which was similarly subject to much criticism and was finally revoked as well.[1028] The government formed a committee to gather all points of criticism directed to Law 70. The role of the committee was to collaborate with CSOs' representatives to discuss on the proposed amendments to the Law 70 to fulfill the requirements of freedom of association and freedom of expression and avoid the drawbacks of the Law 70 in drafting the new law. Based on these efforts, the current Law 149 was issued.[1029]

The Law 149 allows founders to establish NGOs by virtue of mere notification.[1030] However, the Ministry of Social Solidarity retains the right to stop the activities of an NGO or revoke its registration within 60 days of notification if any of its activities violates the law or the Constitution or if the required documents are not fulfilled.[1031] This development is in accordance with the Constitution of 2014, which states that:

> Citizens shall have the right to form civil organizations or institutions according to democratic basis, which shall acquire juristic personality upon notification.[1032]
>
> It shall exercise its activity freely, without interference from administrative authorities or dissolving it or its board of secretaries except by virtue of judicial verdict.[1033]
>
> It is not allowed to establish or to maintain any civil organizations or institutions with clandestine activity or system, or which has military or

[1027] ibid 63.
[1028] Casey Jedele, 'Domestic Restrictions on Non-Governmental Organizations and Potential Protections through Legal Personality: Time for a Change?' (2020) 21(1) Chicago Journal of International Law 126.
[1029] 'The Law on Regulating the Exercise Civil Work and its Executive Regulations: Main Features, Supreme Standing Committee for Human Rights' (*Supreme Standing Committee for Human Rights (SSCHR),* 2021) 3.
[1030] Article 2 of Egyptian Law no 149 of 2019.
[1031] Article 9 of Egyptian Law no 149 of 2019.
[1032] Article 75(1) of the Egyptian Constitution of 2014.
[1033] Article 75(2) of the Egyptian Constitution of 2014.

quasi-military nature, in accordance with the law.[1034]

One of the most important enhancements introduced in the Law 149 is the absence of imprisonment penalty and its replacement with fines. The fines might be high in value but still this improvement is in line with the aim to create an environment of liberty and freedom, whereby nobody shall be imprisoned due to their civil society activities.[1035] The Law 149 also permits NGOs to receive foreign donations after obtaining administrative approval. Foreign donations were restricted under previous laws. If the administrative authority does not respond to the request for funding approval, its silence shall be considered as approval. In previous laws, failure to respond by the administrative authority was considered rejection. Additionally, the Law 84 reduced the waiting period for obtaining approval after submission of an approval request.[1036] The Law 149 was praised by the representative of the US embassy in Cairo, Thomas Goldberger, stating that 'the Law 149 is a step in the right path towards the empowerment of the civil society to play a role in the society, thus states must allow civil society to participate and play a successful role'.[1037]

In practice, the suffocation of NGOs was loosened after the Arab Spring revolution in 2011. There was an atmosphere of freedom, and many NGOs made use of this opportunity and started to carry out its activities more openly, initiate new projects, and establish collaborations among each other. NGOs exercised lower levels of self-censorship due to the temporal absence of regime control over NGOs.[1038] Shortly in the same year, the Ministry of Social Solidarity founded a governmental committee to inspect licenses and funding of NGOs. The outcome of the committee's inspection showed that '39 Egyptian and

[1034] Article 75(3) of the Egyptian Constitution of 2014.
[1035] '2019 Civil Society Organization Sustainability Index: For the Middle East and North Africa' (*United States Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Assistance, and Center of Excellence on Democracy, Human Rights and Governance*, 2020) 9.
[1036] Supreme Standing Committee For Human Rights (SSCHR), 'The Law on Regulating the Exercise Civil Work and its Executive Regulations: Main Features, Supreme Standing Committee for Human Rights' (2021) 7.
[1037] Engy Magdy, 'القائم بأعمال السفارة الأمريكية: قانون الجمعيات الأهلية خطوة فى الاتجاه الصحيح' (The Representative of the US Embassy: the NGOs Law is a Step in the Right Direction)' *Youm 7* (17 July 2019) <www.youm7.com/story/2019/7/17/القائم-بأعمال-السفارة-الأمريكية-قانون-الجمعيات-الأهلية-خطوة-في-الاتجاه/4337711> accessed 17 November 2023.
[1038] Herrold (n 1009) 189-190.

international NGOs that were operating without a license, 28 Egyptian NGOs that were receiving foreign funds illegally, and several other NGOs that were engaging in political activities that violated Law 84 of 2002'.[1039] Accordingly, the government applied penalties against violating NGOs including closing offices, imprisonment of employees, and seizure of assets.[1040]

6.7. Media

Media is a crucial component of any society. It has many roles including making information available to public, education and raising awareness about different topics, forming public opinion and most importantly it represents, when it is strong enough, a form of public accountability tool. That is why media's ownership diversity and press freedom are essential.[1041] Press freedom is guaranteed under the Constitution of 2014 which states:

> Freedom of paper, visual, audio, and electronic press, printing, and publication is guaranteed. Every Egyptian, whether natural or juristic or public or private person, shall have the right to own and issue newspapers and establish visual, audio, and digital media outlets.
>
> Newspapers are issued upon notification in accordance with the law (...).[1042]

Accordingly, the Press Law no. 180 of 2018 (the "**Press Law**") acknowledges freedom of the press. It also prohibits the restriction of the press and the media by any means either by confiscation, suspension, or closure, except in cases of war or general mobilization.[1043] However, for national security considerations, publication, newspapers or other media forms abroad could be restricted locally.[1044] 'Journalists and media figures are

[1039] ibid 203.
[1040] ibid 203-04.
[1041] Zahraa Badr, 'More or More of the Same: Ownership Concentration and Media Diversity in Egypt' (2021) 26(4) The International Journal of Press/Politics 788.
[1042] Article 70 of the Egyptian Constitution of 2014.
[1043] Article 3 of the Egyptian Press Law no 180 of 2018.
[1044] Article 4 of the Egyptian Press Law no 180 of 2018.

independent'.[1045] Journalists shall not be held liable for their opinions or correct pieces of news and they cannot be forced to declare their sources.[1046] Except for national security reasons and the defense of the state, the Press Law guarantees freedom of information for newspapers.[1047] The Press Law has been criticized for the lack of definition of national security. The same criticism was previously directed to the Anti-Terrorism Law. Again, the issue in the use of the term 'national security' is that its broad meaning could be misused by the administrative authority to silence dissent or restrict freedom of expression without justification.[1048]

The SCC has a leading role in ensuring press freedom. It has many judgments declaring unconstitutionality of laws due to inconformity with the constitutional guarantees of press freedom.[1049] For example, the SCC annulled article 123 of the Egyptian Criminal Procedures Law due to its violation of the right to criticize public officials or public work without undue restrictions and the right of free press and freedom of expression. Article 123 required that anyone who publishes something which contains libel and allegations affecting the reputation of a public official or any person undertaking public work, must present a proof of such allegations within five days from notification. If the publisher failed to commit to the five days' timeline, he losses the right to present such proof afterwards which violates his right of defense and leads definitively to his accusation.[1050]

The SCC confirmed that this article contradicts with the constitutional guarantees of the right to express opinions freely and to evaluate the work of public officials and to spotlight their malfunction or abuse of power. Public officials remain accountable to the public and their work cannot be immunized against public opinion given that they derive

[1045] Article 7 of the Egyptian Press Law no 180 of 2018.
[1046] Article 8 of the Egyptian Press Law no 180 of 2018.
[1047] Article 10 of the Egyptian Press Law no 180 of 2018.
[1048] Hussein Amin and Rasha Allam, 'Media Policy in Egypt: Past Performance, Current Situation and Future Strategies' (2022) 1(2) The International Journal of Public Policies in Egypt 70.
[1049] Mostafa, 'Law and Resistance in Authoritarian States' (n 945) 149.
[1050] Case no 37 of 11J dated 6 February 1993 (Egyptian Supreme Constitutional Court).

their authority from public delegation through democratic ways. The SCC held that the short period of five days is not reasonable and hinders the press role of scrutinizing the government.[1051]

Before the Arab Spring revolution in 2011, the newspapers were owned by the state with a minority privately owned newspapers which focuses on day-to-day social topics without going into politics. On the other hand, private TV channels were introduced after the launch of the satellite in Egypt. However, the channels were owned either by the state itself or by pro-regime businessmen and accordingly diversity was undermined or may be just apparent without real existence of diverse competitors in the media field. The MB started to own channels after 2011, which were closed after removing former president Morsi from power in 2013.[1052]

Accordingly, the Constitution of 2014 came to confirm the importance of diversity of the media and to protect the right of equal opportunity for all to communicate with the public through media sources.[1053] The Press Law also includes restrictions on the ownership of multiple media outlets and TV channels to combat monopoly.[1054] Currently, the biggest stakes of ownership of media are mainly distributed between the state and a private company named United Media Services ("**UMS**"), which has other subsidiaries in the same field. Besides those main competitors, there are other minority players which own one or two media outlets. It is worth noting that the state and UMS are partners in some of the outlets which might make them share common ownership interest and as a result undermine the diversity aspect.[1055] Alternatively, social media platforms and internet websites attract those who are underrepresented in other media platforms where they can have wider opportunity

[1051] ibid.
[1052] Badr (n 1041) 775.
[1053] Article 72 of the Egyptian Constitution of 2014.
[1054] Badr (n 1041) 776.
[1055] ibid 788.

for their representation.[1056]

By 2006, social media started to situate itself as a substantial media source capable of intensive political mobilization. Esraa Abdelfattah, who was a new political activist, created an event on Facebook calling people to demonstrate in solidarity with workers to improve their work conditions. This was clear when almost seventy thousand people responded to the event within two weeks of its creation and the number of demonstrators was unprecedented for a long time.[1057] The political activism on the internet and in the streets reached its peak in 2011 during the Arab Spring revolution and the ouster of Mubarak and subsequently Morsi.

The Press Law requires obtaining a license before creating a digital website from the Supreme Council for Media Regulation (the "**SCMR**").[1058] The Press Law also entitles the SCMR to block websites or social media accounts which publish fake news.[1059] These provisions were also criticized for the limitation of the licensing requirement and the censorship and blocking tool granted to the SCMR. On the other side, there are some supporters of these restrictions claiming that controlling the spread of false news has significant importance. This is especially in a country with low level of awareness of the internet user which might affect security and cause chaos.[1060]

The Supreme Administrative Court clarifies the following in relation to the criteria which should be used in blocking websites:

> A distinction must be made between infringement of personal rights and infringement of society, its security and safety. Although both are abhorrent and unacceptable as per the divine laws, the provisions of the Constitution

[1056] ibid 791.
[1057] Charles Hirschkind, 'New Media and Political Dissent in Egypt' (2010) 65(1) Revista De Dialectologia Y Tradiciones Populares 138.
[1058] Article 6 of the Egyptian Press Law no 180 of 2018.
[1059] Article 19 of the Egyptian Press Law no 180 of 2018.
[1060] Amin and Allam (n 1048) 70-71

> and the law, the prevention of infringement of personal right is guaranteed through criminal or civil litigation or both (...). While infringement on safety and security of the society cannot be prevented except by closing the source of the risk, whether an internet website or otherwise.[1061]

The Court of Administrative Justice also confirms the following:

> Freedom of opinion is not dependent on the correctness of opinions or its conformity with the common direction of opinions in a specific environment, or the practical benefit of it. By the guarantee of freedom of expression, the constitution aimed at the dominance of its concepts in all the aspects of life in a way that prevents public authority from imposing its guardianship on the public opinion. So that the criteria of the public authority shall not be considered a reference for evaluating opinions related to the formation of public opinion, nor an obstacle for its flow. Therefore, freedom of expression and the interaction of opinions through various means of communication may not be prevented, banned, withheld, or even restricted by closure that impedes its exercise.[1062]

The media sector has gone through several legislative and structural modifications after the Arab Spring revolution in 2011. The Ministry of Information, which was responsible for media regulation and supervision, was repealed in 2014 as response to the revolution's demands. The SCMR replaced the Ministry of Information to guarantee the independence of the media regulator from the government.[1063]

Some scholars argue that the media system in Egypt is neither authoritarian nor libertarian, rather it can be described as transitional. However, due to multiple political and

[1061] Case no 10171 of 54J (Egyptian Supreme Administrative Court).
[1062] Case no 55337 of 68J (Egyptian Court of Administrative Justice).
[1063] Amin and Allam (n 1028) 67-68.

legislative changes recently affecting this sector, it is not clear which route it is heading towards. The system has both factors of freedom of expression and government control.[1064] Since the Arab Spring revolution in 2011, the credibility of public and private media declined. This is also reflected in the decrease in the selling rates of newspapers.[1065]

6.8. International Organizations and International Community

Egypt is always keen on maintaining a good human rights reputation in the global world. To pursue this goal, Egypt is very active in participating in international initiatives and ensures good representation in most of the international human rights events. Egypt has also entered into most of the UN human rights conventions. It has submitted three reports in the course of the UN Universal Periodic Review (the "**UPR**"), the last of which was in 2019. Egypt was also one of the founding states of the UN.[1066] On the African level, Egypt has acceded to the African Charter on Human and Peoples' Rights (the "**African Charter**").[1067] Current President Abdul fattah El-Sisi has recently commented on human rights in Egypt and noted that:

> Egypt should not be judged by criteria of human rights prevalent in Western countries such as France and the United States (US), but should be judged according to its own specific conditions, particularly its engagement in the fight against terrorism and the mobilization of resources to provide health, education and housing to the Egyptian people. President Sisi stressed that human rights are not limited to civil and political rights, but include economic and social rights such as the right to housing, medical care, education and

[1064] Rasha Allam, 'Constructive Journalism in Arab Transitional Democracies: Perceptions, Attitudes and Performance' (2019) 13(10) Journalism Practice 1274-76.
[1065] ibid 1277-78.
[1066] Mustapha Kamel Al-Sayyid, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level in Egypt' in Christof Heyns, Frans Jacobus Viljoen, and Rachel Murray (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On* (2nd edn, Brill/Nijhoff 2024) 358-59.
[1067] 'List of Countries which Have Signed, Ratified/Acceded to The African Charter on Human and People's Rights' (*African Union*, 15 June 2017).

employment.[1068]

Arab states have been subject to intensive terrorism since and even before the events of 9/11. Accordingly, Arab states were at the forefront in taking steps towards regional fight of terrorism. All the Member States of the Arab League, including Egypt, signed the Arab Convention on The Suppression of Terrorism of 1998 (the "**Arab Convention**").[1069] On the African front, the African Union took some counter-terrorism initiatives as well. The African Union issued the Convention on the Prevention and Combating of Terrorism 1999.[1070] Egypt signed this convention in 1999 and ratified it in 2001.[1071] The African Union issued the Protocol to the Convention on the Prevention and Combating of Terrorism 2004.[1072] However, Egypt has not signed it until now.[1073]

The definition of terrorism included in the Arab Convention has been subject to criticism. It has been argued that the definition is very broad that it could adversely affect human rights, and specifically, freedom of expression and association. The definition does not require spreading fear or terror, which is one of the main characteristics of terrorism and its absence could lead to equating terrorism with ordinary crimes.[1074] Although the Arab Convention excludes acts committed against foreign occupation for the purpose of liberation, regardless of the means used, it does not include similar exclusion for acts committed against dictatorship.[1075]

It has been noticed that most of Arab states frequently refer to the Arab Convention in their reports to the UN Security Council Counter-terrorism Committee (the "**CTC**").

[1068] Al-Sayyid (n 1066) 359.
[1069] Lynn Welchman, 'Rocks, hard places and human rights: anti-terrorism law and policy in Arab states' in Victor V. Ramaj and others (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012) 622.
[1070] Cephas Lumina, 'Counter-Terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice' (2007) 7(1) African Human Rights Law Journal 41.
[1071] 'List of Countries which Have Signed, Ratified/Acceded to the OAU Convention on the Prevention and Combating of Terrorism' (*African Union*, 15 June 2017).
[1072] Lumina (n 1070) 41.
[1073] 'List of Countries which Have Signed, Ratified/Acceded to the Protocol to the OAU Convention on the Prevention and Combating of Terrorism' (*African Union*, 15 June 2017).
[1074] Welchman (n 1069) 630.
[1075] ibid 631.

Given that the Arab Convention itself suffers from inaccuracy and broadness, it might fail to achieve accountability of state authorities towards the international community. Rather, due to the lack of precision of the definition of terrorism, Arab states would be able to justify their acts under the Arab Convention's provisions.[1076]

The CTC is established by virtue of the United Nation Security Council's resolution 1373 (2001) to monitor the implementation of the resolution by Member States. The resolution is concerned with (i) preventing financing of terrorism; (ii) promoting exchange of information to facilitate capturing terrorists; (iii) securing borders; (iv) ensuring law enforcement; and (v) complying with human rights standards.[1077]

Member States provide reports on their progress in relation to the CTC's focus areas and reply on the CTC's inquiries in this regard. This is a good international accountability tool provided by the UN Security Council, and it appears that Egypt has been keen to remain committed to reporting. Egypt has provided annual reports from 2001 until 2006 to the CTC. However, unfortunately the UN Security Council decided to stop the publication of Member States' reports in 2006.[1078] The CTC also provides technical assistance to member states. The CTC has offered Egypt, based on its request, training schemes in relation to combating financing of terrorism.[1079] The CTC determines the needs of each state and communicates with donor states to coordinate providing assistance based on the available resources.[1080]

It has been argued that the CTC, especially in its first years of operation, has not put significant pressure or exercised sufficient scrutiny in relation to human rights violations committed by member states in the course of countering terrorism. This has been obvious

[1076] Joe Stork, 'Human Rights Crisis in the Middle East in the Aftermath of 11 September' in Ashild Kjok (ed), *Terrorism and Human Rights after September 11: Towards A Universal Approach for Combating Terrorism and Protecting Human Rights* (Cairo Institute for Human Rights Studies 2002) 46.
[1077] United Nation Security Council's resolution 1373 (2001).
[1078] 'Member States National Reports: Reports by Member States pursuant to Security Council resolution 1373 (2001)' (United Nations: Security Council – Counter-Terrorism Committee (CTC): Counter-Terrorism Committee Executive Directorate (CTED)).
[1079] Ellen Margrethe Løj, 'Letter dated 30 May 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council' (S/2006/351) 3.3.
[1080] Luis Miguel Hinojosa-Martínez, A Critical Assessment of United Nations Security Council Resolution 1373 in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014) 639.

when comparing the practice of review by the UN Human Rights Committee (the "**UNHRC**"), which is established under the International Covenant on Civil and Political Right, with that of the CTC. It has been noticed that human rights concerns flagged by the UNHRC were ignored by the CTC. For instance, in Egypt's 2002 report, the UNHRC commented on human rights risks associated with the definition of terrorism under the Egyptian Penal Code. However, the CTC was silent on this issue while reviewing Egypt's report of 2001.[1081]

Indeed, the CTC was convinced at the beginning of its operation that human rights issues are not within its jurisdiction. Accordingly, the CTC refused to appoint experts in human rights. However, this practice did not last for long. Since 2006, the CTC started to cooperate with other UN human rights bodies and included experts in human rights within its members, which enhanced its attention to human rights issues.[1082] One of the CTC's focus areas in human rights field is the definition of terrorism and the criminalization and regulation of incitement of terrorism and its negative effect on freedom of expression.[1083]

In its last report on Egypt dated 14 April 2023, the UNHRC reiterated its concerns in relation to the broadness and vagueness of the definition of terrorism under the Egyptian Anti-Terrorism Law. The UNHRC recommended that the state should revise such definition to comply with the principle of the rule of law which requires reasonable degree of certainty and predictability. The UNHRC noted that the current drafting of the definition of terrorism could restrict opposition, academics, lawyers, journalists, …etc. The UNHRC also commented on the death penalty, which is set for many terrorist crimes, which needs revision as well given the severity of such penalty. The UNHRC urged the state to ensure

[1081] George Andreopoulos, 'Whither accountability? Counter-terrorism and human rights at the United Nations Security Council' in Alison Brysk and Michael Stohl (eds), *Contracting human rights: crisis, accountability, and opportunity* (Elgar Studies in Human Rights 2019) 144-45
[1082] Hinojosa-Martínez (n 1080) 638.
[1083] ibid 638-39.

due process and avoid unauthorized detentions.[1084] On the other side, the UNHRC praised the establishment of the National Council for Human Rights, which was founded in 2003. However, it recommended further actions to guarantee its independence from government.[1085]

Although the UNHRC is taking more active role in defending human rights than the CTC, it still failed to put enough pressure on Egypt to revise the definition of terrorism since its comments on the Egyptian Penal Code in 2002. Despite these comments, Egypt adopted similar broad definition of terrorism in the Anti-Terrorism Law in 2015, which still in force until now. This highlights the slow impact of transnational accountability tools due to state's sovereignty.[1086] The issue of sovereignty might also justify Egypt's position in relation to the African Court on Human and Peoples' Rights (the "**African Court**"). While Egypt was one of the first states signing the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights in 1999, but it has not ratified it yet.[1087]

It has been noticed that Egypt's commitment to duly submit requested reports by the UN review bodies has been enhanced since 2020. The number of submitted reports has increased more than in the preceding years. It is suggested that the reason behind this development is the establishment of the Supreme Standing Committee for Human Rights (the "**SSCHR**"), which is subsidiary to the Ministry of Foreign Affairs.[1088] The SSCHR is established by virtue of Prime Minister Decree no. 2396 of 2018, to promote cooperation with regional and international human rights institutions. This includes managing the reporting to the UN Special Procedures and the African Commission on Human Rights and

[1084] 'Concluding observations on the fifth periodic report of Egypt' (Human Rights Committee, 14 April 2023, CCPR/C/EGY/CO/5) Para 13.
[1085] ibid Para 5.
[1086] Al-Sayyid (n 1066) 387.
[1087] 'List of Countries which Have Signed, Ratified/Acceded to The Protocol to The African Charter on Human and Peoples' Rights on The Establishment of An African Court on Human and Peoples' Rights' (*African Union*, 14 February 2023).
[1088] Al-Sayyid (n 1066) 369.

analyzing their recommendations then following up with relevant governmental bodies on its implementation.[1089]

6.9. Conclusion

The SCC in Egypt plays significant role in the supervision of the constitutionality of laws. The SCC can strike down unconstitutional laws in the effect of rendering these laws null and void. Judgments of the SCC are binding on the government and the Parliament. The SCC's independence which has been developed gradually situates it in a strong position vis a vis the government, which conserves the ability of the SCC to undertake its role and limits the powers of the government. Based on this, the SCC in specific and the judiciary in general can be considered the first tool on the list of solutions for achieving the balance between security and liberty. The vague provisions of the Anti-Terrorism Law could face its end whenever the SCC renders a judgment in the underlying case since 2018, which challenges the constitutionality of the Anti-Terrorism Law. This long-awaited judgment is the hope for a first step in the legislative reform plan. Until then, the burden will remain on courts to achieve the balance between security and liberty in light of the broad provisions of law and to establish a uniform moderate approach in trying this type of cases.

The military has also positioned itself in the political scene as a very strong, powerful, and influential institution. It proved its loyalty several times and gained the trust of the people. The influence of the military raises at times of unrest and currently it has a significant role in the fight against terrorism. In addition, the military was able to form coalition with the judiciary and exercise horizontal accountability over Morsi's government until it managed to finally take him down.

Despite the constitutional theoretical powers granted to the Parliament to supervise

[1089] 'Vision & Main Objectives' (*The Supreme Standing Committee for Human Rights (SSCHR)*).

and evaluate the government's acts, the Parliament has failed during the past years to effectively undertake its responsibility and accordingly cannot be considered in its current form as a pressure tool over the government. Likewise, although political parties usually are the main political influencers in democracies, political parties in Egypt are currently very weak which makes them unable to put any significant pressure over the government. The decades of oppression left a poor environment of competing political parties which lack sufficient qualifications to have voice, or popularity to support this voice. The pollical parties' environment in Egypt needs to develop for a better system of political influence which could enhance the protection of human rights and maintain the balance between security and freedoms. Similarly, the media is still in transition. There is no active role of the media which could be considered as a tool of accountability of the government. The diversity of the media ownership needs to be enhanced. On the contrary, social media could be considered more effective as an influential political tool than ordinary media sources.

Finally, international organizations and international courts take proactive initiatives in counter-terrorism and human rights domains. However, lack of coercion of these institutions stands as the biggest obstacle in its route of success. Accordingly, it could be very productive in enhancing states' practices, but only if these states decide to cooperate and commit. The main pressure which these institutions rely on is negatively affecting the international reputation of the country, which in some cases pays off.

Therefore, the judiciary and the military are the most powerful and influential actors in politics in Egypt. They have the abilities to hold the Executive accountable and protect human rights against abuse. Currently, the balance between national security and human liberty could be sought through these institutions. The ultimate aim is to develop other institutions and actors to enable them to exercise effective horizontal accountability of the Executive. The stronger the institutions capable of enforcing horizontal accountability, the

more balance should be.

I may conclude with quoting the comment of the political scientist, Nathan Brown, on Egypt's transition saying:

> [T]hose who build a democracy for the first time must do so on foundations that autocracy has built. Getting rid of autocrats is easier than getting rid of their structures or erasing the stains on political practice that autocrats have left behind. Egypt's post- 2011 politics has not overcome the legacy of the past.[1090]

[1090] Nathan J. Brown, 'Egypt's Failed Transition' (2013) 24(4) Journal of Democracy 55.

CHAPTER SEVEN

COMPARATIVE CONCLUSIONS

7.1. Introduction

Comparative constitutional law has traditionally focused on developed democracies, giving less attention to the experiences of countries in the 'Global South'.[1091] Ran Hirschl described countries of the 'Global North' as the 'usual suspects' of comparative constitutional law.[1092] However, in the field of comparative counter-terrorism law, it is both useful and informative to study the evolution of constitutional law in diverse environments, including in developed, transitional, and underdeveloped states.[1093] Particularly when studying comparative counter-terrorism law, it is important to bear in mind that counter-terrorism policy in the UK is partly dependent on, and interrelated to, what goes on in countries like Egypt, especially in relation to detention and deportation of terrorist suspects. As Kent Roach observed:

> The full story of how constitutional and international rights norms have fared in countries such as the United States, the United Kingdom and Canada in the wake of 9/11 cannot be told without examining what happens in the prisons and military courts of Cairo and Damascus.[1094]

The purpose of my thesis is to analyse and compare the different approaches to balancing criminalizing encouragement and incitement of terrorism against the protection of freedom of expression in both the UK and Egypt. The previous chapters sought to examine each jurisdiction and set out the building blocks on which this final comparative chapter is based. This includes a study of key constitutional principles such as the separation

[1091] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 192-93.
[1092] ibid 192-93.
[1093] Kent Roach, 'Comparative constitutional law and the challenges of terrorism law' in Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar 2011) 538.
[1094] ibid 546.

of powers, proportionality, accountability, judicial independence, and the rule of law.[1095] In drawing some comparative conclusions, this thesis is cognizant of the significant differences between the UK and Egypt, such as the contrast between the UK's established democratic order and Egypt's transitional status. It also appreciates the differences between the UK's common law system in contrast to Egypt's civil law system. Rather, these differences were the inspiration of the comparison from the beginning in pursuit of creative conclusions. Accordingly, it has been crucial to remain aware of these differences and avoid falling into the trap of easy transplantation.

Therefore, the recommendations suggested in this chapter do not assume that what works in the UK shall definitely work in Egypt. However, I remain attentive to the characteristics of each jurisdiction and that is why I adjust some features of the recommended mechanisms to accommodate the variations between the UK and Egypt. In this context, the words of comparative counter-terrorism scholar, Laura Donoghue, are apt:

> In both substantive and geographic transplantation, prudence dictates not that such transplantation never occur, but that such measures be considered in their original constitutional, legal, political and instrumental context and, equally carefully, in the context of the particular realm to which they are being transferred.[1096]

In this chapter, I will extract some key takeaways from the comparison between the UK and Egypt, highlighting the pros and cons of each system. I also analyze some effective accountability mechanisms used in the UK, showing how they could be applied in Egypt. This includes identifying mechanisms which are effective in the UK but may fail to achieve the same progress in Egypt due to the differences in political, economic, and cultural

[1095] Andrea Pin, *Religious Freedom without the Rule of Law: The Constitutional Odysseys of Afghanistan, Egypt, and Iraq and the Fate of the Middle East* (Brill 2024); Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-terrorist Judicial Review* (Cambridge University Press 2014).
[1096] Laura K. Donohue, 'Transplantation' in Victor V. Ramraj, Michael Hor, Kent Roach, George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press. 2012) 86.

contexts. I suggest some modifications to fit the Egyptian system. Additionally, I canvas Egypt's achievements in the field of counter-terrorism law – ones which could inspire the UK in the field of deradicalization of terrorists. I suggest cooperation protocols between the UK and Egypt. Finally, I recommend some possible enhancements of counter-terrorism laws in each jurisdiction based on the comparative study conducted in previous chapters.

7.2. Judicial Influence in The UK and Egypt

The role of courts in established democratic countries like the UK, differs from that in transitional democracies or those which have suffered from authoritarian rule.[1097] There is sometimes a big weight of constitutional responsibility resting on courts in authoritarian regimes.[1098] In the transition from authoritarian to democratic government, the new constitution can burden the constitutional court with the task of ensuring the conformity of old authoritarian laws with the new democratic constitutional understandings.[1099]

Leading comparative constitutional lawyer, Tom Ginsburg, argues that courts in democratic regimes undertake more functions than courts in authoritarian regimes.[1100] The reason offered is that police forces and prosecutions in dictatorships are subject to less accountability and judicial review than those in democratic regimes. Accordingly, when a state is in transition from authoritarianism to democracy, courts incur more responsibility to scrutinize remnants of the old authoritarian regime which possess power in the hierarchical administrative system of the state. This role is crucial to prevent the collapse of transition and return of the old regime.[1101]

This also supports the claim that judges can play an enlarged role in transitional

[1097] Tom Gerald Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders* (Cambridge 2019) 1.
[1098] ibid 1.
[1099] ibid 6.
[1100] Tom Ginsburg, 'The Politics of Courts in Democratization' in James J. Heckman, Robert L. Nelson, and Lee Cabatingan (eds), *Global perspectives on the rule of law* (Routledge 2010) 183.
[1101] ibid 183.

democracies. However, there is not only one scenario of transition. Tom Ginsburg explored four different scenarios for the role of courts in transition which are as follows: (i) supporting the authoritarian regime; (ii) supporting the democratization process; (iii) initiating opposition and confronting with the authoritarian regime, which is not common in practice; or (iv) having no role either by supporting or opposing.[1102] I hereby refer to the scenario of courts buttressing and supporting the democratization process, given that this is the relevant scenario to my case study of Egypt, in which courts play an active role supporting transition.

There are additional factors which strengthen or undermine the ability of courts to act as a guarantor of transition to democracy in post-authoritarian states. First, the greater the independence of the judiciary in an authoritarian regime, the greater the role it can play as a guarantor of transition.[1103] Second, judicial activism requires social support from different actors like, civil society organizations, media, political parties and government support. This support is essential to strengthen the position of courts against agents of the authoritarian regime.[1104]

Much hope is placed on the shoulders of constitutional courts for achieving democracy after authoritarian rule. However, by analysing history and examining what happened in many states in Europe and Africa, it is found that reality disappoints high expectations of constitutional courts as pro-democratic actors. This does not mean that constitutional courts have no influence on democratization, but that its role is much less than what is expected from it. Even in some of the failed democratization processes, there was sufficient judicial review of human and constitutional rights.[1105]

Reflecting on Egypt, it is clear from previous chapters that the Supreme

[1102] ibid 184.
[1103] ibid 190.
[1104] ibid 190.
[1105] Daly (n 1097) 104-05; Ginsburg (n 1100) 50; Irwin P. Stotzky, 'Lessons Learned and the Way Forward' in Roberto Gargarella, Siri Gloppen and Elin Skaar (eds), *Democratization and the Judiciary: the Accountability Function of Courts in New Democracies* (Routledge 2004) 202.

Constitutional Court (the "**SCC**") of Egypt has played a prominent role in the Egyptian history as a guarantor of the rule of law and constitutional rights.[1106] The leading role of the Egyptian SCC was especially clear in the transitional period after the Arab Spring.[1107] Nevertheless, the Egyptian SCC, until now, does not seem to have similar influence in relation to the field of counter-terrorism. It is not clear whether the court is following a non-confrontation policy,[1108] or whether it agrees with the government's approach in adopting broad provisions of the Egyptian Anti-Terrorism Law no. 94 of 2015 (as amended) (the "**Anti-Terrorism Law**"), which might negatively affect constitutional rights. In my opinion, the court might be avoiding confrontation because it is reluctant to issue a decision in the underlying case, which challenges the constitutionality of the Egyptian Anti-Terrorism Law, as this case has been ongoing since 2018.[1109] I assume that if the Egyptian SCC had strong grounds for dismissing such petition, it would have expectedly done so and expedited the process. But the reason behind this delay could be that the court might be avoiding the issuance of unfavourable judgment to the government, following a non-confrontation approach which has been previously adopted by the SCC in other controversial cases. Historically, the SCC avoided aggressive confrontation with the regime, which could lead to diminishing its judicial review powers. The SCC previously confirmed the constitutionality of the State Security Courts and dismissed the petitions submitted in relation to the constitutionality of civilians' trials before the Military Courts to avoid excessive opposition of the regime.[1110] However, it is worth noting that the delay in court proceedings is a usual feature of the Egyptian judiciary, whereby cases could take years in courts before receiving a final judgment. Accordingly, such delay could also be non-

[1106] See Chapter 6, Section 6.2.
[1107] See Chapter 3, Section 3.2.1.
[1108] Tamir Moustafa, 'Law versus the State: The Judicialization of Politics in Egypt' (2003) 28(4) Law & Social Inquiry 903.
[1109] Case no 31 of 40J (Egyptian Supreme Constitutional Court).
[1110] Tamir Mostafa, *The Struggle for Constitutional Power* (Cambridge University Press 2009) 232.

intentional, given that it is the common practice in Egyptian courts.[1111]

On the other side, although the UK does not have constitutional court able to declare laws to be unconstitutional, its judicial system has been successful in tempering injustices in the counter-terrorism context. *A and Others v Secretary of State for the Home Department*,[1112] is a clear example of the strength of the UK's judicial pressure. The UK's court was able to force the replacement of the system of detention of foreign nationals under section 23 of the UK Anti-Terrorism, Crime and Security Act 2001 (the "**ATCSA**") with control orders.[1113] Again, judicial activism in the UK did not stop at this point and attacked the system of control orders as well in *Secretary of State for the Home Department v JJ*,[1114] *Secretary of State for the Home Department v E*,[1115] and *Secretary of State for the Home Department v MB and AF*.[1116] With the absence of a UK constitutional court, the UK judiciary, again, was able to attain the replacement of control orders with Terrorism Prevention and Investigation Measures Act 2011 (the "**TPIM**").[1117] This reflects the flexibility of the UK's common law system and the strong role of the UK's domestic courts in ensuring that counter-terrorism policy conforms with rights. Especially the rights guaranteed under the European Convention on Human Rights (the "**ECHR**" or "**Convention**").

In the UK, the enactment of the Human Rights Act 1998 (the "**HRA**") led to strengthening the powers of UK courts to uphold and protect human rights. Before the HRA, the supremacy of the UK Parliament inhibited the degree to which judges could adjudicate

[1111] Abdelkhaleq Mahmoud Fathelbab, 'Logistic Solutions for the Slowness of Judicial Proceedings' (2022) 3(2) International Journal of Doctrine, Judiciary and Legislation 299.
[1112] [2004] UKHL 56, [2005] 2 A.C. 68.
[1113] Jeff King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Bloomsbury Publishing 2015) 179-80.
[1114] [2007] UKHL 45.
[1115] [2007] UKHL 47.
[1116] UKHL 46; Aileen Kavanagh, 'Constitutionalism, counterterrorism, and the courts: Changes in the British constitutional landscape' (2011) 9(1) International Journal of Constitutional Law 186-87.
[1117] Conor Gearty, 'Terrorist Threats, Anti-Terrorism and The Case Against The Human Rights Act' in Frederick Cowell (ed), *Critically Examining The Case Against The 1998 Human Rights Act* (Routledge 2018) 7.

primary legislation against codified constitutional norms.[1118] However, due to cases filed against the UK before the European Court of Human Rights (the "**ECtHR**") and the lack of domestic remedies, the UK's human rights reputation in the international community was at risk.[1119] Accordingly, the UK Parliament was motivated to enact the HRA and grant domestic courts the right to review the compatibility of laws with the ECHR. Given the supremacy of Parliament in the UK, the judicial review power remained non-binding subject to Parliament's confirmation or decline of declarations of incompatibility. Nevertheless, the UK's courts were given the right to interpret laws contrary to Parliament's intention in order to comply with the ECHR.[1120]

By giving effect to the ECHR rights in domestic law via the HRA, the UK Supreme Court began to rely on proportionality analysis. The culture of proving proportionality enhanced the accountability of the UK's Executive and Parliament and required high levels of justification of their actions.[1121] The UK domestic courts were already applying the Convention rights indirectly through the common law before the enactment of the HRA.[1122] However, after the HRA, the percentage of human rights lawsuits in the UK was raised. Debates were generated due to judicial responsibilities afforded to judges by the HRA like the interpretation role under section 3 of the HRA, which increased the focus on and the awareness of human rights.[1123] As Tom Hickman succinctly observed, '[q]uite simply, the Human Rights Act reaches places the common law cannot reach'.[1124]

The UK experience with a codified statutory protection of rights raises questions about whether adopting a human rights charter would mark an improvement in Egyptian law, both in relation to rights and counter-terrorism policy. Human rights are already

[1118] Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press. 2009) 1-5.
[1119] ibid 3-4.
[1120] ibid 3-4.
[1121] ibid 8.
[1122] Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1997) 205.
[1123] Tom Hickman, *Public Law After the Human Rights Act* (Hart Publishing 2010) v.
[1124] ibid 23.

recognized in the Egyptian Constitution,[1125] in addition to separate laws guaranteeing specific rights, for example, children's rights. Human rights are also stipulated in international treaties and conventions to which Egypt is a party and is, therefore, bound by it.[1126] However, there is no comprehensive charter of rights in Egypt unlike the HRA in the UK. If we considered this option of enacting a charter of human rights in Egypt – thus focusing attention on human rights and judicial empowerment - would such a charter possess the value of constitutional provisions or ordinary laws?

I believe that this option might not be practical because a charter of rights issued by the Egyptian Parliament will have the status of ordinary law and is, therefore, vulnerable to violation and erosion. While currently human rights provisions are included in the Egyptian Constitution and thus enjoy higher protection. A more realistic and pragmatic approach would favor revising the human rights section in the Egyptian Constitution to make it more comprehensive as a set of guarantees entrenched within the Egyptian Constitution.[1127] It is also wise to expect that the effect of a charter of human rights in Egypt might be completely different from that in the UK.[1128] In civil law countries like Egypt, judges' power to interpret the law is restricted by the existence of codified laws by which the judge must abide. Similarly, while it is accepted that judges can make law in common law countries such as the UK, this is not an accepted norm within civil law systems, like Egypt. Whereas in common law systems, the sources of law include legislation and judicial precedents, unlike civil law systems which are not bound by judicial precedents or *stare decisis*. Accordingly, the common law judge has a wider array of interpretative powers which exceed its counterpart in civil law systems.[1129]

[1125] Articles 51 to 93 of the Egyptian Constitution of 2014.
[1126] Sanaa Sayed Khalil, 'مبادئ حقوق الإنسان في الدستور المصري' (Human rights principles in the Egyptian constitution) (*Studies in Human Rights*).
[1127] Joe Stork, 'Egypt: Human Rights in Transition' (2012) 79(2) Social Research: An International Quarterly 482-83.
[1128] Orrantia Fernando, 'Conceptual Differences between the Civil Law System and the Common Law System' (1990) 19(4) Southwestern University Law Review 1164.
[1129] ibid 1164.

There is another difference between the UK's HRA and human rights provisions in Egypt's Constitution. The provisions of the Egyptian Constitution possess the highest value in the hierarchy of laws.[1130] By contrast, it is debatable whether the UK's HRA is constitutional or ordinary legislation. David Feldman explains the importance of distinction between different types of legislation in the UK as '"constitutional" legislation can be repealed or qualified in its application only by express and unambiguous words in a later Act of Parliament. Unlike "ordinary" legislation, it cannot be impliedly repealed'.[1131] It is also argued that the interpretation of constitutional provisions should be more 'generous' and 'purposive' than ordinary provisions. However, this view is debatable given that there is an opposing claim that interpretation is irrelevant to the type of the provision.[1132] The criteria for characterization of constitutional provisions have been controversial issue. According to one view, the constitutional nature is conferred on provisions regulating fundamental rights and the relationship between the state and citizens. While another view provides that constitutional statutes regulate state institutions and its functions.[1133]

In UK law, the HRA is bolstered by a long tradition of protecting civil liberties, as well as an underlying protection of rights at common law – sometimes described as 'constitutional common law rights'.[1134] 'Thus, even absent a codified Bill of Rights, common law courts have significant powers to protect individual rights through the presumptions of statutory interpretation'.[1135] This strengthens the protection of rights in the UK constitutional order.[1136]

It has been argued that the proportionality test in the UK is closely linked to the infusion of Convention rights into the UK public law. Therefore, withdrawal from the HRA

[1130] Hamdy Ali Omar, *النظام الدستوري المصري وفقا لدستور ٢٠١٤ (The Egyptian constitutional regime according to the constitution of 2014)* (Almaaref Institution, 2016) 7.
[1131] David Feldman, 'The nature and significance of "constitutional" legislation' (2013) 129 Law Quarterly Review 345.
[1132] Stephen J. Dimelow, 'The interpretation of "constitutional" statutes' (2013)129 Law Quarterly Review 498.
[1133] Feldman (n 1131) 346-47.
[1134] Mark Elliott, and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Bloomsbury Publishing Plc 2020).
[1135] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023) 216.
[1136] Hickman (n 1123) 48.

could lead to replacing proportionality by the old tradition of *Wednesbury* reasonableness test. However, the case law shows that the UK's courts have employed justification and proportionality mechanisms even if not in its current developed shape. In addition, the extensive practice of the UK judges applying proportionality in domestic courts has generated much case law which represents a significant part of the UK human rights law.[1137] As Mark Elliott observed:

> [T]he courts' experience of proportionality review under the HRA has served to normalize and demythologize it in a way that sits uncomfortably with its characterization as a European import that would depart the UK's shores in the course of a process of de-Europeanization.[1138]

There is no flawless system of protection of human rights. Even the UK faces many challenges in combatting terrorism while protecting human rights. In the field of counter-terrorism specifically, all states are put under pressure. However, what is inspiring about the UK's system is its flexible and dynamic approach to meeting new counter-terrorism challenges, whilst striving to comply with human rights standards. It develops in accordance with the requirements and demands of the society with significant influence from judges. A clear example of this is the repealed system of control orders.[1139] It took judges five years to get rid of the system of control orders. However, it demonstrates the importance and effect of the HRA in enforcing human rights and putting an end to human rights violations even in the course of countering terrorism.[1140] This type of interaction and flexibility is needed in the Egyptian system for it to learn from its faults by experience and allow objections to the government to have positive effect in practice.

Accordingly, developing a similar approach of justification and proportionality in

[1137] Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 Oxford University Press 101-02.
[1138] ibid 101-02.
[1139] Conor Gearty, 'Doing human rights: Three lessons from the field' in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *Strategic Visions for Human Rights: Essays in Honour of Professor Kevin Boyle* (Routledge 2011) 61.
[1140] ibid 61.

Egypt would require enacting a specific law on the topic. Therefore, the enactment of a separate human rights charter might not be useful. However, having a law regulating the use of proportionality test in human rights matters could be a useful way in which to increase and intensify the constitutional accountability of the Executive actors in the Egyptian legal system. Such law will bind judges to apply uniform rules on balancing rights versus government acts. It is worth emphasizing that the proportionality analysis does not ensure or guarantee consistency in outcomes, but it clarifies the framework of the evaluation criteria of cases and the methodology through which cases are tackled.[1141] Developing a uniform approach of justification and proportionality has significant importance to achieve consistency in how judges scrutinize human rights cases.

7.3. The Comparative Advantage of a Parliamentary Human Rights Committee

The UN encourages the establishment of dedicated permanent parliamentary human rights committee responsible for overseeing all human rights related matters.[1142] It is recommended that the committee 'be pluralistic, transparent and public in its operations' and engage with civil society. In addition, parliaments should also make available resources for the committee to help it carry out its functions. It is also suggested that such parliamentary committee shall cooperate with the UN to implement the Universal Periodic Review (the "**UPR**") recommendations and follow up on the progress of the government in this regard.[1143]

'[Parliamentary] committees are the heart of parliamentary activities, 'the engine room of democracy''.[1144] Currently, parliamentary committees are considered an essential

[1141] Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) Federal Law Review 98-100.
[1142] Kirsten Roberts Lyer, 'Parliaments as Human Rights Actors: The Potential for International Principles on Parliamentary Human Rights Committees' in Stéphanie Lagoutte, Sébastien Lorion and Steven L. B. Jensen (eds), *The Domestic Institutionalisation of Human Rights* (Routledge 2021) 41-42.
[1143] ibid (Routledge 2021) 41-42.
[1144] Sven T. Siefken and Hilmar Rommetvedt, 'Investigating the role of parliamentary committees in the policy process' in Sven T. Siefken and Hilmar Rommetvedt (eds), *Parliamentary Committees in the Policy Process* (Routledge 2022) 1.

component of any effective and influential Parliament worldwide. Parliaments need committees to perform two main functions, namely, reviewing laws and scrutinizing the government.[1145] Meanwhile, scholars and journalists face difficulties in understanding or assessing the work of parliamentary committees. These committees usually hold closed sessions, and few information is available to the public, which is mostly concerned with the structure and composition or appointment of the committee. There is lack of detail on policy making process or what is cooked inside the kitchen of the committee and how it operates.[1146]

The Egyptian Parliament has twenty-five permanent committees. Among these committees is the Human Rights Committee (the "**HRC**").[1147] The Egyptian HRC is composed of a number of members of the Parliament decided at the beginning of each cycle.[1148] The Egyptian Parliamentary Office, which is composed of the Chairman of the Parliament and two deputies, receives list of candidates for all committees. The Egyptian Parliamentary Office arranges those lists by giving priority to older candidates in the membership of the relevant committee, then to candidates who possess experience and specialization in the field of the committee.[1149] The Egyptian Parliamentary Office announces the candidates' lists and allows members of the Parliament to express any objections or submit any recommendations. The Egyptian Parliamentary Office then reconsiders the lists based on objections and recommendations and submits final lists for approval by the Parliament.[1150]

The Egyptian HRC's jurisdiction includes reviewing bills and discussing topics in relation to human rights international conventions, reports by regulatory authorities and

[1145] Shane Martin, 'Committees' in Shane Martin, Thomas Saalfeld and Kaare W. Strøm (eds), *The Oxford handbook of legislative studies* (Oxford University Press 2014) 352.
[1146] Siefken and Rommetvedt (n 1144) 4.
[1147] Article 37 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1148] Article 38 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1149] Article 39 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1150] Article 41 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.

independent institutions and complaints by the public and by institutions.[1151] The Egyptian HRC also evaluates the application of laws which affect the interests of the public and the performance of the cabinet in relation to its jurisdiction and prepares reports with its outcomes to the Egyptian Parliamentary Office.[1152] The Egyptian HRC can request a meeting with the responsible Minister for any of the matters within its jurisdiction from the Chairman of the Parliament.[1153] Members and employees of the Egyptian government are obliged to attend before the Egyptian HRC whenever invited and respond to its queries and provide any information or documents as requested and may consult any experts or other employees.[1154] The Egyptian government is responsible for answering the Egyptian HRC's requests for information or documents within fifteen days from the date of being notified of the request.[1155] The Egyptian HRC can consult external experts and counsels and allow them to attend its meetings, while media representatives can exceptionally attend the HRC's meeting after the approval of the Chairman of the HRC.[1156]

The mechanism of operating parliamentary committees in Egypt, including the HRC, has been criticized for several reasons. Although this criticism was directed against the old Internal Regulations of the House of Representatives (the "**Internal Regulations**"), it is still valid after the issuance of the current Internal Regulations given that it includes the same provisions subject to criticism. The Internal Regulations grant the Chairman of the Parliament and the Parliamentary Office in Egypt vast powers leading to obstruction of productive functioning of the committees.[1157] Starting from the selection of the committees' members which is dominated by the Egyptian Parliamentary Office. Moving to the requirement of prior approval of the Chairman of the Egyptian Parliament on any single

[1151] Article 44 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1152] Articles 47 & 48 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1153] Article 50 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1154] Article 61 & 74 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1155] Article 58 of Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1156] Article 57 & 73 of Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1157] Ali Sawi, 'Assess in order to assist: a preliminary analysis of committees in Arab Parliaments' in Sven T. Siefken and Hilmar Rommetvedt (eds), *Parliamentary Committees in the Policy Process* (Routledge 2022) 38-60.

procedure in relation to requesting information, inviting members of the government to investigation, or conducting field visits for inspection.[1158] In addition, the Internal Regulations complicate the procedures for taking action against the Egyptian government, like requesting investigation, while facilitates the procedures for withdrawal of action, like withdrawal of investigation request.[1159] Even coordination or cooperation between any two committees of the Egyptian Parliament requires the approval of the Chairman of the Egyptian Parliament which complicates the work of the committees and wastes much time.[1160] Accordingly, expanding the discretionary powers of the Egyptian Chairman of the Parliament and the Parliamentary Office negatively affects proper and efficient functioning of the parliamentary committees.[1161]

Historically, the Egyptian Parliamentary Office used to refrain from presenting the committees' reports evaluating the government in the parliamentary sessions. In other times, it refrained from submitting the committees' recommendations to the government.[1162] This domination of the Chairman of the Parliament and the Parliamentary Office in Egypt also leads to giving priority to the majority party in the membership of the most important committees and marginalizing members of the minority groups.[1163] The Chairman of the Egyptian Parliament mostly has strong ties with the government. Therefore, making the Chairman of the Egyptian Parliament the connection point between the Egyptian government and the parliamentary committees undermines the effectiveness and influence of the committee. This is in addition to designating it as the channel through which all procedures must be approved.[1164]

Although the Internal Regulations give the committees the right to request

[1158] Adam Cygan and others, 'Parliamentary Committees: International Standards and Problems of Work in the Egyptian Context' (2016) Global Partners Governance and the Arab Forum for Alternatives 9.
[1159] ibid 9.
[1160] ibid 11.
[1161] Sawi (n 1157) 38-60.
[1162] Cygan and others (n 1158) 10.
[1163] ibid 11.
[1164] Sawi (n 1157) 38-60.

information and documents from the government. However, the common practice in any Egyptian governmental institution is bureaucracy and non-cooperation in providing any information to external bodies, which in turn hinders good governance and productivity of the Egyptian parliamentary committees.[1165] It has also been recommended to create a mechanism to force public officials to attend before Egyptian parliamentary select committees when requested, in order to facilitate the work of committees. This mechanism could entail imposing sanctions on public officials who do not commit to their responsibility to attend before select committees.[1166]

On the other side, the UK Joint Committee on Human Rights (the "**JCHR**") has proved to be very effective in the UK. If we compare both the Egyptian HRC and the UK's JCHR, we will find that there are several reasons which might have contributed to the different impact of each. The mechanism of appointment of the UK's JCHR guarantees non-domination of the governing party over the JCHR, which enhances its independence and strengthens its position as an accountability tool for the UK's government. The UK's JCHR is composed of twelve members of both Houses of Parliament, six from the House of Commons and six from the House of Lords.[1167] Likewise, in Egypt, it would be beneficial to specify the number of the members of the Egyptian HRC, rather than leaving it to the discretion of the Chairman of the Parliament and the Parliamentary Office. In turn, this could increase the level of accountability and independent scrutiny such a committee could carry out.

The Egyptian Parliament is bicameral, composed of the House of Representative and the Senate. However, it is not allowed to appoint half of the members of the Egyptian HRC from the Senate to ensure independence and non-domination of the governing party similar

[1165] Cygan and others (n 1134) 12.
[1166] Mohamed Qandil, 'Parliamentary oversight over Government' Global Partners Governance and the Arab Forum for Alternatives 21, 23.
[1167] Anjali Sakaria and Stephanie Aiyagari, 'The Parliamentary Committee as Promoter of Human Rights: The UK's Joint Committee on Human Rights' (*Commonwealth Human Rights Initiative*, 2007) 16.

to the UK's JCHR.[1168] This is because the Egyptian Constitution stipulates that the government shall not be held accountable before the Senate.[1169] Even if this was allowed, it might not guarantee the independence of the Egyptian HRC, given that one third of the members of the Senate are appointed by the President of the state and accordingly could have affiliations to the government.[1170] Alternatively, I would recommend the amendment of the Internal Regulations of the Egyptian Parliament in relation to the appointment of the HRC's members. This amendment would be that the members of the governing party shall not exceed half of the total number of the members of the Egyptian HRC. This is in order to guarantee diversity of membership of the Egyptian HRC and independence from the government.

Both the UK's JCHR and the Egyptian HRC have pre-legislative review competences.[1171] In addition to this pre-legislative scrutiny, I would also recommend that the Egyptian government should start adopting the practice of the UK in relation to the submission of an acknowledgement or memorandum of compliance with the ECHR.[1172] Given that Egypt is not a signatory of the ECHR, it could apply this practice by checking compatibility with the International Covenant on Civil and Political Rights (the "**ICCPR**"), which is signed and ratified by Egypt.[1173]

Regarding the review of the UK's JCHR of implementation of judicial decisions either those issued by the ECtHR or declarations of incompatibility issued by national courts, it might be suitable to adopt similar approach in Egypt.[1174] Therefore, I recommend that the Egyptian HRC should be granted similar power to the UK's JCHR to follow up with

[1168] Article 253 of the Egyptian Constitution of 2014 as amended in 2019.
[1169] Article 253 of the Egyptian Constitution of 2014 as amended in 2019.
[1170] Article 250 of the Egyptian Constitution of 2014 as amended in 2019.
[1171] Article 44 of Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives; Murray Hunt, 'The Joint Committee on Human Rights' in Alexandre Horne, Gavin Drewry, and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013) 230-35.
[1172] Hunt, 'The Joint Committee on Human Rights' (n 1171) 230-35.
[1173] 'Status of Ratification Interactive Dashboard' (*United Nations Human Rights Office of The High Commissioner*) <https://indicators.ohchr.org> accessed 3 June 2024.
[1174] Sakaria and Aiyagari (n 1167) 14.

the government on the implementation of court judgments issued by the Egyptian Council of State in relation to human rights breaches in administrative disputes. However, the SCC in Egypt is entitled to declare domestic laws which violate human rights protected in the Constitution as unconstitutional. Such declaration of unconstitutionality has immediate legal effect and render the provision of law to be null and void.[1175] Given that the Egyptian SCC's judgments have automatic legal effect, it does not need further action from the government and accordingly does not require the Egyptian HRC's review to ensure its implementation.

Moreover, the role of the UK's JCHR expands to comprise additional functions which would be very useful if the Egyptian Parliament followed similar approach with regard to the Egyptian HRC. These functions are (i) engaging civil society and non-governmental organizations with the work of the UK's JCHR; (ii) debating and spotlighting controversial human rights issues; (iii) providing reform proposals for defective laws; (iv) following up with the government on the progress achieved in implementing received recommendations by monitoring international bodies like the UN bodies.[1176]

Kent Roach emphasizes that the most problematic impediment which restricts the work of the UK's JCHR is secrecy in national security related matters.[1177] The UK's JCHR may not be given access to intelligence materials which are available to the UK's Intelligence and Security Committee (the "**ISC**"). The UK's JCHR has previously criticized the performance of the UK's ISC and found it unsatisfactory. It also claimed that the UK's ISC failed to hold the government accountable. It is worth mentioning that even if parliamentary committees get access to intelligence information, they are usually not allowed to publicly discuss or criticize it.[1178] It is however, expected that the issue of secrecy

[1175] Article 49 of Egyptian Law no 48 of 1979, as amended by Egyptian Law no 168 of 1998; Case no 76 of 22J (Egyptian Supreme Constitutional Court).
[1176] Murray Hunt, 'The impact of the Human Rights Act on the legislature: a diminution of democracy or a new voice for Parliament?' (2010) 6 European Human Rights Law Review 604-05.
[1177] Kent Roach, 'Accountability Mechanisms for Transnational Counterterrorism' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2nd edn, Hart Publishing 2019) 189-90.
[1178] ibid 189-90.

will be the same in Egypt if not more, even if the scope and powers of the Egyptian HRC are strengthened.[1179] Accordingly, promoting the cooperation and collaboration between relevant committees of the Egyptian Parliament is essential. For example, it would be beneficial to enhance the collaboration between the Egyptian HRC and the Egyptian Defense and National Security Committee, which is a parliamentary committee responsible for counter-terrorism laws and national security matters. Such cooperation could help in overcoming and resolving human rights issues in this field.[1180]

The Chairman of the Egyptian HRC, Tarek Radwan, has announced that there is some discussion about the possibility of establishing a human rights ministry to represent the umbrella under which all human rights institutions are situated.[1181] Radwan suggested that such a ministry would also be responsible for handling human rights issues in other ministries. This initiative has arisen because of a concern that the work of the Egyptian HRC is diluted between all ministries and, therefore, the HRC struggles to develop a singular and focused mission. This is because human rights are relevant to most of the Egyptian ministries and accordingly establishing one ministry to be the center of communication between the Egyptian HRC, and other ministries is sought to facilitate the mission of the Egyptian HRC.[1182]

7.4. The Independent Reviewer of Counter-Terrorism Legislation

The Independent Reviewer in the UK is a promising oversight mechanism which could enhance government accountability in relation to counter-terrorism policies in Egypt.[1183] The model of adopting an Independent Reviewer to provide independent

[1179] ibid 205.
[1180] Article 44 of Egyptian Law no 1 of 2016 in relation to the Internal Regulations of the House of Representatives.
[1181] Abdelatif Sobh, 'Speaker of the Parliament Human Rights Committee at the symposium "Parliament and the People": Enforced disappearance is a ridiculous joke' *Youm 7* (Cairo 25 January 2021) <www.youm7.com/story/2021/1/25/رئيس-لجنة-حقوق-الإنسان-بمجلس-النواب-في-ندوة-البرلمان-والناس/5174555> accessed 3 June 2024.
[1182] ibid.
[1183] Jessie Blackbourn, 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom' in Fergal F. Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014) 161-82.

oversight of counter-terrorism policy could be applied in Egypt in order to improve the drafting and functioning of counter-terrorism laws. However, if it were implemented in Egypt, it would be helpful to avoid some of the drawbacks of the UK model.

The UK Independent Reviewer is appointed for three years subject to endless renewals. There is no maximum limit on the tenure of the UK Independent Reviewer.[1184] This has been criticized by the UK's JCHR which recommended that there should be a maximum number of years allowed for each candidate to remain in office.[1185] Accordingly, I assume a reasonable period could be two consecutive terms with a total number of six years.

The UK Independent Reviewer is appointed by the government which could undermine their independence. Accordingly, it would be more efficient to adopt, in Egypt, David Anderson's suggestion to call for applications and select the most appropriate candidate based on the best application. This selection mechanism should follow a recruitment process determined in advance.[1186] In addition, it is not recommended to limit participation to specific category like judges as applied in Ireland. Such political position does not need legal experts only, though political experts are also essential.[1187]

Building on this, I would recommend establishing a panel for recruitment of the Independent Reviewer in Egypt. This panel could be composed of three members from the Executive, the judiciary, and the Legislature. The recruitment process should be made uniform, for example, to be composed of filling out an application, attending an interview, and security check. It could also determine specific minimum qualifications required for candidates, for example, minimum years of experience or having specific exposure in

[1184] ibid 175-76, 179.
[1185] Authority of the House of Commons, 'Joint Committee on Human Rights, Counter–Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In, Sixteenth Report of Session 2009–10' (*The Stationery Office Limited*, 25 March 2010) <https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/86/86.pdf> accessed 12 March 2024, 36.
[1186] Blackbourn, 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom' (n 1183) 173-74.
[1187] Donncha O'Connell, 'Weak Oversight of Security a Fatal Flaw in Policing Act' *Irish Times* (14 February 2024).

relevant fields. This is in order to minimise the number of applicants, to maintain high profile candidates for this position, and to guarantee fair process and transparency of appointment.

The funding and location of the Independent Reviewer in the UK are provided by the government. Although this could negatively affect the independence of the Independent Reviewer, there might not be a better solution. Given the sensitivity of the provided information and confidentiality of materials reviewed by the Independent Reviewer, it could be essential to keep their office close to the departments subject to review.[1188]

In relation to reporting responsibilities, I would recommend that the Independent Reviewer reports directly to Parliament rather than the Prime Minister to avoid manipulation of the reports.[1189] Finally, I would recommend that the Independent Reviewer should be regulated through separate law stipulating all the basic constituents of this position, rather than being included as part of counter-terrorism statutes which require review. This is to decrease personal influence on the position and establish well-functioning institutional system regardless of the identity of the person holding the position.[1190]

7.5. Galvanizing the Influence of International Law

The UK and Egypt share a common desire to maintain a good reputation in the international community. They both aspire to fully commit to international human rights standards and be perceived as such globally. Such an aspiration is one of the forces driving both countries to monitor their counter-terrorism policies and ensure that those policies comply with international human rights law.[1191] The main issue raised by international review bodies of human rights is the gap between human rights systems on paper and in

[1188] Blackbourn, 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom' (n 1183) 177-78.
[1189] ibid 177-78.
[1190] ibid 171.
[1191] Aileen Kavanagh, 'What's so weak about "weak- form review"? The case of the UK Human Rights Act 1998' (2015), 13(4) International Journal of Constitutional Law 1024; Laura K. Landolt, 'Externalizing Human Rights: From Commission to Council, the Universal Periodic Review and Egypt' (2013) 14 Human Rights Review 122.

reality. States should aim at diminishing this gap in order for reality to reflect laws and strategies in theory.[1192] Egypt has committed itself to several human rights conventions, including the Universal Declaration of Human Rights, the ICCPR, and the African Charter on Human and Peoples' Rights (the "**African Charter**").[1193] However, this is not enough, as it needs to put more efforts to ensure proper application and compliance with these international conventions and treaties.

International human rights law sometimes lacks strong enforcement mechanisms in light of states' sovereignty.[1194] Accordingly, cooperation and the willingness of the state to comply with international law are necessary pre-conditions for effective international human rights law.[1195] Egypt has been playing an active role within the international efforts exerted in the field of human rights. Historically, Egypt has contributed to the drafting of the initial treaties of the UN which constitute part of the international human rights law.[1196] However, the UN Security Council failed to reach a common definition of terrorism to commit member states to, when drafting their own national definition. Even the guidelines for drafting such definition came very late after most of the states have already drafted their own, to comply with the UN resolution in this regard and fulfil their international obligations. Accordingly, national definitions are characterized by broadness and vagueness.[1197]

Given the success of the ECtHR model in the UK, the African Union or the Arab League bodies could achieve the same function in Egypt as the ECtHR in the UK (i.e. as a regional legal regime which can support human rights protection in Egypt). Egypt signed

[1192] Kevin Boyle, 'Human Rights in Egypt: International Commitments' in Kevin Boyle and Adel Omar Sherif (eds), *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt* (Kluwer Law International 1996) 114.
[1193] Mosaed Abd el Atty, 'The Relevance of Egypt Ratification of the Protocol Creating the African Court of Justice and Human Rights' (2020) 4 African Human Rights Yearbook 178.
[1194] Geoff Gilbert, 'Law and human rights rather than international human rights law' in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *Strategic Visions for Human Rights: Essays in Honour of Professor Kevin Boyle* (Routledge 2011) 32.
[1195] ibid 32.
[1196] Melek Saral, 'Human rights challenges in post-uprising Egypt: political actors' reflections on the years of 2011–2013' (2021) 25(8) The International Journal of Human Rights 1377.
[1197] Kent Roach, *Comparative Counter-Terrorism Law* (Cambridge 2015) 432.

and ratified the African Charter in 1984.[1198] While, Egypt was one of the first states to sign the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (the "**African Protocol**") in 1999, it has not ratified it yet.[1199] Some sources in the Egyptian Ministry of Foreign Affairs have justified this delay by saying that such a critical decision needs thorough study which takes time.[1200] In 2018, the African Union adopted a new Protocol merging the African Court with an African Justice Court. The new court shall be named the African Court of Justice and Human Rights. However, such Protocol has not been in force until now and accordingly the African Court shall remain as is during this transitional period.[1201]

The African Charter established the African Commission on Human and Peoples' Rights (the "**African Commission**") to promote and protect human rights in Africa.[1202] The African Charter states that the African Commission's mandate shall not be limited to the application of the African Charter.[1203] The African Commission follows the route of and is inspired by other several international human rights instruments, like the Universal Declaration on Human Rights.[1204] The African Commission's mandate includes providing non-binding recommendations to member states on human rights issues. The African Commission receives communications from member states claiming human rights violations in other member states. However, African states have not been very active in using such mechanism as compared to European states.[1205]

On the other hand, the African Court issues binding judgments.[1206] The African

[1198] 'List of Countries which Have Signed, Ratified/Acceded to The African Charter on Human and People's Rights' (*African Union*, 15 June 2017).
[1199] 'List of Countries which Have Signed, Ratified/Acceded to The Protocol to The African Charter on Human and Peoples' Rights on The Establishment of An African Court on Human and Peoples' Rights' (*African Union*, 14 February 2023).
[1200] Abd el Atty (n 1193) 184.
[1201] ibid 170, 174.
[1202] Article 30 of the African Charter on Human and People's Rights.
[1203] Article 60 of the African Charter on Human and People's Rights.
[1204] Article 60 of the African Charter on Human and People's Rights.
[1205] Jeremy Sarkin, 'The African Commission on Human and People's Rights and the future African Court of Justice and Human Rights: Comparative lessons from the European Court of Human Rights' (2011) 18(3) South African Journal of International Affairs 283-84.
[1206] Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7(1) International Human Rights Law Review 4.

Court's source of law is the African Charter and any other international human rights instrument to which the relevant member state is party.[1207] The African Protocol allows the African Commission, member states, African intergovernmental organizations, citizens of member states and NGOs direct access to the African Court.[1208] However, citizens and NGOs are not allowed access to the African Court except after the execution of the relevant member state of a declaration accepting the mandate of the African Court.[1209]

Granting individuals and NGOs the right of direct access before the African Court has been a controversial issue when drafting the African Protocol.[1210] This has been the same history of the ECtHR where individuals and NGOs initially were not allowed direct access to the court. Petitions were submitted to the European Commission for Human Rights which in turn had to decide whether to go forward with the case before the ECtHR or not. However, this practice has changed to allow individuals and NGOs direct access to the ECtHR provided that they submit claim before the European Commission for Human Rights first. Such change was made to achieve equality and accordingly it is recommended that the African Protocol follows the same practice and eliminates the requirement for direct access declarations by states.[1211]

In practice, most of the member states have not provided the direct access declaration leading to inadmissibility of many cases before the African Court, which are initiated by individuals or NGOs.[1212] Even states like Rwanda, Tanzania, Benin and Cote d'Ivoire, which have previously provided declaration of direct access, have withdrawn their declarations

[1207] Article 7 of the African Protocol to The African Charter on Human and Peoples' Rights on The Establishment of An African Court on Human and Peoples' Rights.
[1208] Article 5 of the African Protocol to The African Charter on Human and Peoples' Rights on The Establishment of An African Court on Human and Peoples' Rights.
[1209] Article 34(6) of the African Protocol to The African Charter on Human and Peoples' Rights on The Establishment of An African Court on Human and Peoples' Rights.
[1210] Rachel Murray, 'A Comparison between the African and European Courts of Human Rights' (2002) 2(2) African Human Rights Law 201-02.
[1211] ibid 201-02.
[1212] Ssenyonjo (n 1206) 35.

between 2016 and 2020.[1213] This is due to the issuance of unfavorable judgments against these countries by the African Court. However, it is crucial that African countries start developing their culture and accept to abide by judgments even if the country does not like it.[1214] 'Thus, unlike the European Court's impact in the CEE region or the Inter-American Court in Latin America, the African Court has had no hand in the first fifteen years of democratisation processes in Africa'.[1215]

To guarantee fruitful operation of the African Charter and its organs, it is recommended to establish supervisory bodies on the national level to ensure that states comply with the African Charter. This will enhance the efficiency of the African Commission and the African Court and will decrease the case load due to increasing the level of national compliance with the African Charter. This was also recommended by Lord Lester in relation to the ECtHR.[1216]

A challenge faced by the African Court which might not have been of concern to the ECtHR is the diversity of the African member states which are all addressed by the African Charter. One of the reasons for success of the ECtHR was the 'homogeneous audiences' who have common understanding of the standards of human rights governing them. The lack of this common understanding between African states might increase the obstacles in the success route of the African Court.[1217]

One of the main reasons for the ECtHR's prominent success and influence is the high rate of compliance of the European countries with the ECtHR's judgments. Some of the European countries even give the ECtHR judgments the force of law automatically, which allows the enforcement of these judgments directly and regarding it as part of the

[1213] 'African Court Coalition Discussions: States Withdrawals From Article 34(6) of The African Court Protocol' (*Coalition for an Effective African Court on Human and Peoples' Rights*, May 2020) <https://www.african-court.org/wpafc/wp-content/uploads/2020/11/ACC-Publication_Volume-1_2020_ENG.pdf> accessed on 1 July 2024, 1-2.
[1214] ibid 1-2.
[1215] Daly (n 1097) 131.
[1216] Murray (n 1210) 210-11.
[1217] ibid 219-20.

national law.[1218] The African Commission and the African Court have made significant contributions to expose violating states. Nevertheless, the low level of enforcement of the recommendations of the African Commission or the judgments of the African Court waste the efforts of these organs. Accordingly, it is highly recommended that more states should accede to the African Protocol and ratify it, including Egypt, to give effect to the African Court. It is also recommended that the African Union shall apply serious sanction on violating states to enforce the respect of the African Court's judgments.[1219]

Historically, two cases which were filed by NGOs before the African Commission against Egypt have been upheld in national courts.[1220] One commentator emphasized that '[t]his case marked a victory of human rights protection in Egypt through judicial means, but also ended a long debacle that had almost exhausted the life of its central actor'.[1221] Accordingly, even if enforcement mechanisms of the African Commission could be perceived as weak, it still can put some pressure on the Egyptian government to rectify human rights violations.[1222]

When comparing the European court system with the African one, it is clear that there are many areas of development for the African system to learn from the achievements of its European counterpart. Some of these points are (i) improving availability of jurisprudence of the African Court; (ii) spreading awareness of human rights guarantees served by the African Union organs for either states or individuals; (iii) raising funds of the African Commission; (iv) increasing the number of members of the African Commission and the judges of the African Court; and (v) developing the websites of the African Union's organs and updating it regularly.[1223]

[1218] Sarkin (n 1205) 288-89.
[1219] Ssenyonjo (n 1206) 43.
[1220] Curtis Fj Doebbler, 'The case of The State of Egypt v Saad Eddin Mohammed Ibrahim' (2003) 3(2) African Human Rights Law Journal 327.
[1221] ibid 315.
[1222] ibid 315.
[1223] Sarkin (n 1205) 284-85.

The relationship between the African Court and the African Commission is vague.[1224] Although the European system initially consisted of a court and a commission before the revocation of the European Commission for Human Rights, the operation of the European Commission for Human Rights was much clearer with a defined scope. The main function of the European Commission for Human Rights was helping the ECtHR in the filtration of cases and amicable dispute resolution. However, the African Commission has additional 'promotional and protective responsibilities' which overlaps with the African Court's competencies.[1225] Nevertheless, the revocation of the African Commission following the European experience might not be right decision, given the low number of states which allowed direct access to the African Court by individuals and NGOs. The African Court systematically declares inadmissibility and refers large number of the cases filed before it to the African Commission due to lack of declaration of direct access by most of states.[1226]

The Arab states have also initiated the idea of an Arab Human Rights Court (the "**Arab Court**"). The charter establishing the court has been approved swiftly with no sufficient discussions leading to a flawed charter. However, the Arab Court has not been established yet. Despite the Arab's much hope of a well-functioning Arab Court, it is expected that it would face the same destiny of the African Court given that they share the same reasons for failure. The most important of these reasons is the dominance of authoritarian regimes in the Arab states.[1227]

The Arab League approved the Arab Charter of Human Rights in 2004 (the "**Arab Charter**"), which came into force in 2008.[1228] The Arab Charter has been criticized for

[1224] Befekadu Bogale, 'Regional Human Rights Institutions: A Comparison of The European and The African Human Rights Systems' (2014) 20(1) East African Journal of Peace & Human Rights 58-62.
[1225] ibid 62.
[1226] ibid 58-59.
[1227] Daly (n 1097) 134-36.
[1228] Ahmed Almutawa, 'The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights' (2021) 21(3) Human Rights Law Review 508-10.

absence of enforcement and accountability mechanisms, which is common criticism for many international human rights instruments.[1229] The Arab Human Rights Committee, which was established in 2009 pursuant to article 45 of the Arab Charter, has the power only to issue non-binding recommendations. Compared to similar regional or international bodies, it is characterized to be so weak as it does not allow direct claims by individuals or NGOs before it, which hinders its effectiveness.[1230]

To fill in this enforcement gap, the establishment of the Arab Court was suggested. However, the same issue of not allowing direct claims by individuals and NGOs persisted. Access to the Arab Court is limited to states or NGOs which obtain authorization from the relevant state. The Arab Court also does not have jurisdiction to grant compensation for human rights violations.[1231] Accordingly, the International Commission of jurists, which is a non-profit and non-political international association,[1232] requested Arab states to refrain from ratifying the statute of the Arab Court due to, mainly, the following deficiencies:

> [T]he lack of guarantee that the Court and judges will have sufficient independence; the lack of any explicit power to order interim measures; the lack of any mechanism for independently monitoring the execution of the court's judgments; and most importantly the lack of any right of individual petition for human rights victims.[1233]

However, 'it is argued that the establishment of an imperfect Court is better than an outright rejection that leaves the Arab Middle East without any regional human rights enforcement mechanism'.[1234] Especially that similar regional courts, like, the ECtHR has suffered from similar deficiencies at the beginning which have been developed and

[1229] ibid 508-10.
[1230] ibid 479.
[1231] ibid 510-11.
[1232] The International Commission of Jurists Statute of June 2012.
[1233] Almutawa (n 1228) 510-11.
[1234] ibid 519.

enhanced by member states' practices until it reached its current shape.[1235] It is further argued that initially preventing individuals' direct access to the Arab Court might be beneficial. This is to maintain less flow of cases until the judges gain some experience and develop sufficient capabilities to counter higher flow of cases if subsequently access to individuals is allowed.[1236]

The potential of the Arab Court shall not be disregarded. In my opinion the Arab Court could have better opportunity to achieve its goal than the African Court given that (i) Arab states share similar standards of human rights which facilitates the development of agreed upon human rights norms, contrary to the diversity of the African states' cultures; and (ii) Arab states include financially capable states, like the Gulf states, which could help in more availability of funds for the Arab Court than the African Court.

Generally, compliance with and enforcement of international human rights treaties in any country are closely linked to the existence of national democratic institutions subject to sufficient accountability. This in turn requires the existence of (i) national independent judiciary which can uphold treaties' provisions against human rights violations; (ii) strong civil society organizations capable of highlighting government breaches of human rights by using effective 'naming and shaming' methods; and (iii) political accountability through elections, whereby the voters put pressure on the governing party to withdraw their votes in the next elections, if the governing party did not stick to their promises to respect human rights acknowledged by treaties.[1237]

Egypt is a monist legal system which does not require domestic legislation to incorporate international law. It allows direct application of international treaties in the

[1235] ibid 512, 526.
[1236] ibid 530.
[1237] Jana Von Stein, 'Making Promises, Keeping Promises: Democracy, Ratification and Compliance in International Human Rights Law' 2016 46(3) British Journal of Political Science 657-58.

national legal system.[1238] International conventions and treaties - which are signed by the Egyptian President of the state, approved by the Egyptian Parliament, ratified and published in the official gazette - shall have the status of law within the Egyptian system.[1239] It does not need the issuance of a separate domestic law for its recognition.[1240] In addition, the Egyptian Constitution stipulates that the state is bound by ratified and published human rights conventions.[1241] Accordingly, the state is not supposed to issue laws violating the provisions of human rights treaties.[1242] However, former Chief Justice of the Egyptian SCC, Awad El-Morr, argues that in case of issuance of a later national law which contradicts a former valid international treaty, the later law shall supersede.[1243] El-Morr justifies his argument by stating that hence international treaties possess the force of national law, the general rules shall apply in case of its contradiction with other laws. Typically, in case of contradiction between two laws, the subsequent law would have precedence and amend the former law.[1244] The Egyptian SCC also acknowledges that its jurisdiction does not encompass resolving issues of contradiction between laws.[1245] Rather, the SCC is entitled to review the compatibility of laws with the Constitution. Given that international treaties do not have the status of constitutional provisions, but rather it has the force of law, the SCC does not have jurisdiction to invalidate laws issued in contradiction with international treaties. Therefore, the SCC commonly declines similar cases with justification of incompetency.[1246]

However, other scholars oppose this argument. Ashraf Hegaza claims that pursuant to established public international law jurisprudence, international treaties shall supersede

[1238] Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109(3) American Journal of International Law 515-523.
[1239] Article 151 of the Egyptian Constitution of 2014 (as amended).
[1240] Mohamed Safy Youssef, *القانون الدولي العام (Public International Law)* (Dar El-Nahda El-Arabya 2022) 129.
[1241] Article 93 of the Egyptian Constitution of 2014 (as amended).
[1242] Abd el Atty (n 1193) 183.
[1243] Awad El-Morr, *الرقابة القضائية على دستورية القوانين في ملامحها الرئيسية (Main Features of Judicial Review of the Constitutionality of Laws)* (René-Jean Dupuis Center for Law and Development 2003) 816.
[1244] ibid 816.
[1245] Case no 31 of 3J (Egyptian Supreme Constitutional Court).
[1246] ibid.

national laws in case of contradiction, regardless of the date of the international treaty or the national law.[1247] According to this argument, international obligations of states represent its relationship with other states, which should not be affected by national laws. Therefore, the judge should resolve the conflict by employing other criteria in relation to the treatment of contradicting law provisions.[1248] Pursuant to the Egyptian legal system, laws regulating specific or private matters, shall restrict laws which regulate general or public matters (i.e. *lex specialis derogat legi generali*).[1249] In the same vein, if the judge considers that the international treaty regulates specific matters, while the national law regulates general matters, the international treaty shall supersede. Accordingly, subsequent laws shall not affect the validity of a former treaty.[1250] This argument has been acknowledged in a judgment of the Egyptian Court of Cassation.[1251] Nevertheless, there is no agreed upon approach in this regard between scholars or in court judgments and the law is not clear about this either.[1252]

It is also argued that human rights treaties particularly shall retain special value in the Egyptian law given that there is a dedicated article in the Egyptian Constitution which acknowledges the respect of human rights treaties and conventions.[1253] Based on this argument, any law which is issued in contradiction to human rights treaties can be challenged and nullified before the Egyptian SCC.[1254] This is because Egypt is not entitled to change the provisions of treaties unilaterally and accordingly it cannot enact laws violating its international obligations. Further to this argument, human rights treaties gain their power directly from the Constitution which could justify the claim that they enjoy the

[1247] Ashraf Arafat Abu Hegaza, 'مكانة القانون الدولي العام في اطار القواعد الداخلية الدستورية والتشريعية (The Status of the Public International Law within National Constitutional and Legislative Rules)' (2004) 60(60) (Egyptian International Law Journal) 198.
[1248] ibid 198.
[1249] ibid 198.
[1250] ibid 198.
[1251] Case no 137 of 22J (Egyptian Court of Cassation).
[1252] Youssef (n 1240) 134-37.
[1253] Abd el Atty (n 1193) 183.
[1254] ibid 183.

same legal protection of constitutional provisions and thus lies within the jurisdiction of the SCC. Therefore, human rights international treaties cannot be overridden by virtue of subsequent contradictory laws.[1255]

However, claiming that the SCC has jurisdiction to resolve issues of conflict between human rights international treaties and national laws contradicts with the explicit declaration of the SCC that resolving disputes of contradicting treaties and laws lies outside of its jurisdiction.[1256] The Egyptian SCC did not make any exception in relation to human rights international treaties, which supports that human rights treaties do not have the force of constitutional provisions. Rather, it has the force of law like any other international treaties.[1257]

Nevertheless, if we accept that national laws could supersede or amend international treaties, this could subject Egypt to the violation of its international obligations, which could not be logically accepted as a reasonable consequence of the application of national law. Therefore, in case of contradiction, ordinary civil and administrative courts shall have the jurisdiction to resolve the dispute.[1258] The judge shall balance between national and international interests without causing the violation of Egypt's international obligations under international treaties.[1259] This argument is also supported by the fact that many Egyptian laws state that the provisions of the law shall be applied provided that it does not contradict with international treaties and conventions.[1260] This reflects and acknowledges the intention of the Egyptian Legislature to respect international treaties and its diligence in avoiding its violation.

[1255] ibid 183.
[1256] Case no 31 of 3J (Egyptian Supreme Constitutional Court).
[1257] ibid.
[1258] Hegaza (n 1247) 197.
[1259] ibid 197.
[1260] Youssef (n 1240) 132-34.

7.6. Deradicalization and Rehabilitation of Terrorists

Egypt is something of a success story in the field of deradicalization and rehabilitation of terrorist prisoners of Al-Jama'a Al-Islamiyya (Islamic Group or "**IG**") and Egyptian Islamic Jihad ("**EIJ**").[1261] It took the government around six years to successfully gain the fruits of its hard work. The process of deradicalization and rehabilitation is slow and gradual which employs logic, communication, building trust and providing incentives and motivation, like job opportunities and enhanced life conditions.[1262] The Egyptian government also allowed the deradicalized members to enjoy their political rights freely as some of them participated in the Egyptian parliamentary elections in 2005.[1263]

Kent Roach praised Egypt's efforts in deradicalization and rehabilitation of terrorists. As Roach observed 'it is striking that two of the countries that have pursued the harshest policies toward terrorists – Egypt and Singapore – have also explored and had some success in the rehabilitation of terrorists, an issue that Western democracies have failed to confront'.[1264] For instance in the UK, the Prevent aspect of the CONTEST strategy has led to marginalization of Muslims minorities and division of the community, which could adversely increase radicalization rather than eliminate it.[1265]

In 1997, the IG decided to stop violence and cease terrorist operations against the Egyptian ruling government. This decision was debatable within the group until it was implemented in 1999 after the Luxor bombing of tourists. Accordingly, the Egyptian government made use of this opportunity and started deradicalization program by providing the IG prisoners with religious readings which explain the correct moderate Islamic

[1261] Angel Rabasa and others, *Deradicalizing Islamist Extremists* (RAND 2011) 81-84.
[1262] ibid 81-84.
[1263] Omar Ashour, 'Lions Tamed? An Inquiry into the Causes of De-Radicalization of Armed Islamist Movements: The Case of the Egyptian Islamic Group' (2007) 61(4) Middle East Journal 624.
[1264] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge 2011) 430.
[1265] Joel David Taylor, ''Suspect Categories,' Alienation and Counterterrorism: Critically Assessing PREVENT in the UK, Terrorism and Political Violence' (2020) 32(4) Terrorism and Political Violence 867-68.

principles. The program focused on erasing radical thought by means of learning and raising awareness.[1266] The Egyptian government allowed Islamic scholars from Al-Azhar, which is the biggest Islamic educational institution in Egypt, and scholars, who are known for their moderate and reasonable approaches, from other Islamist groups like the MB.[1267]

At the beginning, the Egyptian government was concerned that this could be a trick by the IG to release them and then resume their terrorist operations.[1268] However, with close observation and monitoring for long period of time, it was clear that the head of the IG and many of the members were seriously open for rehabilitation. Within the scope of the efforts of the Egyptian government, it (i) started to coordinate with the head of the IG to convince imprisoned IG members to let go of violence. This included allowing them to meet their followers in all prisons across the country; (ii) enhanced the prison's conditions, including health conditions, meals, and treatment; (iii) allowed prisoners' visits, which were not allowed before; (iv) announced the deradicalization initiative to record its progress and raise awareness; (v) financed the publications of the IG members calling for cease violence and spreading their new moderate ideologies; and (vi) offered job opportunities and facilitated the start of new life after the release of the IG members.[1269]

After progress of the deradicalization plan with the IG, the Egyptian government repeated the experience with the EIJ. The Egyptian government used members of the IG as intermediaries to help in convincing the EIJ members. The program was effective with the EIJ members, except with those who have already joined Al-Qaeda. Subsequently in 2003, the government released fifteen thousand terrorist prisoners who have been subject to deradicalization and rehabilitation plan.[1270]

However, the Egyptian government has been criticized for lack of information about

[1266] Ashour (n 1263) 612-13.
[1267] Rabasa and others (n 1261) 81-84.
[1268] ibid 81-84.
[1269] ibid 81-84.
[1270] ibid 81-84, 89.

following up with the released prisoners to guarantee their good behaviour and avoid recidivism. In addition, there was little support provided by the Egyptian government after release. These factors could minimise the positive effect of the initiative causing the released prisoners to re-engage with terrorism. But in fact, there has been only few numbers of reported recidivism of the IG members.[1271]

Historically, since 1988 and until 1996, there were many failed initiatives with the IG to stop violence. Unlike these failed attempts, the 1997 initiative succeeded because of the IG leaders' influence. The initiative targeted imprisoned IG leader. In similar groups, the leaders have great influence on the followers who abide by the principle of blind obedience of the leaders. Accordingly, cooperation and agreement of the IG leaders were the main reasons for the success of the government initiative. It is not to say that convincing the IG members was guaranteed, it took the leaders much effort and time to negotiate with the followers and inject the new peaceful thought in their minds. Leaders of terrorism organizations possess highly influential role; they are the sole credible source for their followers. Therefore, deradicalization of leaders is a key to its success.[1272] In addition, the approach of distributing prisoners in the cells is likely to have had a positive effect on the deradicalization of the IG leaders. Despite the absence of any acknowledgement of this by the IG leaders, it is highly likely that the diversity of the prison cells' structures composing of IG leaders, liberals and human rights advocates positively influenced redirection of the IG leaders' ideology.[1273]

Surprisingly, some of the IG leaders stated that regime repression against the members of the IG was one of the causes of rethinking their ideology. They concluded that violence against the regime resulted in restriction of their liberty and limitation of their

[1271] ibid 81-84.
[1272] Ashour (n 1263) 614-16.
[1273] ibid 618-19.

power. They found that the cons highly exceed the pros of violence and at the end they could not achieve their goal and remove the regime through these methods. They believe that '[j]ihad is not an end by itself. It is just a means to attain other ends. If you cannot attain these ends through jihad, you should change the means'.[1274]

Nevertheless, it should be emphasized that nothing is understood to encourage or support repression, given that repression in itself could be the root cause of radicalization in the first place.[1275] Another reason of the emergence of the IG was the absence of religious education and awareness in the South of Egypt where the origin of the IG.[1276] The most important lesson to be learnt from this experience is what has been expressed by 'Fouad Allam, a former state security general of Egypt, [who] said that security measures alone cannot defeat terrorism'.[1277]

On the other side, since 2003, the UK has established the CONTEST strategy for countering terrorism, which includes among its aims the Prevent strand. The Prevent strategy seeks to counter radicalization of terrorists from its roots. It targets more vulnerable members of the community to prevent radicalization and extremism from the beginning. The UK has been developing the CONTEST strategy and launched several amended versions.[1278]

For this purpose, the UK government obliges schools and universities to report students suspect of radicalization. However, this system was not very welcomed as it builds police state with extensive surveillance inside universities and schools.[1279] In addition, the Prevent strategy has been subject to criticism for perceiving Muslims as more vulnerable to radicalization and leading to the marginalization and isolation of the Muslim community.

[1274] ibid 621-622.
[1275] ibid 625.
[1276] Rohan Gunaratna and Mohamed Bin Ali, 'De-Radicalization Initiatives in Egypt: A Preliminary Insight' (2009) 32(4) Studies in Conflict & Terrorism 288.
[1277] ibid 280.
[1278] Clive Walker and Oona Cawley, 'The Juridification of the UK's Counter Terrorism Prevent Policy' (2022) 45(11) Studies in Conflict & Terrorism 1004.
[1279] Cian C. Murphy, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the Wars on Terror' (2015) 6(1) Transnational Legal Theory 45.

According to a case study conducted by the Equality and Human Rights Commission, which surveyed four different districts in the UK, 'Muslims and non-Muslims from the same local areas appear to live 'parallel lives''. [1280]

It has been recorded that Muslims have been facing extensive counter-terrorism policing measures more than non-Muslims. This includes stop and search, precautionary measures at airports or detentions. Muslims became suspects of radicalization based on religious identity rather than tendency to violent behaviour.[1281] Discrimination against Muslims in the UK could lead, not only to failure of the Prevent strategy, but also could have side effects of disengaging and isolation of the Muslim community which might increase radicalization.[1282]

One of the defects of the UK's Prevent strategy is the lack of accountability of policy implementers.[1283] This is a direct cause of the lack of guidance or standards for assessment of vulnerability to violence or radicalization. The UK's Prevent strategy gives the police wide discretion in identifying the targets or the suspects without having uniform methodology in such identification.[1284]

The application of the UK's Prevent strategy also extends to prisons which could be a fertile soil for either radicalization or deradicalization. In comparison to the Egyptian scenario, the factors of language, less awareness of Muslim community and less availability of intermediaries of moderate Muslim scholars could all make the experience of the UK more difficult. The UK allows communication between Muslims in prisons for the purpose of rehabilitation and deradicalization. However, the authorities impose that all communications are made in English to make sure that no radical ideas are disseminated.[1285]

[1280] Tufyal Choudhury and Helen Fenwick, *The impact of counter-terrorism measures on Muslim communities* (Equality and Human Rights Commission 2011) 85.
[1281] ibid 85.
[1282] Joel David Taylor ''Suspect Categories,' Alienation and Counterterrorism: Critically Assessing PREVENT in the UK, Terrorism and Political Violence' (2020) 32(4) Terrorism and Political Violence 867-68.
[1283] Walker and Cawley (n 1278) 1014-15.
[1284] ibid 1014-15.
[1285] Rabasa and others (n 1261) 138.

Accordingly, cooperation between western countries and Muslim majority countries in this field would be mutually beneficial. I would recommend establishing a protocol of cooperation between Egypt and the UK.[1286] According to such protocol, Egypt could assist the UK by making available Muslim scholars and experts in Islamic studies to help in deradicalization plans. These scholars and experts could supervise negotiations and discussion in prisons between terrorists, vulnerable persons and intermediaries in the UK. This, in turn, would facilitate communication and at the same time maintain supervision of the discussions which are conducted in Arabic.

7.7. Proposals for Law Reform

Both the UK and Egypt criminalise terrorist speech, which is an international obligation of both countries imposed by the UN.[1287] Based on the study of the law provisions criminalizing encouragement and incitement of terrorism in both jurisdictions, I hereby list some proposals for law reform as a benchmark for maintaining freedom of expression while criminalizing these offences. These recommendations are inspired by different criticisms directed at either the UK or the Egyptian counter-terrorism laws.

The purpose behind criminalizing encouragement and incitement of terrorism is the prevention of terrorist acts at preparatory stage before its commission. Accordingly, this purpose assumes that there would be high probability that encouragement or incitement will be followed by the commission of a terrorist act, which is the main concern of the criminal provision.[1288] However, criminal provisions in the UK and Egypt criminalize encouragement and incitement of terrorism regardless of the level of risk caused by such encouragement or incitement. This expansion of application goes beyond the initial purpose

[1286] Malkanthi Hettiarachchi, 'Rehabilitation to deradicalise detainees and inmates: a counter-terrorism strategy' (2018) 13(2) Journal of Policing, Intelligence and Counter Terrorism 267-268.
[1287] Roach, 'Comparative constitutional law and the challenges of terrorism law' (n 1093) 539.
[1288] Helen Fenwick and Daniel Fenwick, 'National Counter-terrorism (CT) policies and challenges to human rights and civil liberties: case study of the UK' in Eran Shor and Stephen Hoadley (eds), *International Human Rights and Counter-Terrorism* (Springer 2019) 34.

of criminality and threatens freedom of expression without proper justification.

Therefore, I would recommend that counter-terrorism laws in the UK and Egypt which criminalize statements encouraging terrorism should require that such statements must pose serious risk or threat to life or national security. This is in line with the requirements of the Council of Europe Convention on the Prevention of Terrorism (the "**CECPT**"), which states that the provocation should result in a real risk that a terrorist act may be committed.[1289] In this context, the consequence of the statement should be of concern to the law. One of the factors which could help in predicting negative consequences of a statement of encouragement is the existence of sufficient number of audiences who are highly likely to be encouraged by the statement. Accordingly, I would suggest that the existence of sufficient number of audiences should be made a pre-requisite for the crime of encouragement or incitement of terrorism.[1290] By contrast, statements which should be outside of the scope of criminalization due to lack of serious risk of terrorism are, for example, statements glorifying violent opposition against undemocratic government abroad or glorifying terrorist acts in the history.[1291]

The Egyptian Anti-Terrorism Law is characterized by broad, vague and undefined terms and expressions like 'disturbing public order', 'harming national unity', 'social peace' and 'national security' which are included in the definition of 'terrorist act'.[1292] The lack of clear definitions of these terms violates the rule of law, which assumes that the law must be clear enough to allow the addressees to understand the limits defining the criminalized acts

[1289] Article 5 of the Council of Europe Convention on the Prevention of Terrorism.
[1290] Sterling A. Marchand, 'An Ambiguous Response to a Real Threat: Criminalizing the Glorification of Terrorism in Britain' (2010) 42(1) George Washington International Law Review 140; Adrian Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' (2007) Criminal Law Review 24-25.
[1291] Helen Fenwick and Richard Edwards, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge Taylor & Francis Group 2016) 1079.
[1292] Fionnuala Ní Aoláin and other, 'Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders' (*United Nations Human Rights Office of the High Commissioner*, 28 February 2020) OL EGY 4/2020, 5.

and avoid liability.[1293] Considering any act threatening national unity or public order as terrorist act is very broad and might negatively affect political freedom of expression.[1294] Accordingly, I would recommend to amend the Egyptian Anti-Terrorism Law to either entirely eliminate broad and vague terms or add clear definitions of these terms.[1295]

Another issue is the confusion between terrorist crime and ordinary crime, which is caused due to the expansion of the scope of terrorist crimes.[1296] For example, in the UK, if the method used for commission of terrorist act is explosives or firearms, no need to prove that the target behind the act of terrorism is to influence the government or terrify the people.[1297] The justification behind this exception is to secure political or public persons in case of unclear purposes behind acts like assassinations.[1298] This provision has been subject to criticism because it excludes from the elements constituting terrorist offence a significant factor, which is the effect of the act on the public, yet it is essential requirement in a terrorist act and confuses it with ordinary crimes, which do not necessarily have a terror effect.[1299]

Comparably, in Egypt, broad and vague terms used in the definition of terrorism expand the meaning of motive that it might not be possible to differentiate between the required motive in terrorist crimes and ordinary crimes. For instance, the term national security does not have a uniform definition. Since ordinary criminal offences could affect the security of citizens or the state, it would be hard to distinguish it from terrorist crimes due to the lack of definition of national security.[1300] Accordingly, I would recommend to clearly define the terrorist motive and differentiate between ordinary crimes and terrorist crimes in both the UK and Egypt, which is essential to justify the severe penalties set for

[1293] Mohamed Alansary, 'تعليقا على مشروعي القانون الحكوميين بشأن الإرهاب في مصر: مكافحة إرهاب أم قمع أي ممانعة؟' (Commentary on the bills of the government in relation to terrorism in Egypt: counterterrorism or repression of any reluctance?) (*Legal Agenda*, 21 April 2014).
[1294] David Ferguson, 'Silencing the Arab Spring with Co-opted Counterterrorism' (2016) 7 Berkeley Journal of Middle Eastern & Islamic Law 13.
[1295] Aoláin and other (n 1292) 5.
[1296] Jessie Blackbourn, 'The evolving definition of terrorism in UK law' (2011) 3(2) Behavioral Sciences of Terrorism and Political Aggression 142.
[1297] Section s 1(3) of the Terrorism Act 2000.
[1298] Clive Walker, *Blackstone Guide to The Anti-Terrorism Legislation* (3rd edn, Oxford University Press 2014) paras 1.32-1.33.
[1299] Blackbourn, 'The evolving definition of terrorism in UK law' (n 1296) 142.
[1300] Alansary (n 1293).

terrorist crimes.

In relation to the elements of the crime of encouragement of terrorism in the UK, publishing a statement encouraging terrorism implies the liability of the publisher if he intends to encourage terrorism or is reckless in doing so.[1301] Again, this expansion of criminalization has been criticized by the UK's JCHR as being disproportionate response to the pressing social need.[1302] Accordingly, I would recommend to replace recklessness with the requirement of clear direct intention to encourage terrorism. Recklessness should not be sufficient to constitute the crime.[1303] This is also in line with the CECPT, which confirms that there must be direct intention to commit the crime.[1304] While in Egypt, the mental element or *mens rea* in a terrorist crime is the intention to spread a state of terror among the public and disturb public security and public order.[1305] Accordingly, the issue of the existence of direct intention is already cured in the Egyptian system, unlike in the UK's system.

English courts have fiercely refused to accept that terrorism could be justified if it is directed towards fighting undemocratic regimes or 'what some would describe as terrorism in a just cause. (...) Terrorism is terrorism, whatever the motives of the perpetrators'.[1306] It is true that nothing justifies terrorism, given that terrorism is characterized by its indiscriminate nature, which threatens the right to life of peaceful citizens.[1307] However, this does not deny that legitimate fight against occupation or oppressive regimes must always be allowed, especially that such regimes typically violate fundamental human rights of peaceful

[1301] Terrorism Act 2006, s 2(b).
[1302] Ellen Parker, 'Implementation of the UK Terrorism Act 2006 - The Relationship between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom versus the United States' (2007) 21(2) Emory international law review 752.
[1303] Marchand (n 1290) 139-40.
[1304] Article 5 of the Council of Europe Convention on the Prevention of Terrorism.
[1305] 'Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice' (*United Nations Human Rights Office of the High Commissioner*, 10 March 2021) HRC/NONE/2021/SP/16 <https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=36036> accessed 27 September 2022, para 25.
[1306] *R v Gul* [2013] UKSC 64 [26].
[1307] Fenwick and Edwards (n 1291) 1025.

citizens.[1308] However, under the broad counter-terrorism laws in the UK and Egypt, freedom fighters, rebellions, journalists, minority and opposition groups can all be at high risk of being convicted under the definition of terrorism and deprived of their right of freedom of expression.[1309]

Accordingly, I would recommend that counter-terrorism laws in the UK and Egypt should establish clear differentiation between terrorists and protestors, rebellions, journalists, academics etc. It should also include guarantees to the rights of legitimate freedom fighters who struggle in the fight against colonization or undemocratic governments. In this context, statements encouraging for liberation from colonization or ouster of undemocratic governments should be explicitly excluded from the scope of application of the offences of encouragement, incitement or glorification of terrorism. In such cases, a differentiation must be established between statements against the government or foreign occupation and statements encouraging acts committed against members of the public. For instance, resistance against apartheid in South Africa should not be characterized as terrorism.[1310]

The Egyptian SCC and the Egyptian Court of Cassation emphasized the importance of freedom of expression including the right to criticize public figures and the government's performance.[1311] The ECtHR stressed that not all offensive statements equate encouragement of terrorism. The right of freedom of expression protects offensive statements as long as it does not encourage terrorism.[1312] In this context, I would recommend that the UK and the Egyptian counter-terrorism laws should clearly differentiate between the definition of offensive expression and encouragement of terrorism.

[1308] Stella Margariti, 'Defining International Terrorism to Protect Human Rights in the Context of Counter-terrorism' (2018) Security and Human Rights 188.
[1309] Fenwick and Edwards (n 1291) 1025.
[1310] Margariti (n 1308) 188.
[1311] Case no 42 of 16 J (Egyptian Supreme Constitutional Court); Case no 3221 of 79 J Civ 1 January 2017 (Egyptian Court of Cassation).
[1312] *Handyside v The United Kingdom* (1979-80) 1 EHRR [49].

Finally, in relation to penalties for encouragement and incitement of terrorism, the Egyptian Anti-Terrorism Law sets the same penalty for incitement of terrorist crime and preparation for incitement.[1313] It is not common to set the same penalty for commission of preparatory work and the commission of the crime itself. There are two reasons for giving lighter penalty for preparatory work. Firstly, the lack of clear intentional criminal will to commit the crime at the stage of preparatory work. Secondly, the penalty for preparatory work should be lighter to encourage the perpetrator to withdraw the criminal plan at the preparatory stage before committing the crime. If the current penalties are retained, the perpetrator once engaged with preparatory work will not have incentive to step back, given that the preparatory work is punishable with the same penalty set for incitement.[1314]

Accordingly, I recommend amending the Egyptian Anti-Terrorism Law to make the penalty for preparatory work for incitement of terrorist act lighter than the penalty for incitement of a terrorist act, which in turn should have lighter penalty than commission of a terrorist act.[1315] Generally, it is highly recommended that criminal penalties should be proportionate to the gravity of the act committed.[1316]

To sum up, the proposals recommended for development of the UK and the Egyptian counter-terrorism law in respect of encouragement, incitement and glorification of terrorism are to (i) require the existence of high probability that the impugned statement would result in a risk of terrorism; (ii) eliminate, replace or strictly define broad terms like 'disturbing public order', 'harming national unity', 'social peace' and 'national security'; (iii) clearly define terrorist motive and differentiate between ordinary crimes and terrorist crimes; (iv) replace recklessness, as an element of the crime of encouragement of terrorism, with the

[1313] Article 6 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended); Article 28 of The Egyptian Anti-Terrorism Law no 94 of 2015 (as amended).
[1314] Alansary (n 1293).
[1315] Ahmed Fathy Sroor, 'الدستور ومواجهة الإرهاب (The constitution and counterterrorism)' (2019) 34 The Journal of The Supreme Constitutional Court; ibid.
[1316] 'Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice' (n 1305) para 41.

requirement of clear direct intention to encourage terrorism; (v) include guidance on the differentiation between acts of freedom fighters and acts of terrorists and exclude the former from the scope of criminalization; (vi) differentiate between the definition of offensive expression and encouragement of terrorism; and (vii) ensure that criminal penalties are proportionate to the gravity of the act committed.

7.8. Conclusion

Development takes time. We cannot put well-developed, consolidated democracies with countries in transition side by side and expect the latter to transform overnight. In any transition, there are stages of development. We can imagine the development process as stairs with several steps with the ultimate aim of becoming a fully developed democratic order, like the UK, in the final step. Accordingly, any development, although not perfect or complete, should still be encouraged and celebrated. In paving the way towards achieving a fully-fledged constitutional democracy, it is important to pay attention to structuring well-functioning institutions, rather than simply depending on the dispositions and personal capabilities of any individual ruler.

It is also essential to work towards a multi-party state, with a variety of political parties and competition to enhance political deliberation and accountability. Such diversity and competition would allow peaceful transition of power, which in turn would eliminate repression and enhance human rights protection and the rule of law. The absence of deliberation and social agreement between different sectors in Egypt following the Arab Spring is a crucial contributor to polarization and failure of the revolution to achieve its demands.[1317] Andrea Pin brilliantly described the situation in Egypt as follows:

> [T]he power struggles in Egypt show that the rule of law has not become a

[1317] Pin (n 1095) 112-13.

> common denominator capable of hosting all political factions. The promoters of constitutional liberalism, the Muslim Brotherhood, and the military that have supported Al-Sisi—all thought that the constitution should reflect their own political and legal agenda. Whereas the proponents of constitutional liberalism never seized power, the Muslim Brotherhood and the military that replaced them were both capable of transposing their ideas into constitutional texts. The conflicts between the prioritization of Islamic law, of the Ummah, and of religious groups in the case of the Muslim Brothers, and of the centrality of the military and of the presidency after the demise of Mohammad Morsi's regime, testify to the fact that the liberal ideals encapsulated in the rule of law did not provide a common ground for Egyptian society: They were contentious ideals, which important players in Egypt did not embrace.[1318]

In this concluding chapter, I have focused on the most influential institutions in the UK which have helped to make some progress in the field of counter-terrorism. These institutions are national courts, parliamentary human rights committees, the UK Independent Reviewer of Counter-terrorism Legislation, international human rights courts with the leading example of the ECtHR. The innovation of my research is my normative argument about the potential benefit of introducing novel domestic and foreign accountability tools into the Egyptian system, whilst remaining attentive to the need to adjust these tools to fit the peculiarities of the Egyptian system. I will recap on my reform proposals, categorising them under three main headings.

First, I advance recommendations in relation to *legislative structure and the rule of law.* These recommendations include (i) developing a comprehensive human rights charter

[1318] ibid 112-13.

to be entrenched in the Egyptian Constitution with clearer and more comprehensive provisions; (ii) strengthening the tradition of judicial reasoning and justification using proportionality test in Egypt, which could be enacted in a law to guide judges and help in establishing uniform judicial practice in balancing human rights against counter-terrorism laws; and (iii) amending counter-terrorism laws in relation to encouragement, incitement and glorification of terrorism to achieve more balance and ensure protection of freedom of expression. This last point includes proposals for law reform in both the UK and Egypt.

Second, I make recommendations in relation to *institutional development in Egypt*. These recommendations include (i) promoting the role of the Egyptian HRC; (ii) copying the role of the UK Independent Reviewer of Counter-terrorism Legislation in Egypt, while applying some developments to enhance practical application; and (iii) empowering regional human rights courts, like the African Court and the Arab Court to play similar accountability role as the ECtHR.

Third, I advance recommendations in relation to *deradicalization and rehabilitation of terrorists*. These recommendations apply to both the UK and Egypt and are inspired by the relatively successful experience of Egypt in deradicalization of the IG and the EIJ. This includes (i) following up with and providing support to rehabilitated persons after deradicalization to ensure they do not return to terrorism; and (ii) establishing cooperation protocols between countries to facilitate deradicalization of terrorists worldwide.

To conclude, the challenge of countering terrorism whilst protecting rights is not an easy balance to strike in any country, whether it is a consolidated democracy or a country transitioning towards constitutional democracy. The high risks posed by terrorism on national security place burdens on the state and complicate the missions of each branch, especially in a context of secrecy and given the gravity of national security threats. However, we must still invest hope that both national and international bodies will, together, contribute

to mitigating the negative effects of terrorism on human rights protection. My thesis explores what Egypt can do to rise to that challenge, drawing some fruitful inspiration from the UK. In recent years, Egypt has managed to successfully eliminate the risk of terrorism to a substantial extent, compared to the years following the Arab Spring. Now, it is time to focus more on strengthening institutional accountability to guarantee the protection of human rights and to move forward towards becoming a fully-fledged constitutional democracy which respects rights and the rule of law. This transition would be enhanced and invigorated if Egypt adopted the array of accountability mechanisms articulated and defended in this thesis.

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