Counter-Terrorism Legislation as a Proxy for "Improper Influence" in the Judiciary by the Executive and Legislature

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Abstract

In this article, counter-terrorism law provides a suitable proxy for the dyadic influence of the executive and the legislature on the judiciary. Counter-terrorism law of a democratic nation is often a product of both the executive and the legislative branches of government. Yet this law has substantial bearing on the independence of the judiciary. The present paper employs it as a substituted measure (proxy variable) of the executive and the legislative influence on the judiciary.

1. Introduction

There are several ways that both the executive and the legislature can influence the judiciary, either directly, or indirectly. However, there are other subtle ways that judicial independence can be threatened by the dyadic influence of the executive and the legislature. Over the last two decades, states have adopted increasingly robust counter-terrorism laws and policies. Frequent terrorist attacks experienced over that period reaffirmed the continued importance of strengthening the administration of justice, particularly in western democracies where such attacks became prevalent. The enhancement of the administration of justice therefore means the maintenance of legal rights within a political community by means of the physical force of the state. The strengthening of legal rights and the use of physical force by the state to combat and prevent terrorist acts and activities has been perceived as a step in the right direction and a measure to ensuring national security preservation. UN Security Council Resolution 1373 and subsequent related resolutions require states to implement laws and measures to improve their ability to prevent terrorist acts. Various western states have therefore recently adopted what is commonly referred to as "counter-terrorism laws." While counter-terrorism laws existed in many countries even prior to the September 11, 2001 (9/11) attacks on the US soil, such laws were not as "aggressive" as the new ones. Besides, the immediate response by the international community in the fight against terrorism serve as a catalyst for states to develop new measures and strengthen existing laws. These measures include criminalizing the financing of terrorism; freezing the funds of individuals involved in acts of terrorism; denying financial support to terrorist groups;

cooperating with other governments to share information; and investigating, detecting, arresting, and prosecuting individuals and entities involved in terrorist acts.[1]

In trying to understand how counter-terrorism law has affected the administration of criminal justice, and the independence of the judiciary, particularly in western democracies, the present paper addresses the relationship between the criminal justice system and terror suspects. The assumption being made here is that, terror suspects are "innocent till proven guilty." Indeed, Article 11 of the United Nations Universal Declaration of Human Rights, affirms that "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."[2] Terror suspects are, therefore, not terror criminals, or guilty, unless and until the court of justice renders a "guilty" verdict. Terrorists who have been proven guilty deserve proportionate punishment through the full force of the law. However, terror suspects under the custody of the state and are yet to be arraigned before the court of justice, deserve certain rights. They deserve the due process right and the right to fair trial within the ambit of the criminal justice system. But the due process and fair trial can only be realized if they rely on procedures that respect human dignity and equal treatment for all criminal suspects.

Although counter-terrorism laws existed in many western nations prior to the 2001 attacks, the magnitude of the 9/11 attacks impelled the immediate response by the international community to develop new measures aimed at strengthening existing laws. Even though diversity emerge in the organizational structure, as well as the administrative model of the judicial systems in western liberal democracies, the world of modern constitutional state is characterized by significant convergence, rather than divergence, particularly in the direction of judicial independence, transparency, accountability, and efficiency. Increasingly, therefore, there is homogeneity that define and characterizes similarities in trends and, indeed, the traditional differentiating characteristics of legal families are fading. This makes comparison on regional level very necessary.[3]

Yet tensions between these two areas of law and policy have emerged in recent years, resulting in challenges for governments and humanitarian actors. Although western democracies have laid a strong foundation for judicial independence, the independence of the judiciary still faces practical challenges in these democracies, particularly when it comes to the administration of criminal justice for terrorist suspects. Despite the western countries creating essential aspects of ensuring judicial independence such as, institutional structures, constitutional infrastructure, legislative provisions and constitutional safeguards, adjudicative arrangements and jurisprudence, and maintaining ethical traditions and a code of judicial conduct, there still exists improper influence,

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[1] BURNISKE, Jessica; MODIRZADEH, K. Naz; LEWIS, A. Dustin. *Counter-terrorism laws and regulations: what aid agencies need to know*. Humanitarian Practice Network. No.79. November, 2014, p.3.

[2] https://www.humanrights.com/what-are-human-rights/universal-declaration-of-human-rights/articles-11-20.html. Retrieved on December 17, 2020.

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

particularly on the administration of criminal justice by the state. Indeed, these essential aspects serve to insulate judges from the external pressure and the improper influence on the judiciary by the two other branches of the government (executive and legislature). Yet, even though these aspects are necessary and underpin the legitimacy of the institutional independence of the judicial branch, judicial systems are not fully free from political influence. This paper argues that the political control of the judiciary is well subsumed in the state's power to preserve national security. The contemporary national security legislations in the name of counter-terrorism law, allocate more powers to the state the "new" powers often

As John Salmond observes, the administration of justice implies, "the maintenance of rights within a political community by means of the physical force of the state."[4] While Salmond is right that the maintenance of rights (law and order) in society requires the use of physical force by the state, the physical force must also be guided or tamed by a body of laws that limits the hard-power of the state. This suggests that all state agencies and state actors must also adhere to, and respect the rule of law. But Salmond warns that although, the law is, without doubt, a remedy for greater evils, it also brings with it evils of its own. In the present paper, it is argued that although the counter-terrorism law is necessary remedy the evils commissioned by terrorists, the same law also brings with it other evils such as infringing on liberty and decreasing the likelihood of achieving a fair process in judicial trial. Counter-terrorism law essentially creates two different institutional cultures within the criminal justice system for terror suspects. On the one hand, there is the culture that does not necessarily believe in the ideals of fundamental justice and, hence espouse the use of disproportionate force, and longer pretrial detention for terror suspects. This culture is headed by the executive branch of government. On the other hand, there is the culture that observes the hygiene of the rule of law, due process, fair trial, and ideals of fundamental justice. This culture is headed by the judicial branch. When these two different institutional cultures live together within the criminal justice system, conflicts based on "intense constitutional dissension" increase.

2. Counter-terrorism Legislation as Proxy for the Executive and Legislative Dyadic Action

In the present study, a proxy scheme is herein adopted to account for the "improper influence" on the judiciary by the executive and legislative actions. It must be borne in mind that the executive and the legislature are key political players whose actions can potentially impact on the judicial performance. More pivotal, the executive and the legislature are two important political organs whose consensus is necessary for legislation and policymaking. The assumption is made here that the quality of relationship between the executive and the legislature in democracies is more likely to improve in periods of high-level national security threats. This implies that in times of high-level terrorist threats, both the executive and the legislature are more likely to build consensus or form a joint action in shaping their policy preferences on terrorism intervention measures. This commonly adopted policy preferences by both the executive and the legislature, is assigned the name "dyadic action," in the present study. It entails a joint action between the two political organs in decision making on matters important to the national security preservation. In this case, the focus is particularly on new national security legislation on terrorism prevention. It is this

[4] SALMOND, W. John. (1902). *Jurisprudence OR The Theory of the Law*. Temple Bar: London, Stevens and Haynes Bell Yard, p.14.

legislation that is implicated in bringing into play "improper influence" upon the competency of the judicial branch, through the executive and legislative dyadic action. The new national security legislation on terrorism prevention is referred herein as "counter-terrorism legislation" or interchangeably as "counter-terrorism laws". They refer to laws passed by the legislature with a view to combating terrorism and protecting the national security. In the subsequent paragraph, we explicate how counter-terrorism legislation (dyadic action) serves as a suitable proxy for the improper influence on the judicial power by both the executive and the legislature.

Since counter-terrorism legislation is a policy action adopted by the dyadic action between the executive and the legislature, it can be deduced that there is a positive correlation between counter-terrorism legislation and the dyadic action. The implication being that the dyadic action by the executive and the legislature is subsumed in the counter-terrorism legislation. In other words, counter-terrorism legislation is a suitable proxy for, or a suitable substitute of, the executive and legislative joint action (dyadic action). This national security law deserves considerable attention. Firstly, to a great extent, it materially deviates from the ordinary criminal law. It is designed to sanction administrative detention. This kind of detention allows for arrest and detention of individuals by the State without trial. Secondly, it permits prolonged pre-trial custody, which undermines the right to *habeas corpus,* and the right of arrestees to contact their family. Thirdly, it denies many suspects the right to be represented by a lawyer during the arrest, investigation, and atrial. Fourthly, it presumes that the existing criminal procedure code is ill-suited to handle the specific challenges presented by terrorism, and that the ordinary criminal law's reliance on suspect's rights and the strict evidentiary rules are not effective enough to remove the threat of dangerous terrorists. Sixthly, while criminal prosecutions are normally designed primarily to punish past crimes (criminal proceedings have a retrospective focus), counter-terrorism law is aims to prevent future action. It is remarkable to add that administrative detention does not require proof of individual guilt. It attributes to all members of a certain group the actions of a few. Such action by the State goes against the International Covenant on Civil and Political Rights, which protect individuals' freedom from infringement by governments.[5] Thus, the improper influence on the judicial power by the executive and legislative dyadic action unfolds against the backdrop of counter-terrorism legislation. Consequently, we elucidate how counter-terrorism legislation adversely impacts the judicial power- competency.

3. Counter-terrorism Laws and Improper Influence on the Judicial Power

Counter-terrorism laws have become part of an effective scheme by the executive and the legislature to unlawfully invade and "chip off" the "judicial power." It is respectfully submitted in the present study that counter-terrorism laws pose potential threat to judicial power and judicial independence. It is therefore necessary to illustrate with robustness, how counter-terrorism laws potentially weaken the judicial power and hence pose significant threat to judicial independence in democracies. Our delving into the relationship between counter-terrorism laws and the judicial power is premised upon the presumed "improper influence" exerted upon the judiciary by the joint action (dyadic action) between the execute and the legislature. Justice Miller, in his work on the Constitution defined the concept of judicial power as "the power of courts of justice to decide and

[5] https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. Retrieved on September 12, 2020.

pronounce a judgement and carry it into effect between persons and parties who bring a case before it for decisions."[6]

It is important to examine criminal justice system in the age of terrorism. The focus here, therefore, is on the relationship between counter-terrorism legislation and the impartial judicial decision-making within the criminal justice system. The bountiful literatures on judicial systems systematically examine how different rules, institutional structures, and incentives determine the concept of judicial independence. Scholars, for instance, have shown that only genuine and credible judicial reforms are likely to safeguard judicial independence and create guarantee of fair trial.[7] These credible reforms and incentives include fair selection of judges, automatic case allocation schemes, autonomous budget for the judiciary, and judicial security of tenure. While many western democracies have fulfilled most, if not all, of these crucial aspects for legitimizing judicial independence, it is often perceived that these essential aspects produce desired balanced judicial outcomes in western democracies. However, the relational outcomes between judicial reforms and judicial independence often circle back. This is likely to happen, especially when the executive is desirous of curtailing judicial independence.

There are a number of reasons, however, which are likely to force the state to become desirous of the curtailment of judicial independence. One of them is politics, and especially when the government wants to respond to national security threats in heavy-handed ways that violate the rights of individuals. For instance, in the United Kingdom (UK), courts only have the authority to review the validity of delegated legislation, but not primary legislation. Indeed, parliamentary sovereignty places an important limit on the power of the UK courts. Although the Human Rights Act 1998 is said to have imposed some limits on parliament, this could be more theoretical than practical. The UK judiciary is still incapable of legally invalidating primary legislation under the constitutional doctrine of parliamentary sovereignty. This provides parliament with ultimate legal control. This induces the government to look for ways of single-handed decisions and thus weakening the judicial autonomy. In some cases, the government is desirous of judicial loyalty in order to make the judiciary defer and rule in favor of crucial government policies that the ruling party seeks to implement. Judicial loyalty to the executive is likely to happen when the executive succeeds in weakening the judicial self-governing bodies.[8] There are mixed accounts, however, of how far the government has succeeded in securing judicial loyalty, particularly in western democracies. One of the government's failures in coercing judicial loyalty in western democracies is due to the strict adherence to the principle of the separation of powers.

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[6] THOM, Pembroke Alfred. (1912). *The Judicial Power and the Power of Congress in Its Relation to the United States Courts: Argument of Alfred P. Thom in Opposition to Senate Bills 4365 and 4366, Prohibiting the Granting, by Any Court, of Injunction in Certain Cases*. U.S. Government Printing Office, p.5.

[7] FLECK, Zoltan; BADO, Attila; SZARVAS, Kata. (2014). Fair Trial and Judicial Independence in Comparative Perspectives. In "*Fair Trial and Judicial Independence: Hungarian Perspectives*." (2014). BADO, Attila. (Ed). Switzerland: Springer International Publishing.

[8] BADO, Attila. Political, merit-based and nepotic elements in the selection of Hungarian judges. A possible way of creating judicial loyalty in East Central Europe. *International Journals of the Legal Profession*. Routledge, Taylor and Francis Group. 2016.

The concept of separation of powers has been entrenched in the constitutional documents. It would have been good to observe and specify improper influence of the executive and legislature in the judiciary. However, the prospect of making such direct observation, where the executive and the legislature directly exert their undue influence in the judiciary is sometimes practically impossible, especially in constitutional democracies. Proxy variables in research, is a variable that is not easily captured in a date series, yet it impacts the dependent variable in a significant way. Research on the improper influence in the judicial branch by the executive and judiciary have long focused on….Yet little attention has been paid to proxy alternatives. In the present paper, undue influence in the judiciary by the executive and legislature is proxied as "counter-terrorism legislation."

Using counter-terrorism law as a substitute for specifying the improper influence in the judiciary by the executive and legislature can be said to be valid insofar as it captures the dyadic action by the two political organs that exerts pressure on the judiciary to endorse government security policy that negates the letter and the spirit of the fundamental law (constitution). Counter-terrorism law has been argued to chip off the constitutionally protected rights of individuals.[9] For instance, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act 2001, which was immediately created as a counter-terrorism law after the 9/11 provides more power to security agencies to conduct warrantless searches, and if necessary, warrantless intrusions without obtaining probable cause search warrant from the court of justice. This action by the executive in the name of national security law, goes against the Fourth Amendment protection, which provides individuals constitutional protection from unreasonable searches and seizures by the government.[10] The only time a warrantless search and seizure could be allowed without probable cause is where their reasonable procurement is impracticable. But it is interesting to remark that the U.S. Supreme Court in, *Olmstead v. United States*, upheld the unwarranted use of wiretaps to intercept the conversations of the defendant and others in a criminal investigation.[11] However, it must be understood that the Court was only categorical on telephone wire taps, but refused to extend that exception to "persons, houses, papers, and effects, as expressed in the Fourth Amendment language.[12] This implies that the government can remotely intercept or wiretap private conversations without obtaining a warrant. The Supreme Court seemed to have relied upon the concept of "tangible property" when pronouncing itself in *Olmstead*.

In 1967, however, the Supreme Court broadened its interpretation in *Olmstead* when deciding in *Katz v. United States,* to include searches of people as well as places.[13] But it asserted that first, the court must decide whether the individual had a subjective expectation of privacy. If the answer is yes, the court must then determine whether society objectively recognizes that individual's expectation of privacy. The Court pronounced that the government's eavesdropping activities violated the privacy upon which petitioner justifiably relied while using the telephone booth. This

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[9] EVANS, C. Jennifer. Hijacking Civil Liberties: The USA PATRIOT Act of 2001. *Loyola University Chicago Law Journal*. Volume 33, Issue 4, 2002.
[10] https://constitution.congress.gov/constitution/amendment-4/. Retrieved on November 28, 2020.
[11] Olmstead, 277 U.S. at 438.
[12]U.S. CONST. amend. IV.
[13] Katz v. United States, 389 U.S. 347 (1967).

is a classic example where we see the Supreme Court seems to be affirming the Fourth Amendment constitutional foundation in favor of civil liberty protection, by asserting that the word "privacy" entails the privacy of people in their homes as well as any other place outside their homes that they might find themselves in. This broadened interpretation seems to protect privacy to almost everything. *Katz* seems to strengthen public trust and confidence in the judiciary as the guardian of the constitution and the protector of rights.

Counter-terrorism law is basically a body of laws adopted by the state to deter and punish terrorist acts and activities, and to prevent terrorist groups from being able to threaten state security, disrupt law and order, and cause harm to innocent civilians. Although counter-terrorism law is a notable national security legislation in many western constitutional democracies, it considerably weakens and regresses criminal justice reforms. There have been complaints that counter-terrorism laws have introduced different rules of criminal procedure. The legal principles under counter-terrorism laws also seem to be applied on a discriminatory basis. This has been said to interfere with the due process, and fair trial in criminal law. For instance, the USA-PATRIOT Act 2001, was immediately created as a counter-terrorism law after the 9/11, with increased power of government agencies to combat violent terror machinations plotted against the U.S. by Islamic extremists.[14] At the same time, special military tribunals were established by the U.S. president through an executive order to try non-US citizen terror suspects.[15] Detailed discussion on how counter-terrorism laws tend to affect the criminal procedure law is tendered in the sections below.

Counter-terrorism law is used in the present paper as a suitable proxy for describing the improper interference of the executive and legislature in the administration of criminal justice, particularly in western democracies that have experienced high numbers terrorist attacks. Myriad episodes of terrorist attacks in western democracies in the recent period have led to governments taking responsive measures and actions that often offend their constitutions. The Execute and Legislative branches, are political organs capable of imposing deprivation of liberty during high-level national security threats. In times of war, or during periods of high-level terrorist attacks, for example, the two political organs are capable of building a dyadic consensus with a view to imposing a state of emergency that considerably limits civil liberties. This deprivation of liberty may have far-reaching repercussions for the administration of justice. Let me illuminate this point further. When the dyadic consensus between the executive and the legislature is aimed at restricting liberty on national security grounds, it often comes in the form of a new legislation, which to a considerable extent, also offends the constitution. The two political organs may agree to come up with a new national security legislation, for example, counter-terrorism law, which legally calls for conformity. They would then make astute rational argument and persuasion (informational influence) that the new law is necessary for national security preservation. This kind of argument and persuasion amounts to social pressure. It is a form of social pressure that calls for conformity and is capable of directing other forms of influence, such as demands, threats or personal attacks on the judges and the judiciary as a whole. This is just but one instance, of how the two political

[14] FRIAS, S. Ana. *Counter-terrorism and human rights in the case law of the European Court of Human Rights.* Council of Europe Publishing, November 2012.
[15] GROSS, Emanuel. Trying Terrorists - Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights.

organs (the executive and the judiciary) might influence the administration of justice – directly or indirectly imposing social pressure on judges.

As one scholar, Jerome Alan Cohen, observes, judicial independence requires that a legal system protects its judges from governmental or social pressures that could force a judge to deviate from his or her interpretation and application of the law.[16] As already stated, both the executive and the legislature are capable of imposing social pressure on the judiciary. According to the American Psychological Association Dictionary of Psychology, social pressure, entails the exertion of influence on a person or group by another person or group.[17] Social pressure must therefore be seen as a potential external and improper influence on the judiciary from the two political organs. It is capable of influencing the judiciary to support the government in achieving its national security policy objectives. It is important, however, to exactly understand how this social pressure comes about, and how it exerts far-reaching repercussions on the administration of justice.

In the present-day permutation of terrorist attacks, considerable pressure is bound to mount on the government to preserve national security and to maintain law and order. This impels the government to act swiftly in order to renew its strength and security, by revitalizing its security apparatus. In the case of terrorist threats, the government would undertake additional efforts to create counter-terrorism law with a view to preventing terrorists from acquiring space to commission terrorist attacks. This security apparatus not only serves to defend the territorial integrity of a country, but also enables the state to enforce the law. But the structure of this security apparatus must be based on adopted legislation so as to validate its fundamental objective of ensuring safety. Many of western democracies have been able to create new national security laws, commonly referred to counter-terrorism law. The counter-terrorism law comes as a package with provisions derived from the dyadic consensus of both the executive and the legislature. But the enforcement of this law often creates fundamental challenges. These challenges come in the form of human rights violations and impediment in the administration of justice, contrary to the fundamental law. But just how does counter-terrorism-law falls afoul of the constitution – the basic or the fundamental law of the state?

Counter-terrorism laws are often passed in the legislature with far less debate on their infringement on liberty and their potential conflict with the constitution. The proponent of counter-terrorism laws often believe that speed is essential in the battle to prevent terrorist attacks. This has led to new security laws being passed despite the fact that they potentially undermine liberty and the due process rights guaranteed by the constitution. These compromising maneuvers often pose significant threats to the independence of the judiciary. Moreover, the enforcement of counter-terrorism law often potentially undermines the rule of law and weakens fair trial. From a criminal justice perspective, full constitutional protections should always be applied to detained suspected terrorists. Criminal justice proponents also argue that treatment of detained suspected terrorists and the investigative methods used to build cases against them should comport with the traditional due process protections for all suspects of crimes. The counter-terrorism law also provides the law

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[16] COHEN, Alan Jerome. The Chinese Communist and Judicial Independence. *Harvard Legal Review*, (1969).
[17] https://dictionary.apa.org/social-pressure. Retrieved on 12, October, 2020.

enforcement agencies the discretion for arbitrary arrests, indefinite or prolonged detentions, harsh interrogations, and in some cases torture of suspected terrorists, some of which could be innocent persons.

The enforcement of counter-terrorism laws is complicated and is known to offend the constitutionally guaranteed human rights in a number of ways. For instance, the fight against terrorism by the state has witnessed several attempts by state security agencies to unduly extend pre-trial detention of terror suspects without the judicial authority ordered by court of justice. In the corpus of the European Court of Human Rights (ECtHR) case law, unlawfully prolonged pre-trial detention sharply conflicts with international law and best practice. Undue extension of remand custody is condemned by the ECtHR as it runs afoul of Article 5 of the European Convention on Human Rights.[18] Indeed, prolonged pre-trial detention removes the right to liberty from suspects, some of which, are innocent because they have not been tried before a competent court and proven guilty. Terror suspects who have not been convicted of any penal crime, on the basis of evidence that has not been examined, are likely to suffer serious detriments. This not only amounts to denying them liberty, but also affects their health, family, and livelihood. It is only the court of justice, but not state security agencies, which should have the competent authority to determine the pre-trial custody of terror suspects. Indeed, in the constitutional democracy of western nations, the right of access to justice should be expeditious and not illusory.

Moreover, the enforcement of counter-terrorism laws often run in the constitutional democracy of western nations afoul of *habeas corpus* rights. It means that terrorist suspects can be detained for a longer period of time without being produced before court. This potentially creates impediment to *habeas corpus* proceedings. A well-established rule in criminal law is that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law. However, terrorist suspects under the counter-terrorism law, are often treated as if they are already guilty even before being arraigned before a competent court. Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[19] The decision by the investigating security agencies to decide to unilaterally detain suspects for longer periods and deny them the right to be heard in court within the time period provided for in the constitution is improper and runs afoul of the human rights law. It is only the court, and not the executive-led security agents that should determine how long a suspect should be in custody pending full investigations before being arraigned in court. This implies that there are some state actions that are *ultra vires* and the state is capable of acting beyond its legal powers to detain suspects for a longer periods than what the human rights law permits. All criminal procedures, whether involving terror or non-terror suspects must be in line with the human rights. Article 6(1) of the European Convention asserts this guarantee by assuring that in the determination of individuals civil rights and obligations or of any criminal charge against them,

[18] https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06. Retrieved on October 14, 2020.
[19] https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf. Retrieved on November 17, 2020.

everybody is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[20]

In some cases, due to the harsh interrogations, indefinite detentions, and torture of suspected terrorists, and as far as the rules of evidence in a trial are concerned, it becomes questionable how the investigating agencies collect and tender admissible evidence. This suggests that judges may not be able to decide each case in accordance with the facts, the rule of law, and by reference to the manipulated evidence before the court. Because of this lack of transparency, the evidence procured and adduced could be of great concern. The primary concern would be on the issue of fairness and impartiality in the administration of justice. Indeed, it would be a travesty of justice if sound conclusions are drawn from an improperly procured material evidence. Yet, the rules of evidence often profoundly affect the course and outcome of trial in courts of justice.

In the present paper, counter-terrorism law is used as a proxy variable and is therefore substituted for the executive and legislative influence (improper interference) on the judiciary. It is precisely for the reason that it might be difficult to directly observe the executive and legislative influence on the judiciary because of the rebuke that they might get if they openly and directly try to interfere with independence of the judiciary. But it should not be surprising that the dyadic influence of the executive and the legislature on the judiciary can be exerted through other mechanisms. In the absence of an observable direct influence of the executive and the legislature on the judiciary, a suitable proxy variable (counter-terrorism law) can be used to capture that aspect of direct influence. As one scholar, Kazuhiro Ohtani, correctly observes, using the proxy variable is better than omitting the unobservable variable in terms of the effects.[21] In this case, using counter-terrorism law as a proxy (substitute) for the executive and legislative influence on the judiciary is better than omitting the unobservable direct influence of the executive and the legislature on the judiciary. This is to say that there are other ways or mechanisms under which the two political organs can use to exert their influence on the judicial system.

4. The Executive and Legislature Influence on the Judiciary

During periods of high-level terrorist threats, the two political organs (executive and legislature) are, highly likely to build consensus on how to counter such threats, and maintain social order of shared norms and values. One of the consensus is that the "means justify the ends." This implies that there must be some form of interventions in curbing terrorist threats. Such interventions usually involve new security legislations, commonly known as "counter-terrorism law." Whenever counter-terrorism law is adopted, it becomes a popular sentiment by the executive and the legislature. It is assumed to carry the values and preferences of the citizens since the citizens' will, are represented by elected leaders. When the executive and the legislature make counter-terrorism law become the popular will of citizens, judges are often expected to be responsive to the values and preferences of the citizens. Although judicial systems are supposed to maintain boundaries with the other non-judicial systems that exist within their environment, they can hardly escape the

[20] Ibid, p.6.

[21] OHTANI, Kazuhiro. A Note on the Use of a Proxy Variable in Testing Hypotheses. *Economics Letters* 17 (1985) 107-110.

trust and confidence that citizens put and have upon them. There is almost always strong social pressure on the judiciary to pronounce harsh punishment on terrorists.

5. Conclusion

The social pressure potentially on the judiciary effectively makes counter-terrorism law a suitable proxy for the external and improper influence on the judiciary by the two political organs. In some cases, the pressure would be on the judge to surrender independence, and the rule of law, and instead defer to the popular will of citizens. The independence of the judiciary cannot hold when there is improper interference in, pressure on, and threats against, the judiciary system. In deciding on terrorism related cases, judges are often confronted with more complex situations that require them to develop a cautious approach in adjudicating over such cases. Besides, the ICCPR states that trying civilians under a military court may raise problems regarding the "equitable, impartial, and independent administration of justice concerned." This is why the ICCPR goes on to say that "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials." It implies that trying civilians under military courts should be the exception and not the norm, especially when those being tried are charged with crimes that can be handled by civilian judges. In most democratic nations, civilians are tried before civilian courts where their cases are heard by civilian judges even where they are charged with terrorist acts. The Right to a Fair Trial is protected by the ICCPR under Article 14. The violations of the rights to Liberty and Security and prohibition of torture and inhuman or degrading treatment or punishment directly impact the right to a fair trial.