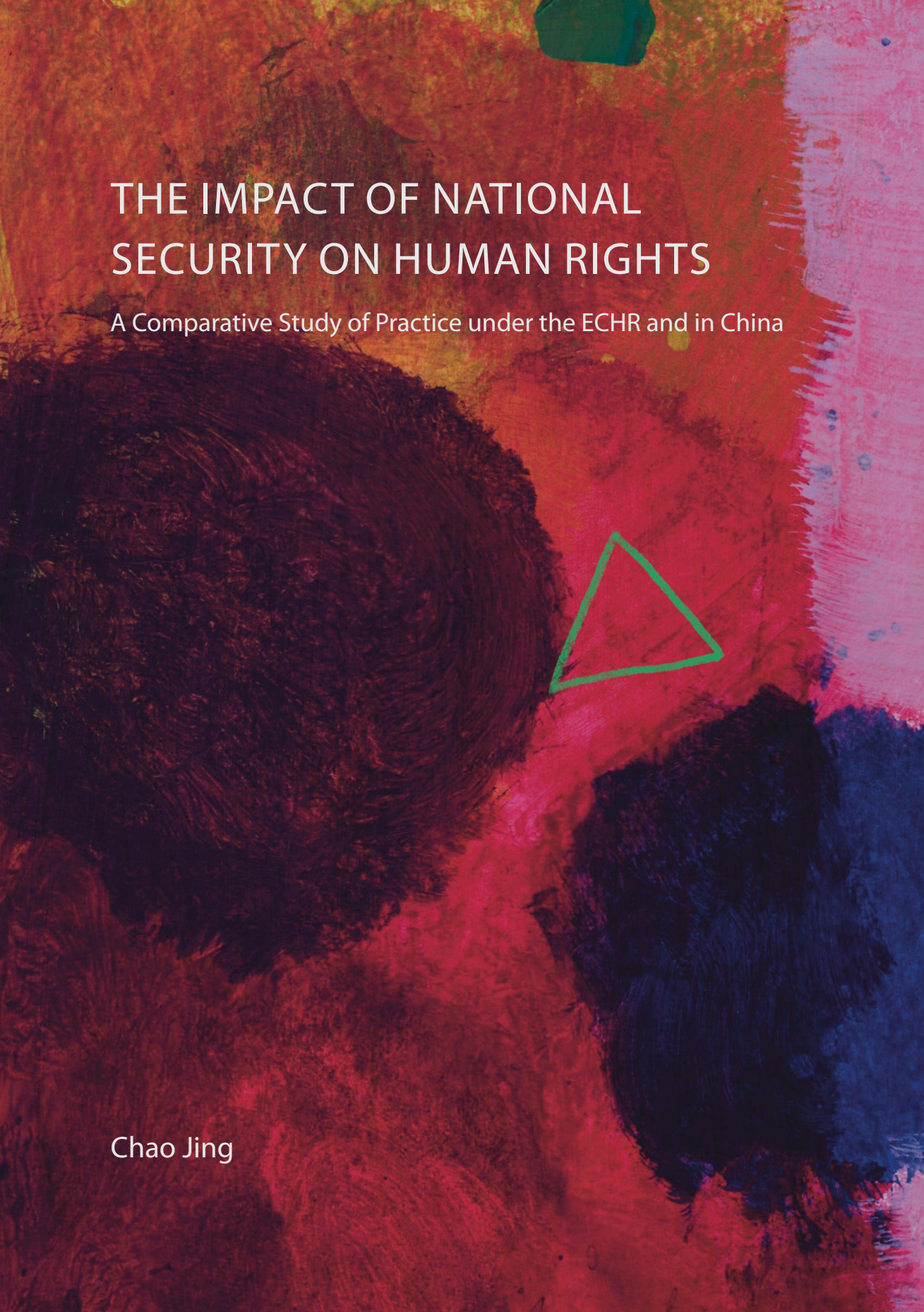
THE IMPACT OF NATIONAL SECURITY ON HUMAN RIGHTS
A Comparative Study of Practice under the ECHR and in China
Chao Jing

The Impact of National Security on Human Rights

A Comparative Study of Practice under the ECHR and in China

Chao Jing

Cover design: Klaartje Hoeberechts
DOI: https://doi.org/10.33540/1014

The Impact of National Security on Human Rights

A Comparative Study of Practice under the ECHR and in China

De Impact van Nationale Veiligheid op Mensenrechten
Een Vergelijkende Studie over de Praktijk onder het EVRM en in China

(met een samenvatting in het Nederlands)

Proefschrift

ter verkrijging van de graad van doctor aan de
Universiteit Utrecht
op gezag van de
rector magnificus, prof.dr. H.R.B.M. Kummeling,
ingevolge het besluit van het college voor promoties
in het openbaar te verdedigen op

dinsdag 21 november 2023 des ochtends te 10.15 uur

door

CHAO JING

geboren op 18 december 1990
te Shandong, China

Promotor:
Prof. dr. T. Zwart

Beoordelingscommissie:
Prof. dr. G. Alfredsson
Prof. dr. A.C. Buyse
Prof. dr. P.M. Langbroek
Dr. J.P. Loof
Prof. dr. A. Renteln
Prof. dr. M. Sun
Prof. dr. M.C. van der Wende

This thesis was accomplished with financial support from the China Scholarship Council (CSC No. 201607070018).

ACKNOWLEDGMENTS

This thesis would never have been completed without the support and guidance of many people. I am deeply grateful for my supervisor, Professor Tom Zwart. He supported my research not only by providing the opportunity to proceed this PhD study at the Utrecht University, but also by his guidance and encouragement throughout this project. When writing this thesis, he gave me professional and practical advice on the direction of the research and specific questions, as well as the freedom I needed to study the topics of interest. I can always count on his inspiring comments, sensible approach and active support for my study and research.

I appreciate the scholarship granted by the China Scholarship Council (CSC) for my four-year PhD research in the Netherlands. I also would like to thank Utrecht University for offering the work space, printing and other facilities, and thank the International and European Law Department of the School of Law for helping with practical matters in my work and for providing financial aid for my participation in academic conferences.

I am very grateful for the comments and feedback on this thesis from the assessment committee. Their intellectual input contributed substantially to my analysis of the topic and broadened my grasp of the subject. So special thanks to Prof. dr. Gudmundur Alfredsson of Stefansson Arctic Institute, Prof. dr. Antoine Buyse of Utrecht University, Prof. dr. Philip Langbroek of Utrecht University, Mr. dr. Jan-Peter Loof of Leiden University, Prof. dr. Alison Renteln of University of Southern California, Prof. dr. Meng Sun of China University of Political Science and Law, and Prof. dr. Marijk van der Wende of Utrecht University.

I would like to thank Professor Wenzhan Ban, who guided me with his wisdom and kindness. I shall not forget the help offered by Professor Wei Zhang during my PhD study. I also would like to express my gratitude to my dear friends and colleagues with whom I shared many special moments: Wen Duan, Julie Fraser, Hye-Min Kim, Ruoyu Li, Wei Lin, Stacey Links, Yuanzheng Liu, Kai Mu, Ming Niu, Qinxuan Peng, Cong-rui Qiao, Pengbo Qin, Hao Ren, Ying Song, Chenyu Wang, Wenyang Wu, Tong Xu, Xian Zhang and Chenjun Zheng. They were always there for me and ready to offer their selfless help. I am grateful to

them for making life colourful. I also want to thank Henrike Prudon and Alison Gibbs for proofreading this thesis and improving the language.

My last thoughts go to my family. During my study abroad, my mother gave me nothing but support. She waited, waited and waited, without any complaint. I am deeply indebted to her for this life and her love. My late father directs me to act with honesty and integrity, and I hope I have not let him down. I dedicate this thesis to my parents – Xiaobin Jing and Mingyan Jiang.

为报平生未展眉

July 2023, Qingdao
Chao Jing

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CCP	Chinese Communist Party
CNSC	Central National Security Commission
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GCHQ	Government Communications Headquarters
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-governmental organisation
NPC	National People's Congress
OHCHR	Office of the High Commissioner for Human Rights
RSDL	Residential surveillance at a designated location
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
VETP	Vocational Education and Training Programme
XUAR	Xinjiang Uyghur Autonomous Region

CHAPTER 1 INTRODUCTION

Is national security the Achilles' heel of the discourse on human rights protections? Could national security bring an end to our freedoms? In recent years, the conflict between security and freedoms has attracted considerable attention from governments, the public and academics. Following, for example, the disclosure in 2013 of the mass communication surveillance programme of the US National Security Agency (NSA), government authorities, international organisations and scholars debated the extent to which we surrender human rights out of concerns for security, and the UN Human Rights Council has appointed a special rapporteur on the right to privacy to examine interceptions of digital communications and collecting of personal data.[1] In Europe, jihadist atrocities prompted France, in particular, to declare and then extend a state of emergency (*état d'urgence*); this was closely followed by official derogation from the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention).[2] Many governments see it as inevitable that we have to trade freedoms for security and that sticking rigidly to asserting human rights would endanger the security of the state, as well as the lives of people. [3] Facing practical realities and political pressure, government authorities are reviewing norms, policies and instruments as they attempt to strike a balance between national security and human rights.

European countries have been critical of China's human rights records for decades. While China firmly insists that its approach to human rights is based on its national condition[4] and has refused to copy the European model. The

[1] See UN General Assembly, Report of the Special Rapporteur on the Right to Privacy, A/HRC/37/62 (2018). UN General Assembly, The Right to Privacy in the Digital Age, A/HRC/RES/28/16 (2015).
[2] See Council of Europe, "Declaration from the Permanent Representative of France, Dated 22 July 2016, Registered at the Secretariat General on 22 July 2016", *Council of Europe*, 15 December 2016, retrieved 15 December 2016, from http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW.
[3] See Chiara Giorgetti, 'Balancing Security and Human Rights: Post 9/11 Reactions in the United States and Europe', in Karin von Hippel (ed.), *Europe Confronts Terrorism*, Palgrave Macmillan, 2005, 244-262, pp. 244-245.
[4] See Xinhua, "China Will Unswervingly Follow the Path of Human Rights Development that Suits its Own National Conditions: Ma Zhaoxu on China's Participation in the 48th Session of the UN Human Rights Council", *Xinhua,* 25 September 2021, retrieved 8 January 2022, from http://www.news.cn/2021-09/25/c_1127899157.htm. （参见新华网："中国将坚定不移走符合自身国情的人权发展道路——马朝旭谈中国参与联合国人权理事会第 48 届会议"，新华网 2021 年 9

Chinese government's counterterrorism policy in Xinjiang has drawn strong condemnation from some European countries for repressing human rights.[5] European nations differ from China in terms of their political systems,[6] and some observers are consequently tempted to conclude that the two will make distinctly different choices when facing the same challenge.[7] The assumption is often that European nations are committed to liberalism, while China is dominated by authoritarianism.[8] This raises the question of whether this is also the case when it comes to reconciling national security and human rights? I will engage with this topic here by answering the following main research questions. In which aspects has national security made an impact on human rights in Europe and China? Do Europe and China take different approaches to balancing national security and human rights? To what extent are their approaches similar or different? As well as outlining the approaches taken by European countries and China, I will also try to analyse the rationale behind each of them. By comparing the two approaches, I aim to offer an insight into the legitimacy of the assumption that China is more partial to security while European nations' preference is for freedom.

1.1 OUTLINE

The title of this thesis is 'The Impact of National Security on Human Rights – A Comparative Study of Practice under the ECHR and in China'. 'Practice' in the title, as opposed to theory, includes not only cases, but also legislation, enforcement of law and policies, as all of these aspects can be considered to constitute state authorities' responses to national security challenges. 'Impact' in the title refers to the influence or effect that action taken by state authorities in the name of national security has on human rights. I will illustrate and analyse how this influence is manifested, especially for the categories of people

月 25 日报道，网址 http://www.news.cn/2021-09/25/c_1127899157.htm，最后访问日期 2022 年 1 月 8 日。）

[5] See Al Jazeera, "More Countries Criticise China at UN for Repression of Uighurs", *Al Jazeera,* 22 October 2021, retrieved 8 January 2022, from https://www.aljazeera.com/news/2021/10/22/43-countries-criticize-china-at-un-for-repression-of-uyghurs.

[6] See Thorsten Benner, Jan Weidenfeld, Mareike Ohlberg, Lucrezia Poggetti, and Kristin Shi-Kupfer, 'Authoritarian advance: Responding to China's growing political influence in Europe', *MERICS*, February 2018, pp. 2-3, retrieved 9 January 2020, from https://merics.org/en/report/authoritarian-advance-responding-chinas-growing-political-influence-europe.

[7] See Mathieu Duchâtel and Alice Ekman, 'Countering Terrorism: An Área for EU-China Cooperation?', *European Union Institute for Security Studies (4),* 2015, retrieved 9 January 2020, from https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_14_China_counter-terrorism.pdf.

[8] See Jacques deLisle, 'Security First - Patterns and Lessons from China's Use of Law to Address National Security Threats', *Journal of National Security Law & Policy 4(2)*, 2010, 397-436, pp. 397-398 & 408-422. Elena Pokalova, 'Authoritarian Regimes against Terrorism: Lessons from China', *Critical Studies on Terrorism 6(2)*, 279-298, pp. 281-283.

whose rights could be interfered with, and the rights that could be affected. In this context I will also examine how state authorities' responses to national security challenges could influence people's enjoyment of human rights. It is widely accepted that the relationship between national security and human rights should not be an either-or option. The key is to calibrate the extent to which human rights should be reduced out of concern for national security. In this regard, I will analyse how the extent is determined in the sense of striking a balance between national security and human rights.

Following the introductory chapter, I will unfold my analyses and arguments in five chapters. Since I will compare Europe and China, these chapters can be divided into two main parts, one part analysing how governments' interference with human rights out of concern for national security is justified under the ECHR and the other part analysing this in respect of China. After addressing the ECHR in Chapters 2 and 3, and China in Chapter 4, I compare their approaches (Chapter 5) and come to my conclusion (Chapter 6).

Chapter 2 focuses on the text of the Convention, particularly the provisions related to national security. Looking back at the drafting history, I also note those substantive provisions in the Convention that do not list national security as specific justification for restricting rights and offer an explanation as to why this justification was not included by the drafters. My main aim in this chapter is to provide a full picture of national security in the Convention, including the initial ideas on this term, and the generic way the European Court of Human Rights (ECtHR, or the Court) implements it. In Chapter 3, I conduct an in-depth analysis of ECtHR case law to shed light on how national security impacts on human rights protections in practice. I analyse the impact from multiple perspectives, specifically its legal basis, scope, pathways and extent. These four elements constitute the main body of my research, with the last three being paralleled in the study of China provided in Chapter 4. The 'legal basis' refers to the mechanism that the Convention provides for a state party to reduce its human rights obligations in order to protect national security. The 'scope' embodies several dimensions of the impact of national security on human rights, including the groups of people affected, the categories of rights, and the spatial and temporal factors of the impact. The 'pathways' indicate how the impact on human rights is achieved by the government. The 'extent' investigates the proportionality of the government's interference with human rights. I conclude this part by identifying the decision-making patterns depicted by the Court in reviewing national security cases.

The margin of appreciation is an evident indicator for identifying the Court's reasoning patterns when balancing national security and human rights. The questions I examine are whether the Court gives a wide or narrow margin of

appreciation to state authorities, and what this specifically means in terms of the Court's analysis of proportionality in national security cases. The case law on this subject matter is inconsistent because, at first glance, the Court's considerations flow from the nature and features of the cases on which it has to adjudicate. However, I propose that by reading its decision-making process from two perspectives – the broad categorical perspective and the case-specific perspective – we can find a certain level of consistency underlying the Court's considerations. From the broad categorical perspective, I address the question of when a wide or narrow margin of appreciation is provided, and argue that this determines the intensity or major concerns of the Court's scrutiny. I find that the intensity and major concerns, corresponding to the margin of appreciation being assigned, display a trend of prioritising either human rights interests or national security interests, which I refer to as the Human Rights Priority Model and the National Security Priority Model, respectively. However, this trend is not decisive in terms of the outcome of each case. From the case-specific perspective, I find that the Court tries to redress each model's embedded tendency to prioritise either human rights or national security by weighing the concrete facts and specific circumstances of the case.

Chapter 4 turns to mainland China. Bearing in mind that it has signed and ratified several international human rights treaties, China has obligations to fulfil when establishing a balance between national security and human rights. The analyses in this chapter could therefore help China to observe international human rights standards. When it comes to China and international norms, the argument about 'Chinese characteristics' is nearly inevitable. The term is sometimes vaguely used by Chinese authorities to denote certain political, social, economic and historical features characterising the country's situation and that may merit a special interpretation of international norms. This raises the question as to whether this is the case in matters of 'human rights' and 'national security'. The first question I address is how China interprets the meanings of national security and human rights, and whether 'Chinese characteristics' play a role in these interpretations. Then I analyse the impact that national security has on human rights protections in China. As in the ECHR part, my analysis examines the scope, pathways and extent of the impact. In these sections I also identify deficiencies in China's approach.

Chapter 5 compares the approaches adopted by European nations and China. First and foremost, I compare how China and Europe interpret the meanings of national security and human rights, as well as the reasons behind their interpretations. My objective is to examine whether they share basic apprehensions about the contents of national security and the rights that are often interfered with owing to such concerns. The answer to this question

constitutes the foundation for any further comparisons of how the balance has been struck and for addressing deficiencies in China's approach, and considering how it could learn from its counterparts' arrangements. Secondly, I summarise and compare the approaches taken by Europe and China when reconciling national security with human rights. Chapter 6 contains the conclusion, in which I propose some instructive lessons that China could learn from European practices and that could be incorporated into Chinese practices without meeting resistance from its existing political system.

1.2 OBJECTIVE AND APPROACH

My prime objective is to study how national security and human rights interact in Europe and China, and how each seeks to protect one without damaging the substance of the other. In doing so I will explore laws and their implementation, given that these tell us how a country weighs national security against human rights. To pinpoint China's approach, I focus on national security regimes and use cases as illustrations, either for an empirical confirmation or for noting the gap between law and implementation. For Europe, I base my analysis mainly on ECtHR case law.

When introducing my approach, I first address two questions: why have ECHR Contracting States and China been chosen? In which sense can and will they be compared? As the focus of my research is on the relationship between national security and human rights, I have chosen the ECHR and its case law as the basis for studying European practice because, being specifically aimed at protecting human rights, the ECtHR is the institution analysing national security challenges primarily in the context of human rights.[9] Compared to common law countries like the United States of America, most European countries under the ECHR have adopted the civil law system, which is more similar to the Chinese legal system and thus more comparable.[10] While the ECHR is regarded as providing one of the strongest mechanisms for human rights protections, China is often criticised for its commitment, or lack of commitment, to and protection of fundamental rights, in particular civil and political rights. Comparing two systems by putting them under the same light, i.e. by reconciling national security with human rights, enables the features and defects in each system to be more clearly identified and thus analysed than if the inquiry were to be confined to one system.

[9] In this thesis, I use the terms 'Europe' and 'European countries/nations' in the sense of the Contracting States of the ECHR taken as a whole.

[10] The United Kingdom is another country using the common law system, and it is a state party to the ECHR. As we will see in the following chapters, when it comes to examples of the UK, I only invoke its statute law, instead of the case law.

The group of 46 European nations[11] have ratified a treaty that is specifically committed to protecting human rights, and thus they all have to follow the same legally binding standards when tackling national security issues. As each European country also has its own particular and specific struggles between national security and human rights, choosing one or two European countries would result in too much attention focusing on their specific local conditions, history and culture. Although these factors undeniably contribute to the approach that governing authorities take towards balancing national security and human rights, they are not necessarily the immediate and major causes of it. The Convention stresses the importance of democracy and the ECtHR has turned the notion of 'democracy' into an important standard in its case law.[12] In *United Communist Party of Turkey and Others v. Turkey*, the Court indicated the central position of democracy: 'Democracy is without doubt a fundamental feature of the European public order. That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights … the Convention was designed to maintain and promote the ideals and values of a democratic society.'[13] From this perspective, the Convention can be seen as articulating the scope and limit of democracy. It not only demands a democratic political system ensuring the supreme power is vested in the people and exercised by them directly or indirectly through a system of elected representation, but also represents a commitment to engendering respect and acceptance of values that are essential for a democratic way of life, such as individual autonomy and collective and institutional autonomy. [14] Moreover, democracy also serves to justify

[11] On 16 September 2022, the Russian Federation ceased to be a High Contracting Party to the Convention. The total number of ratifications/accessions is now 46. Due to the time span for the case law I set, my research includes the case law of Russia. See Council of Europe, "Russia Ceases to be a Party to the European Convention on Human Rights on 16 September 2022", *Council of Europe*, 23 March 2022, retrieved 17 June 2023 from https://coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022.

[12] See Alastair Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy', *Public Law 44*, 1999, 703-725. More discussion on models of democracy promoted in the text of the Convention and in the case law of ECtHR, see Rory O'Connell, 'Theories of Democracy', in Rory O'Connell, *Law, Democracy and the European Court of Human Rights*, Cambridge: Cambridge University Press, 2020, 5-32.

[13] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, Reports of Judgments and Decisions 1998-I. *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 86-87, ECHR 2003-II.

[14] See Gerhand van der Schyff, 'The Concept of Democracy as an Element of the European Convention', *Comparative and International Law Journal of Southern Africa 38(3)*, 2005, 355-372, pp. 357-371.

limitations on the exercise of several human rights for public interest including national security. Those Articles provide that the limitation should be 'necessary in a democratic society'.[15] When it comes to China, parliament, government, and courts are operating under the Chinese Constitution which emphasises the importance of Marxism.[16] According to Marxism, forces of production determine the relations of production, and the sum total of these relations of production constitutes the economic structure of society, on which rises a legal and political superstructure.[17] This base-superstructure model underscores the importance of the determinative influence of the productive forces.[18] Political, juridical, philosophical, religious, and other elements' development is based on economic development; although those of the former all react on one another, they are circumscribed by economic necessity which ultimately always asserts itself.[19] This explains why economics plays such an important part in the Chinese authorities' governance philosophy and practice.[20] But while the research is being carried out in a comprehensive way, this does not mean disregarding certain specific practices in countries. After all, the limitation clauses pertaining to the rights provided for in the ECHR allow states to restrict the exercising of rights,[21] and the details of how limitations are arranged are also left to state authorities' discretion.

It should be noted that the ECtHR is an international, rather than a domestic, tribunal mandated to monitor the implementation of ECHR. The ECtHR does not serve as a court of appeal for state parties, meaning its function is not to 'deal with errors of fact or of law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the

[15] Articles 8, 10, 11, and Article 2 of Protocol No. 4.
[16] See Constitution of the People's Republic of China, Preamble, available at http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml#:~:text=This%20Constitution%20affirms%2C%20in%20legal%20form%2C%20the%20achievements,of%20the%20state%20and%20has%20supreme%20legal%20force, last visited 14 July 2023.
[17] See Karl Marx and Friedrich Engels, *Selected Works in Two Volumes*, Volume 2, Moscow: Foreign Language Publishing House, 1958, pp. 362-363.
[18] At the same time, many Marxists also held that there was some kind of interaction or mutual conditioning between base and superstructure. See Csaba Varga, 'Autonomy and Instrumentality of Law', *Acta Juridica Hungarica 40(3-4)*, 1999, 213-236, pp. 220-223.
[19] See S. Ryazanskaya (ed.), *Karl Marx and Frederick Engels: Selected Correspondence*, I. Lasker trans., 2nd edition, Moscow: Progress Publishers, 1965, p. 467. See also Dileep Edara, *Biography of a Blunder: Base and Superstructure in Marx and Later*, England: Cambridge Scholars Publishing, 2016, pp. 28-42. Chris Harman, 'Base and Superstructure', in Chris Harman, *Marxism and History*, London: Bookmarks, 1998, 7-54, pp. 16-17. See also Alexander Eckstein, 'Economic Development and Political Change in Communist Systems', *World Politics 22(4)*, 1970, 475-495, p. 476.
[20] See Yan Xuetong, 'Chinese Values vs. Liberalism: What Ideology Will Shape the International Normative Order?', *The Chinese Journal of International Politics 11(1)*, 2018, 1-22, pp. 7-8.
[21] See Guðmundur Alfreðsson and Asbjørn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, 1999, p. 643.

Convention'.[22] Deferral to the national court for interpreting domestic law is assured by the principle of subsidiarity to which the Court adheres. Under this principle, national authorities, including national courts, are assumed to be in a better position to make policies, to enact and enforce laws, and to deliver judgment due to their being more familiar with local situation.[23] The principle of subsidiarity has been added to the Preamble of the Convention by Protocol No. 15: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'[24] Nevertheless, the subsidiary role of the Court does not mean that it would unconditionally defer to the domestic decision without any scrutiny. If a breach of the Convention may have occurred, the Court will weigh in by providing its judicial review. It is also argued that the international character of a monitoring body allows it to take a more independent and detached stance from domestic legislative and executive attempts to interfere with fundamental rights.[25]

Although the principle of subsidiarity would seem to make the Court serve as a supplement to national authorities, including national courts, the case law of the former has a substantial impact on practice in the latter. This is not only because the parties to the case abide by the Court's judgments,[26] but also because its interpretations are of a binding nature as part of the states'

[22] See Maija Dahlberg, 'It is not Its Task to Act as a Court of Fourth Instance: The Case of the European Court of Human Rights', *European Journal of Legal Studies 7*, 2014, 77-108, p. 78. Geir Ulfstein, 'The European Court of Human Rights as a Constitutional Court?', *PluriCourts Research Paper No. 14-08*, 2014, p. 3, retrieved 17 June 2023 from https://deliverypdf.ssrn.com/delivery.php?ID=220090127065000103126122090123106064054038089037048042010100081081119006071112083093100042033122009045047068021124078110114029052078043034093122123093092007102100089081046043006073127088006067017124003073083021113026124075030103075029098083106074112112&EXT=pdf&INDEX=TRUE. See also *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140.

[23] See Fan Jizeng, 'Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights', *The Journal of Human Rights 15(1)*, 2016, 46-87, pp. 55-56. Eva Brems and Jogchum Vrielink, 'Floors or Ceilings: European Supranational Courts and Their Authority in Human Rights Matters', in Koen Lemmens, Stephan Parmentier, and Louise Reyntjens (eds.), *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens*, Intersentia, 2019, 271-302, p. 272.

[24] Protocol No. 15 came into effect on 1 August 2021. As of 17 June 2023, it has 46 member states. Data available at https://www.coe.int/en/web/conventions/by-subject-matters1?module=signatures-by-treaty&treatynum=213.

[25] See Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights', *Human Rights Quarterly 23(3)*, 2001, 625-649, p. 639.

[26] Article 46(1) of the ECHR reads: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

Convention obligations.[27] In the latter case, given the interests of legal certainty, foreseeability and equality before the law, the Court tends to interpret and apply the Convention in the same way as in previous cases on the same issue.[28] In this sense, the Court's judgment thus acquires a *res interpretata* effect, as concluded by scholars.[29] A formal and direct expression of this effect can be identified on occasions when the Court recalled and summarised general principles it had developed in cases on the same topic before applying the principle to the case in question.[30] Moreover, the effect also works in the sense that the Court's interpretation of the Convention is of a general nature and should be applicable to all state parties.[31] The general norms and principles developed by the Court in case law of relevance to this research are those concerning national security. National security case law should not, however, be understood as a single group of cases, but instead needs to be further broken down into specific issues, such as secret surveillance (or, even further, bulk interception of data), the disclosure of state secrets, and other topics related to national security that have been argued before the Court. Even where they are not parties to such cases, all state parties are expected to draw norms and principles from a judgment finding a violation of the Convention by another state so as to check whether the same problem exists within their own legal system.

I have conducted this comparative research in a context where both China and Europe are facing the same challenge: specifically that national security seems to be demanding increasing reductions in the protection of human rights. What I compare is the approach taken by each side in seeking to reconcile the two conflicting interests. This issue-oriented comparison of the approaches

[27] See Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"', in Janneke Gerards and Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of The ECtHR in National Case-Law: A Comparative Analysis*, Intersentia, 2014, 13-94, p. 21.

[28] See Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', *The European Journal of International Law 28(3)*, 2017, 819-843, pp. 823-824.

[29] More discussions on the *res interpretata* effect of the ECtHR's judgment, see Adam Bodnar, 'Res Interpretata : Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings', in Yves Haeck and Eva Brems (eds.), *Human Rights and Civil Liberties in the 21st Century*, Springer, 2014, 223-262. See also Christos Giannopoulos, 'The Reception by Domestic Courts of the Res Interpretata Effect of Jurisprudence of the European Court of Human Rights', *Human Rights Law Review 19(3)*, 2019, 537–559.

[30] A good example is the cases that concern secret surveillance. The Court has developed general principles in case law, and would invoke them in the case when the same issue occurs. See *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, §§ 303-313, ECHR 2018.

[31] See Marinella Marmo, 'The Execution of Judgments of the European Court of Human Rights – A Political Battle', *Maastricht Journal of European and Comparative Law 15(2)*, 235-258, pp. 242-243.

does not call for comparing the legislative, executive, and judicial equivalents *respectively*, given that legislation, law enforcement, and judicial judgment are considered in this research to be practices of authorities balancing national security and human rights. On the one side, there is the ECHR, which is regarded as setting a minimum level of human rights protections for all state parties in respect of national security issues.[32] The standards, norms and principles developed in this regard have to be implemented by state authorities. Domestic courts are not necessarily the only national authorities that can or should implement them as it is up to the individual states to decide how to fulfil their treaty obligations.[33] On the other side, there is China, which does not have a 'human rights law' and so whose approach to balancing human rights and national security has to be identified from the regime for ensuring national security and protecting human rights and by examining law enforcement and relevant case law. Many Chinese scholars have studied the ECHR and its case law by focusing on certain topics or rights, and made reference to European standards to analyse how China should address the same issue.[34] In most of those studies, the lesson learned is not about whether China's courts should follow or partly follow the ECtHR's reasoning, but about the norms and principles the ECtHR developed.

In addition, and in order to compare the approaches adopted by China and Europe, I argue that it is essential to explore the immediate and major reasons

[32] See Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights', in Yves Haeck and Eva Brems (eds.), *Human Rights and Civil Liberties in the 21st Century*, Springer, 2014, 69-129, p. 85. See also Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, pp. 132 & 135.

[33] See Eckart Klein, 'Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended?, in Rolv Ryssdal and Paul Mahoney (eds.), *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdal*, Köln: Carl Heymanns, 2000, p. 709.

[34] For example, Zhang Xiaosha, 'A Constitutional Analysis of Hate Speech – A Comparative Analysis Based on the Jurisprudence of the US Supreme Court and the European Court of Human Rights', *Human Rights (2)*, 2022, 92-117.（章小杉："仇恨言论的宪法学分析——基于美国最高法院与欧洲人权法院判例的比较分析"，载《人权》2022 年 2 期。）Long Hao, 'European Standards on the Grounds for Pre-trial Detention and Their Significance', *Journal of Fujian Police College 35(6),* 2021, 29-40.（龙浩："审前羁押理由的欧洲标准与借鉴意义"，载《福建警察学院学报》2021 年 6 期。）Li Yanhua, 'Privacy Protection Mechanisms for Health Data in Europe and their Implications for China - A Perspective on the Jurisprudence relating to Article 8 of the European Convention on Human Rights', *Journal of Cyber and Information Law (2)*, 2021, 181-211& 297.（李艳华："欧洲健康数据的隐私保护机制及其对我国的启示——以《欧洲人权公约》第 8 条相关判例为视角"，载《网络信息法学研究》2021 年 2 期。）Liu Zhengfeng, 'Finding a Balance between the Principle of the Best Interests of the Child and the Protection of the Human Rights of Parents - An Examination of Article 8 of the European Convention on Human Rights as the Centrepiece', *Journal of Guangzhou University (Social Science Edition) 14(7)*, 2015, 17-24.（刘征峰："在儿童最大利益原则和父母人权保护间寻找平衡——以《欧洲人权公约》第 8 条为考察中心"，载《广州大学学报（社会科学版）》2015 年 7 期。）

for their adoption. By anchoring the comparison to these reasons, we can identify where the differences in the approaches derive from, to what extent they are comparable, which aspects can be identified as defects rather than necessary elements, and which elements can be imported. For example, one party may base its approach on efficiency (i.e. the need to deal with a national security threat as quickly as possible), while the other party may base its approach on political considerations (i.e. the political effect of taking a particular measure). In a comparison of the two approaches, differences identified do not constitute defects in a party's approach, as long as that approach contributes substantially to the reasons for adopting the approach. Nevertheless, defects may be found at the margins of the approach if it contributes to a decreasing extent to the reasons for adopting it.

Applying a sociological lens, the principal-agent theory also supports the comparability of approaches adopted by China and Europe. The theory describes situations in which a principal delegates conditional authority to an agent that empowers the latter to act on behalf of the former.[35] The delegation is premised upon the division of labour, which often occurs because the agent has certain kinds of expertise or information, or simply time that the principal lacks.[36] With regard to China, the people have transferred the power to balance human rights with national security to State institutions via adoption of the Constitution. Article 2(1) of the Constitution provides 'all power in the People's Republic of China belongs to the people', and Article 3(3) provides 'all administrative, supervisory, adjudicatory and procuratorial organs of the State shall be created by the people's congresses and shall be responsible to them and subject to their oversight.' [37] Theoretically speaking, Chinese Constitution features a chain of delegation from voters to those who govern.[38] In terms of

[35] See Gary J. Miller, 'The Political Evolution of Principal-Agent Models', *Annual Review of Political Science 8*, 2005, 203-225, p. 207. See also Dietmar Braun and David H. Guston, 'Principal-agent Theory and Research Policy: An Introduction', *Science and Public Policy 30(5)*, 2003, 302-308, pp. 303-306.

[36] Kaare Strøm, 'Delegation and Accountability in Parliamentary Democracies', *European Journal of Political Research 37*, 2000, 261-289, p. 266.

[37] The English text of Constitution of the People's Republic of China, is available at http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml#:~:text=This%20Constitution%20affirms%2C%20in%20legal%20form%2C%20the%20achievements,of%20the%20state%20and%20has%20supreme%20legal%20force, last visited 14 July 2023.

[38] In reality, considering the role played by the Chinese Communist Party and some specific features of congresses of China, the democratic model in China differs from Western model of representative democracy. Nevertheless, as far as this legal research is concerned, the focus is on legislation, law enforcement and adjudication, instead of how the CCP plays a role in deciding the leadership of the government, or its political interactions with the people. More about CCP's relationship with congresses and China's political model, see Melanie Manion, 'When Communist Party Candidates Can Lose, Who Wins? Assessing the Role of Local People's Congresses in the Selection of Leaders in China',

balancing human rights with national security, voters have delegated the power to elected representatives who constitute congresses, and the congresses enact the laws; the congresses then have delegated the power to other State institutions: executive branch implements them, and courts interpret them. These institutions all together can be seen as the agent who is empowered ultimately by the people of China to decide how to weigh human rights against national security.

The ECtHR also fits the paradigm of delegation. The Contracting States, as a collective principal, have delegated to the ECtHR the authority to decide if human rights provided in the Convention are violated.[39] States delegate the authority to the ECtHR not only due to its expertise and specialisation, they also aim to enhance the credibility of their policy commitment to human rights protection.[40] Protecting human rights is in a State's long term interest, whereas it may not be in its interest at a particular moment or in a specific case, such as when the security of the State is threatened by a terrorist attack. At a given moment the State may be tempted to ignore human rights unduly or completely in order to satisfy other interest. In this sense, delegating authority to an international court can reassure its people that the State is committed to protecting human rights and, if not, will be held accountable by the ECtHR.[41] The chain of delegation can be traced to the people of each State Party to the Convention: the people have delegated the power to State authorities to join the international human rights treaty; and usually the executive branch is empowered to negotiate the terms of accession, and the parliament is empowered to make the final decision to join it. In this regard, the ECtHR is the

The China Quarterly 195, 2008, 607-663. Ma Yide, 'The Role of Consultative Democracy under the Constitutional Framework and the Associated Rule of Law', *Social Sciences in China 38(2)*, 2017, 21-38.

[39] See Darren Hawkins and Wade Jacoby, 'Agent Permeability, Principal Delegation and the European Court of Human Rights', *The Review of International Organizations 3*, 2008, 1-28, p. 10. See also Karen J. Alter, 'Delegation to International Courts and the Limits of Re-contracting Political Power', in Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney (eds.), *Delegation and Agency in International Organizations*, Cambridge: Cambridge University Press, 2006, 312-338, p. 312.

[40] See Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney, 'Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory', in *Delegation and Agency in International Organizations*, Cambridge: Cambridge University Press, 2006, 3-38, p. 18.

[41] In his empirical study, Andrew Moravcsik found that during the drafting process of the Convention, the primary proponents of binding human rights guarantees were the governments of newly established democracies, whose democracies were unstable. He argued that by delegating authority to the Strasbourg organs, these countries attempted to 'locking in' human rights and democracy policies against future domestic political alternatives that could be authoritarian reversals. The delegation thus enhanced their credibility and stability vis-a-vis nondemocratic political threats. See Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization 54(2)*, 2000, 217-252, pp. 219-220 & 230-244.

agent empowered first by State authorities, which in their turn are empowered ultimately by the people of the State, to check how human rights are balanced against national security. Therefore, in my research what I am comparing is how two agents are using the authority delegated to them by their principals.

In terms of the research approach and to define, firstly, the role that national security plays under the ECHR, I use the historical method and the text analysis method to examine the Convention. Considering the Convention does not give a definition on national security, I use historical method by analysing the preparatory works (*travaux préparatoires*) of the Convention, which record the important discussions between the drafters, to provide an overview of how the notion was come up with, and what role it was expected to play. These historical materials serve to underline the original intent of relevant provisions. A look at the drafting history also serves to verify one of my basic arguments concerning its definition, namely we should not rely exclusively on the definition of national security to prevent abuse of power by government authorities, by 'filtering out' their false claims. At the same time, it is important to note that the Convention should be interpreted dynamically. After examining the drafting history, I generally evaluate the gap between case law (i.e. the application of the ECHR) and its provisions in achieving the desired goals.

Secondly, by adopting case law study and text analysis methods, I examine how national security impacts human rights in general, and how the ECtHR evaluates the justifications of this impact. I devote more attention to this section of case law analysis than to the previous section on drafting history because, when reviewing a case, the ECtHR does not usually consider the drafters' intentions for the provision. I analyse the impact of national security on human rights from multiple perspectives, including its legal basis, scope, pathways and extent. I review each of these four aspects, based on ECtHR judgments on related cases. Both limitation and derogation could constitute a legal basis for governments to interfere in human rights, whereas derogation is invoked in more serious situations that have both substantial and procedural requirements. In the thesis, I view derogations as a *lex specialis* and concentrate on limitations, given that my aim is to study the 'general' impact of national security on human rights. When examining case law, I investigate the relevant laws, policies and practices of the High Contracting Parties in question to evaluate how European nations address the relationships between national security and human rights in practice.

When it comes to China, I use the text analysis method and case law study to determine how state authorities strike a balance between national security and human rights. I firstly shed light on how Chinese authorities portray these two issues in light of 'Chinese characteristics'. I then analyse the impact the

government has on human rights due to national security concerns, and how governing authorities weigh their justifications. On that basis, I identify major deficiencies in laws, mechanisms and practice. The materials reviewed include, *inter alia*, the Constitution, legislation, regulations and court judgments, as well as central government and relevant ministries' policy documents and papers of the Communist Party of China.

Based on the above, I use the method of comparative study in Chapters 5 and 6. Before comparing the approaches that European nations and China have adopted to reconciling national security with human rights, I examine whether they are on the same page when speaking of 'national security' and 'human rights'. I then compare their approaches, based on the conclusions set out in Chapters 2 to 4. I note that European countries and China have very different natures. This then raises the question of whether China can actually profit from European examples by learning lessons applicable to its own situation. I therefore highlight distinctions that governing authorities have reasonably claimed to be embedded in 'Chinese characteristics'. Any attempt to change these aspects by simply importing solutions from Europe would meet genuine resistance. After ruling out those 'no-go' subject matters, I conclude by pointing out the remaining instructive lessons to help China's governing authorities address the balance between national security and human rights.

1.2.1 Limitations and Scope

A difficulty in studying national security is the limited access to some research materials, such as cases, policy papers and internal manuals, which are not publicly available. However, not having security clearance will not seriously hamper my research because I am not doing an intelligence analysis. Laws and regulations related to national security are available, and not all national security cases are classified information. I will introduce the case databases in subsequent paragraphs. On the other hand, the fact that national security regimes and cases constitute classified information deserves attention and an analysis to see whether their being kept secret is justified.

Given the considerable amount of ECtHR case law, I am selective about the cases analysed in this study. The scope is limited to the merits in the judgments of the Chamber and Grant Chamber,[42] and to the reasoning under the qualified rights[43] of Articles 8, 10 and 11 of the Convention, Article 2 of Protocol No. 4

[42] Other types of document collections, such as Decisions given by the former European Commission on Human Rights, would be included when the literature or snowball method led me in that direction.
[43] Qualified rights refer to rights that may be interfered with for reasons of protecting others' rights or public interests. The right is first asserted and then permissible restrictions can be applied. The relevant Articles explain that it can be lawful to qualify a right if it is necessary in a democratic society

and Article 1 of Protocol No. 7, as well as the limited rights[44] of Articles 5 and 6.[45] In terms of selecting the rights, I focus my research on the rights that can be subject to legitimate restrictions under the Convention. The ECtHR's reasoning regarding these rights can be expected to follow significantly different doctrines or principles from its reasoning regarding absolute rights.[46] I have chosen Articles 8, 10 and 11 of the Convention, Article 2 of Protocol No. 4 and Article 1 of Protocol No. 7 because their limitation clauses give national security as a legitimate reason to restrict the exercising of rights.[47] Moreover, especially when it comes to Articles 8, 10 and 11, the ECtHR has developed a relatively consistent reviewing approach.[48] Although Articles 5 and 6 do not provide rights limitation clauses in the same way as the articles on qualified rights,[49] a closer reading of the case law shows that some elements considered by the ECtHR correspond to those in the approach adopted in situations involving qualified rights.[50] In terms of the topic of national security, however, major

to do so and that there is a legal basis for such limits. See Council of Europe, "Some Definitions", *Council of Europe*, retrieved 1 May 2020, from https://www.coe.int/en/web/echr-toolkit/definitions.

[44] Limited rights are rights that can be limited under specific and finite circumstances. See Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Heidelberg: Springer, 2010, p. 300. See also Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 41.

[45] As most cases are available in English and French, this book worked mostly on English version. The cases reported in French would be included only when there were merely limited number of cases available, or when the literature or snowball method led me in that direction.

[46] See Natasa Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights', *Human Rights Law Review 12(4)*, 2012, 723–758, pp. 729-738. See also John Finnis, 'Absolute Rights: Some Problems Illustrated', *The American Journal of Jurisprudence 61(2)*, 2016, 195-215.

Absolute rights refer to those rights that cannot be derogated or limited. See Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Heidelberg: Springer, 2010, p. 284. See also Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 39.

[47] Article 6(1) also provides that national security can be invoked to exclude the press and public from all or part of the trial.

[48] See Begum Bulak and Alain Zysset, '"Personal Autonomy" and "Democratic Society" at the European Court of Human Rights: Friends or Foes?', *Journal of Law and Jurisprudence 2*, 2013, 230-254, pp. 232-233. See also Steven C. Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights,* Human Rights Files No. 15, Council of Europe Publishing, 1997. Article 2 of Protocol No. 4 provides a similar rights limitation clause as Articles 8, 10 and 11 do, and the Court's reasoning in the case law displays a same reviewing approach. Regarding Article 1 of Protocol No. 7, its rights limitation clause is slightly different from those under Articles 8, 10 and 11, but also includes 'national security' as a legitimate reason to limit the rights. The case law shows that some elements being considered are parallel to those in the approach taken by the Court under Articles 8, 10 and 11.

[49] An exception of this observation is paragraph 1 of Article 6, which reads, '… the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society …'

[50] A quick look at those case law, see Council of Europe, 'Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security', *ECHR*, 2022, retrieved 23 June 2023 from https://echr.coe.int/documents/guide_art_5_eng.pdf. Council of Europe, 'Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)', *ECHR*, 2022,

concerns have been raised with regard to some absolute rights, in particular the right to life (Article 2) and the prohibition of torture (Article 3). I will discuss these concerns mainly in Section 3.2.3. Data collected for this research can be categorised into two groups, whereby the first group contains judgments issued after 1 December 2013.[51] The data on cases concerning qualified rights was collected by searching the *HUDOC* database and setting its 'Keywords' filter with the date in descending order.[52] The data on cases of limited rights was collected mostly through the snowball method. This method was chosen for two reasons: first, Articles 5 and 6 do not contain indicative terms such as 'national security', 'territorial integrity' or 'economic well-being of the country' (unlike the articles on qualified rights) and, second, the reasoning employed by the Court does not necessarily involve a proportionality test, which is a key focus of this thesis. The cases relating to limited rights were therefore gathered on the basis of Case Law Guides and Factsheets containing leading and recent judgments.[53] The case law cited in those judgments resulted in additional cases being included in the study.

The second set of data collected consists of cases with a significant impact on subsequent cases, i.e. the leading cases. These were collected on the basis of existing literature,[54] as well as the Court's case law citations noted down while

retrieved 23 June 2023 from https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf. Council of Europe, 'Guide to the case-law of the European Court of Human Rights: Terrorism', *ECHR*, 2022, retrieved 23 June 2023 from https://www.echr.coe.int/Documents/Guide_Terrorism_ENG.pdf.

[51] See European Court of Human Rights, 'HUDOC Database', available at www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=#n1355308343285_pointer, last visited 1 February 2020.

The reason for choosing those cases after November 2013, is to avoid duplication of the work done by the ECtHR's Research Division in its national security case law report in November 2013. See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

[52] The 'Keywords' of Article 8 includes 'national security', and 'economic well-being of the country', that of Article 10 includes 'national security', and 'territorial integrity', Article 11 'national security', Article 2 of Protocol No. 4 'national security', and Article 1 of Protocol No. 7 'national security'.

[53] These documents are published by the European Court of Human Rights, and being updated constantly. As of 1 October 2020, the Case-law Guides on Article 5 and Article 6 (criminal limb) were updated on 31 August 2020, and the Factsheets on Terrorism was updated in September 2020. See European Court of Human Rights, 'Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf. European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf. Press Unit of European Court of Human Rights, 'Terrorism and the European Convention on Human Rights', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf.

[54] For example, David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018.

reading the first group of cases. The studies from which I collected these cases include the ECtHR Research Division's *National Security and European Case-law* (2017),[55] *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* by Harris et al (2018)[56] and Van Dijk et al's *Theory and Practice of the European Convention on Human Rights* (2018),[57] to name but a few.

Complaints brought to the ECtHR are filtered by the admissibility criteria provided for in Article 35 before the ECtHR examines them on their merits. In this sense, cases considered by the ECtHR are representative in terms of their substance, arguments, evidence and other features. In 2022, for instance, 35,402 of the 39,570 applications to the Court were declared inadmissible or struck off the list of cases,[58] leaving only approximately 10.5% admitted. Among the various procedural and substantive criteria, I note two here as they show the quality of the cases admitted and considered by the Court. First, an applicant needs to exhaust all available and effective domestic remedies before filing a complaint to the Court.[59] This requirement to exhaust domestic remedies represents long-established international practice.[60] As the same arguments in substance have already been raised and reviewed in domestic proceedings, the ECtHR has the benefit of those views, as well as necessary information on the matter under consideration.[61] This also ensures that the cases on which my research is based contain relevant national background information, including facts, laws and legal arguments. The second criterion for admissibility I want to underline here is a substantive one: if the complaint is manifestly ill-founded, the Court will declare it inadmissible.[62] This should prompt a preliminary

Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018.

[55] Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

[56] David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018.

[57] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018.

[58] See European Court of Human Rights, 'Analysis of Statistics 2022', *ECtHR*, January 2023, p. 3, retrieved 26 June 2023 from http://www.echr.coe.int/Documents/Stats_analysis_2022_ENG.pdf.

[59] Article 35(1) of ECHR reads: 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken.'

[60] See Cesare P. R. Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures', in Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, and Chiara Ragni (eds.), *International Courts and the Development of International Law*, The Hague: T.M.C. Asser Press, 2013, 561-572, pp. 561-562.

[61] See *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008. *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 164, ECHR 2009.

[62] Article 35(3)a of ECHR reads:

examination of the substance of the complaint. Manifestly ill-founded complaints include those which fail to disclose any appearance of a violation of the rights guaranteed by the Convention, and those which lack sufficient explanations of the alleged breach of the Convention or lack documentary evidence in support of allegations.[63] This *prima facie* assessment serves to make sure that cases admitted warrant further examination on their merits. Given the two admissibility criteria mentioned (i.e. exhaustion of domestic remedies and manifest ill-foundedness), cases admitted by the ECtHR are arguably rather contentious and thereby worthy of being studied in more detail.

Regarding the specific questions raised in my research, I use the cases mainly as illustration. In the case law, the Court does not always consider the same elements or consider them in a same manner. On the one hand, the Court has developed principles to be applied with regard to certain subject matters and then recalled these principles in subsequent cases involving the same issue. In cases, for instance, concerning secret surveillance, the Court has established minimum safeguards against abuse of power.[64] I will refer to recent cases to check whether the principles are still being applied by the Court. Some notions have also been interpreted in the Court's case law in a general nature.[65] On the other hand, many analyses by the Court are closely related to specific features of the case being considered, and I will pinpoint the contextually relevant features when citing any such reasoning by the Court. When it comes to the manner of the Court's review, the Court does not follow a consistent approach. While in some cases it may provide a thorough analysis on several specific elements that it finds most problematic, or in the event of major controversies

'The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application.'

[63] See European Court of Human Rights, 'Practical Guide on Admissibility Criteria', *ECtHR*, 31 August 2022, paras. 300-323, retrieved 26 June 2023 from https://www.echr.coe.int/documents/admissibility_guide_eng.pdf. More discussions on criterion of 'manifestly ill-foundedness', see Simona Granata-Menghini, 'Manifest Ill-Foundedness and Absence of a Significant Disadvantage as Criteria of Inadmissibility for the Individual Application to the Court', *The Italian Yearbook of International Law 20*, 2010, 111-123.

[64] See *Centrum För Rättvisa v. Sweden*, no. 35252/08, § 103, ECHR 2018. *Roman Zakharov v. Russia*, no. 47143/06, § 231, ECHR 2015. *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, § 76, ECHR 2007. *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 95, ECHR 2006-XI. *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003. *Valenzuela Contreras v. Spain*, 30 July 1998, § 46, Reports of Judgments and Decisions 1998-V. *Amann v. Switzerland* [GC], no. 27798/95, §§ 56-58, ECHR 2000-II. *Huvig v. France*, 24 April 1990, § 34, Series A no. 176-B.

[65] See Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"', in Janneke Gerards and Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of The ECtHR in National Case-Law: A Comparative Analysis*, Intersentia, 2014, 13-94, p. 22.

between the applicant and respondent state, in other cases the Court devotes its attention to different elements as the problems and controversies have changed. As a result, it is beneficial to study a number of cases, rather than one single case, in order to get a clearer picture. In addition, the examples from certain European countries used are for illustrative purposes. A selection has to be made from various laws and practices of state parties. I choose the ones that can best illustrated the points I am making. These examples derive from the cited case law and scholarly research, as well as instances that I have been paying attention to in daily life driven by my curiosity and by serendipity, or that have been chosen due to language considerations.

When it comes to China, legal cases were taken from three main sources. Firstly, I collected cases from databases such as 'China Judgments Online' of China's Supreme People's Court, [66] 'Chinalawinfo' (PKUlaw) of Peking University[67] and the 'Communications Reports Database' of the Office of the United Nations High Commissioner for Human Rights (OHCHR).[68] In addition, legal cases collected by some NGOs were used for reference purposes only.[69] Regarding the first two databases, cases were selected by setting the 'Type of Disputes' and 'Instrument Type' filters with the date in descending order.[70] It is important to note that the databases include 'China's Guiding Cases', which are specially selected by the Supreme People's Court for local courts to take reference of when hearing similar cases. [71] The 'Communications Reports

[66] The database is available at https://wenshu.court.gov.cn/, last visited 6 April 2021. An introduction to the database, see Du Guodong and Yu Meng, 'You Can View Almost All the Chinese Court Judgments Online for Free', *China Justice Observer,* 8 June 2018, retrieved 7 October 2020, from https://www.chinajusticeobserver.com/a/you-can-view-almost-all-the-chinese-court-judgments-online-for-free.

[67] The database is available at https://www.pkulaw.com/case/, last visited 6 April 2021. An introduction to the database is available at http://www.lawinfochina.com/ProductsServices/index.shtm#ourservicesForEng, last visited 6 April 2021.

[68] The database is available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments, last visited 6 April 2021. An introduction to the database, see OHCHR, "What are Communications?", *OHCHR*, retrieved 7 October 2020, from https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx.

[69] For example, see China Human Rights Lawyer Concern Group (CHRLCG), "'709 Crackdown' Latest Data and Development of Cases as of 8 July 2019", *CHRLCG*, 24 July 2019, retrieved 24 May 2020, from https://www.chrlawyers.hk/zh-hant/content/%E3%80%8C709%E5%A4%A7%E6%8A%93%E6%8D%95%E3%80%8D%E9%80%B2%E5%B1%95%E9%80%9A%E5%A0%B1.

[70] I set the 'Type of Disputes' by selecting those crimes related to offences endangering national security, and terrorist offences, under the category of 'criminal cases'. I set the 'Instrument Type' by selecting the 'Judgment' category.

[71] See Du Guodong, 'Highlights of China's Guiding Case System – Guiding Cases & Similar Cases Series (1)', *China Justice Observer*, 11 October 2020, retrieved 23 May 2017, from https://www.chinajusticeobserver.com/a/highlights-of-chinas-guiding-case-system-guiding-cases-similar-cases-series-

Database' was also included in the study as it registers cases received by the Special Procedures of the Human Rights Council. As for the cases from 'China Judgments Online' and 'Chinalawinfo', I focus on the reasoning and judgments. Compared with ECtHR case law, the reasoning and judgments issued by Chinese courts are not always specific from a perspective of interference with fundamental rights. A certain number of cases related to national security also appear not to have been published by those databases. However, as I indicated earlier, it is the approaches of China and Europe that I am aiming to compare. The approach taken by China is reflected in court judgments, legislation and law enforcement, as well as in the gaps between them. Regarding the cases registered in the OHCHR Communications Reports Database, my attention is on the situations they reveal. In the case of China, a preliminary issue to tackle is the circumstances in which human rights are often interfered with on grounds of national security, and this will determine the scope of this part of research. In addition, as (mainland) China has not ratified the International Covenant on Civil and Political Rights, the Human Rights Committee does not have jurisdiction to review individual complaints. In this regard, UN Special Procedures, where the focus is on human rights, is a good place to start looking for cases which involve governments' national security concerns. The focus is on the features of the cases, rather than on observations made by the Special Rapporteur or Working Group. I do not include cases registered under the UN Special Procedures in respect of European countries, given that ECtHR case law provides sufficient data on situations where national security collides with human rights. The Special Procedures are assigned with various thematic and country mandates. I selected the cases registered under those mandates that were most relevant to the topic, i.e. the Special Rapporteur on human rights defenders; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the right to privacy; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; 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; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on minority issues. The cases were selected by setting the 'Mandates' and 'State'

1#:~:text=China's%20Guiding%20Cases%20(%E6%8C%87%E5%AF%BC%E6%80%A7,levels%20when%20hearing%20similar%20cases.&text=Local%20courts%20have%20no%20power%20to%20issue%20such%20cases.

filters with the date in descending order. As China's new National Security Law was adopted in 2015, I confined the selected cases mainly to those occurring after 1 January 2015.

Besides a thorough search of key case law and databases, I also reviewed existing literature and media for supplementary information on national security cases.[72] Those cases mostly involved human rights lawyers and counterterrorism in Xinjiang. Lastly, I collected cases based on information received during my internship at the OHCHR Special Procedure Branch. As data from the UN's internal database is confidential, I only used such information as clues for searching open-access materials.

1.3 MEANING OF 'NATIONAL SECURITY'

The term 'national security' has commonly been taken for granted, especially since 9/11, and is used to cover a wide variety of circumstances. To prevent abuse of the term, it would be logical to start from a clear-cut definition. In practice, however, this approach does not work, given that national security is more an ambiguous than an explicit concept. Nevertheless, a description is still needed, not for preventing abuse of the term, but instead for clarifying what governments attempt to convey when using the term 'national security'.

Even though 'national security' is a relatively new term, the issues concerned with state security emerged simultaneously with the state itself, dating back to the early form of the state: the slavery States, such as Ancient Rome or the Xia Dynasty of China.[73] As to the origin of the expression 'national security', the

[72] For example, the literature involves, Michael Caster (ed.), *The People's Republic of the Disappeared*, Safeguard Defenders, 2017. And regarding the media source, court hearings of several national security cases were recorded by videos or transcripts. For instance, See the first instance trial on case of Jiang Tianyong, available at https://www.weibo.com/hncszy?profile_ftype=1&is_all=1&is_search=1&key_word=%E6%B1%9F%E5%A4%A9%E5%8B%87&sudaref=passport.weibo.com#_rnd1582790597922, last visited 27 February 2020.
Peng Yuhua and Li Mingzhe's case, available at https://weibo.com/u/3960688335?is_all=1&is_search=1&key_word=%E5%BD%AD%E5%AE%87%E5%8D%8E%E3%80%81%E6%9D%8E%E6%98%8E%E5%93%B2%E9%A2%A0%E8%A6%86%E5%9B%BD%E5%AE%B6%E6%94%BF%E6%9D%83%E6%A1%88%E5%85%AC%E5%BC%80%E5%BC%80%E5%BA%AD%E5%AE%A1%E7%90%86&reason=&retcode=, last visited 27 February 2020. Xie Yang's case, available at https://www.weibo.com/hncszy?profile_ftype=1&is_all=1&is_search=1&key_word=%E8%B0%A2%E9%98%B3#_rnd1561898826337, last visited 27 February 2020. Hu Shigen's case, available at https://www.weibo.com/u/3919910570?profile_ftype=1&is_all=1&is_search=1&key_word=%E8%83%A1%E7%9F%B3%E6%A0%B9#_rnd1561969778828, last visited 27 February 2020.

[73] See Liu Yuejin, 'On the Basic Meaning of National Security and Its Emergence and Development', *Journal of North China Electric Power University (Social Sciences) (4)*, 2001, 62-65, p. 63. （参见刘跃进："论国家安全的基本含义及其产生和发展"，载《华北电力大学学报（社会科学版）》2001年4期，第63页。）See also Prabhakaran Paleri, 'National Security: Definitions and

academic community commonly accepts the view of Peter Mangold, who suggests that the term was not widely used by Americans until after the Second World War.[74] It is interesting to note that this expression was accepted relatively quickly by the international human rights instruments that came out afterwards, even without any serious debate.[75] The Universal Declaration of Human Rights (UDHR) started being drafted in 1946, just one year after the end of the Second World War and the founding of the UN.[76] Although its final text does not mention 'national security', proposals were made during the drafting to include the term as a further purpose of limitation in Article 29(2).[77] In 1950, the first draft International Covenant on Human Rights then explicitly used 'national security',[78] and the term also survived in the text of its subsequent alternatives – the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). As for the ECHR, which was drafted between 1949 and 1950,[79] at almost the same time as the Covenant on Human Rights, it too accepted the term 'national security'.

More recent studies have adopted various approaches to explain 'national security'. Iain Cameron divides these approaches into two categories –

Manifestations', in *Revisiting National Security Prospecting Governance for Human Well-Being*, Springer Singapore, 2022, Chapter 3, 109-153, p. 116.

[74] See Peter Mangold, *National Security and International Relations*, Routledge, 1990, pp. 1-2. The scholars who adopt his view include Liu Yuejin, 'On the Basic Meaning of National Security and Its Emergence and Development', *Journal of North China Electric Power University (Social Sciences) (4),* 2001, 62-65, p. 62（参见刘跃进：“论国家安全的基本含义及其产生和发展”，载《华北电力大学学报（社会科学版）》2001 年 4 期，第 62 页）; Cai Yutai and Tan Weien, 'From "State" to "People": In Light of Human Security', *Issues & Studies 47(1),* 2008, 151-188, p. 153.（蔡育岱、谭伟恩：“从‘国家’到‘个人’：人类安全概念之分析”，载《问题与研究》第 47 卷 1 期，2008 年，第 153 页。）

[75] See Cameron Iain, *National Security and the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2000, p. 49.

[76] See United Nations Library, "Drafting of the Universal Declaration of Human Rights", para. 1, retrieved 23 May 2017, from http://research.un.org/en/undhr/introduction.

[77] See Guðmundur Alfreðsson and Asbjørn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, 1999, p. 636.

[78] About the history of drafting the ICCPR and ICESCR, see UN Audiovisual Library of International Law, "International Covenant on Civil and Political Rights – Procedural History", para. 2, retrieved 23 May 2017, from http://legal.un.org/avl/ha/iccpr/iccpr.html.

For the first draft Covenant on Human Rights, see United Nations Commission on Human Rights, Report of the Sixth Session, Annexes Ⅰ, E/1681(1950), pp. 15-23. And hence the history introduced by Audiovisual Library of International Law mistook the file E/1681 for E/1618 in the second paragraph.

[79] About the brief draft history of the ECHR, see Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018, pp. 2-4.

linguistic and functional.[80] The linguistic approaches attempt to find the ordinary meaning of the term, whereas the functional ones depend on the context in which the term is used. By identifying the phrase as an endocentric construction,[81] the linguistic approach explains the composition of the term separately: 'national' serves to narrow the meaning of the term by referring to the severity or scope of the issue, whereas 'security' carries the bulk of the term's semantic content, meaning the status without threats, or measures to tackle threats. An example of this is given by Christian Fjäder as being 'the protection of what is most critical for the survival of a nation and the well-being of its citizens.'[82]

In the field of politics the term is most usually defined using 'vital interests' of a state as its core meaning. Walter Lippmann held, for instance, that a nation has security 'when it does not have to sacrifice its *legitimate interests* to avoid war and is able, if challenged, to maintain them by war'[83] [emphasis added]. In his preceding paragraph, he implied the meaning of '*legitimate interests*', stating that 'the *vital interests* of the nation must be so *legitimate* that people will think them worth defending at the risk of war…'[84] [emphasis added]. Amos Jordan and William Taylor's definition reconstructed the description: 'National security, however, has a more extensive meaning than protection from physical harm; it also implies protection, through a variety of means, of vital economic and political interests the loss of which could threaten fundamental values and the vitality of the state.'[85] In 1990, this description was recognised as 'the most frequently cited modern definition' of national security,[86] and it continues to be of influence today, with 'national interests' or 'national values' being used to explain the meaning of national security. Based on this, studies have specified these interests as ranging from military and political interests to economic, cultural and ecological interests.[87] In this regard, and while countries' views

[80] See Cameron Iain, *National Security and the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2000, p. 40.
[81] In linguistics theory, an endocentric construction refers to a phrase or compound word that consists of an obligatory *head* and a *dependent*. The *head* bears the main semantic content of such phrase or word and determines its grammatical category, whereas the *dependent*, as it is named, serves to narrow the meaning of the head.
[82] Christian Fjäder, 'The Nation-state, National Security and Resilience in the Age of Globalisation', *International Policies, Practices and Discourses 2(2)*, 2014, 114-129, p. 115.
[83] Walter Lippmann, *Us Foreign Policy: Shield of the Republic*, Little, Brown and Company, 1943, p. 38.
[84] Walter Lippmann, *Us Foreign Policy: Shield of the Republic*, Little, Brown and Company, 1943, p. 38.
[85] Amos A. Jordan, William J. Taylor, Jr., and Michael J. Mazarr, *American National Security* (5th edn.), Johns Hopkins University Press, 1999, p. 3.
[86] Peter Mangold, *National Security and International Relations*, Routledge, 1990, pp. 1-2.
[87] About how the elements of national security develop and extend, see Liu Yuejin, 'On the Basic Meaning of National Security and Its Emergence and Development', *Journal of North China Electric*

may vary on the importance of certain interests for their own specific national conditions, they can at least agree on these elements as constituting the interests of a state. Regarding vital national interests, Kenneth Waltz argued that 'At the highest level of analysis, then, states can be regarded as having only one interest: national survival, or the preservation of sovereignty.'[88] Based on this argument, Matthew Sussex further explored the elements of national interest in the context of defining national security: 'National survival can be broken down to encapsulate other more specific interests of a state that often include the physical security of its territory and citizens, the prosperity of its people and the preservation of national values, culture and way of life. In this way, preserving a state's mode of political organisation (whether democratic, authoritarian or hybrid models) is tied to its understanding of history, and the domestic consensus – which is sometimes broad-based and on other occasions more of an elite consensus – about its core interests that need safeguarding.'[89]

As shown in the subsequent sections, I basically accept the definition given by a Chinese scholar, Liu Yuejin, whose study concentrates on the field of national security. He attempts to define 'national security' in a general way rather than within a specific national context. I find the definition encompassing and practicable.

1.3.1 Defining National Security

National security studies is a newly developing field of inquiry in China. Belonging to political science, it focuses on national security in a general sense. Liu Yuejin defines national security as 'an objective situation that a State is in free from internal and external dangers or harms.'[90] For instance, terrorism may be an element threatening national security by creating external or internal dangers. A surveillance programme may be the action taken by state authorities to eliminate such dangers in order to restore the status that national security requires. Compared with the definitions pertaining to 'vital interests', this description offers a clear composition of elements and a basis for understanding national security across countries with different national settings. I will now examine this definition in more detail as it will provide a basis for the rest of the analysis.

Power University (Social Sciences) (4), 2001, 62-65.（参见刘跃进："论国家安全的基本含义及其产生和发展"，载《华北电力大学学报（社会科学版）》2001 年 4 期。）

[88] Kenneth Waltz, *Theory of International Politics*, New York: McGraw-Hill, 1979, p. 91.

[89] Matthew Sussex, 'Understanding National Security: The Promises and Pitfalls of International Relations Theory', in Michael Clarke, Adam Henschke, Matthew Sussex, and Tim Legrand (eds.), *The Palgrave Handbook of National Security*, Switzerland: Springer, 2021, 23-52, p. 27.

[90] Liu Yuejin (ed.), *National Security Studies,* China University of Political Science and Law Press, 2004. p. 51.（刘跃进主编：《国家安全学》，中国政法大学出版社 2004 年，第 51 页。）

An objective situation

According to its semantic meaning, security can be both a status (*free from dangers or harms*) and measures (*that are taken to prevent threats*). With regard, however, to defining *national security*, it is a status rather than measures, given that 'measures protecting X' still does not clarify what that 'X' is. Within the various descriptions of the meaning of national interests, most definitions given by scholars can be seen as attempting to describe a status. For instance, Lippmann's definition describes a status in which a state can maintain its vital interests, even at the cost of war.

According to this definition of national security, this status then rests on objective elements instead of subjective judgment. While many definitions do not stress this aspect, some have held national security to be of a subjective or partly subjective nature. In Arnold Wolfers' definition, national security is described in both an objective and subjective sense: 'Security, in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked.'[91] I argue that state authorities may have a relatively subjective reading of what constitutes a nation's vital interests or what kind of threats endanger security, but whether a state is in a security status should be regarded as an objective quality. In practice, a state's situation can be very different, for an outside observer, from how the state itself understands or judges the situation. Stressing this element in the definition of national security aims to exclude dangers and harms to a state that are imaginary or overestimated.

Free from internal and external dangers or harms

One of the aims when providing a definition is to distinguish the subject from others. In this case, Liu's definition is not attempting to differentiate national security from kindred terms such as 'state security', 'state safety' or 'national safety', but rather from the 'insecurity' status a state could be in. In this regard, a state can be seen in a security status, providing that:

(a) there are no dangers or harms, at home or abroad; *or*

(b) even in the presence of threats, the state has the ability to deal with them effectively.

By including both internal and external factors, the definition reflects the development of the notion since the end of the Cold War,[92] with security

[91] Arnold Wolfers, '"National Security" as an Ambiguous Symbol', *Political Science Quarterly 67(4)*, 1952, 481-502, pp. 484-485.

[92] See Sharon L. Caudle, 'National Security Strategies: Security from What, for Whom, and by What Means', *Journal of Homeland Security and Emergency Management 6(1)*, 2009, p. 2.

concerns gradually transforming from foreign military attacks to non-military foreign and domestic threats. This development can be observed in the following example: in 1966, P.G. Bock and Morton Berkowitz defined national security as 'the ability of a nation to protect its internal values from *external* threats'[93] [emphasis added], while in a paper published in 2015 Satish Chandra and Rahul Bhonsle held that national security 'requires the preservation of the independence, integrity and sovereignty of the state against external and internal adversaries'.[94]

More importantly, using 'internal and external dangers or harms' as a core element provides a more direct and workable basis than using 'vital interests' to understand and compare different countries' national security concerns. 'Vital interests' are inclined to be subject to political judgment and decisions, whereas 'dangers or harms' mainly concern factual situations, which could make different countries' national security concerns more commensurable. This is certainly not to say that the latter concerns are not influenced by any political factors. Determining a specific incident to be a national security threat can be a political decision. One of the advantages of using the term 'dangers or harms' is that it focuses more on the objective situation, rather than on how state authorities understand their own state's interests.

State and nation

As a kind of status, security can be a subject of concern for different areas of society, where its meaning will change accordingly. When we take the state as its subject, we speak of national security. In his article, Matthew Sussex also viewed the nation as the subject of the notion: 'Because national security is tied to protecting the nation – specifically the nation state – the main actor in defining national security is fairly clear-cut. States have international legal personality, they have physical borders, are centres for economic activity, and have a sovereign centralised authority that makes policy and controls the means of organised violence (the capacity to make laws and fight wars with other states).'[95]

The state or nation state as we know it today is a relatively recent phenomenon. In medieval times, European countries were under the authority of churches and empires, and the concept of the state had not yet emerged.

[93] P. G. Bock and Morton Berkowitz, 'The Emerging Field of National Security', *World Politics 19(1)*, 1966, 122-136, p. 134.
[94] Satish Chandra and Rahul Bhonsle, 'National Security: Concept, Measurement and Management', *Strategic Analysis 39(4)*, 2015, 337-359, p. 340.
[95] Matthew Sussex, 'Understanding National Security: The Promises and Pitfalls of International Relations Theory', in Michael Clarke, Adam Henschke, Matthew Sussex, and Tim Legrand (eds.), *The Palgrave Handbook of National Security*, Palgrave Macmillan Cham, 2021, 23-52, p. 25.

Through the Peace of Westphalia, and its recognition of sovereignty, these countries gained their own highest and independent authorities, with their territory of governance being identified by borders.[96] This was when the sovereign territorial country, the basis of the modern system of states, started emerging. Nations, or nation states, came afterwards. Through an 'imagined community' the members of a nation state, even though from different nations, share a common social, cultural and political identity.[97] Such a sense of commonality among its citizens is the main element distinguishing a nation state from a sovereign state. Nowadays, most countries in the world are nation states.[98]

As the subject of national security, the state refers to the political entity with a permanent population, a defined territory, one government, and the capacity to enter into relations with other sovereign states.[99] The term 'state' (sovereign state) can carry those meanings, as well as 'nation' (nation state), and therefore '*state* security' would convey the same notion as '*national* security'. No special reason for using the latter term instead of the former has ever been attributed to the above differences between 'nation state' and 'sovereign state'. Instead, the two chief reasons for doing so are that, first, the term 'national security' has become commonly accepted and, second, given that the nation state is countries' contemporary formation, using 'national security' has proved to be good enough to express the meaning it refers to.

In states' current practice, and depending on the state and time, many issues have been put under the heading of 'national security'. Nevertheless, most of the variants can be categorised as pertaining to one of the following eleven areas: security of citizens, political security, military security, sovereignty security, territorial security, economic security, cultural security, technological security, energy and natural resources security, ecological security and, most

[96] See Barry Buzan and Lene Hansen, *The Evolution of International Security Studies*, Cambridge University Press, 2009, pp. 22-26.
[97] See Benedict Anderson, *Imagined Communities: Reflections on The Origin and Spread of Nationalism*, Verso, 1991, p. 7.
[98] See Andreas Wimmer and Yuval Feinstein, 'The Rise of the Nation-State across the World, 1816 to 2001', *American Sociological Review 75(5)*, 2010, 764-790.
[99] Frederick Tse-shyang Chen, 'The Meaning of States in the Membership Provisions of the United Nations Charter', *Indiana International & Comparative Law Review 12(1)*, 2001, 25-51, p. 25.

recently, cyber security.[100] These areas are often deemed to be vital interests by state authorities.[101]

1.3.2 What are States Protected from?

According to Liu's definition, a state can be deemed safe as long as either of the following two conditions is met: (a) there are no threats, either at home or abroad; or (b) with dangers or harms occurring, the state has the ability to deal with them effectively. The latter usually means that the state has established effective institutions and mechanisms for countering threats. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, drafted by a group of experts in international law, national security and human rights, contain a comparable interpretation.[102] Principle 2 provides that legitimate national security interests lie in protecting '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.'

In this regard, national authorities invoking national security are either protecting the nation from specific threats, or improving the operational effectiveness of security-related agencies. This interpretation makes Liu's definition of national security a workable choice for conducting my research. Normally, people can easily recognise the eliminating of specific and serious threats, like a foreign invasion or terrorist attack, as national security issues. But the connection to national security becomes less direct and less obvious when it comes to issues such as classifying secret services' documents or updating surveillance technology, especially given that such matters do not put a state in a danger that is as great or imminent as in cases of the former. The gap is even wider when the two cases are viewed in the context of national security and human rights. Bearing in mind that national security can be used

[100] See Liu Yuejin, "How Many Security Elements does National Security Include?", 20 November 2021, retrieved 11 January 2022, from https://mp.weixin.qq.com/s/UrrSoL8_SG9YjhfggP5nSQ.（参见刘跃进："国家安全到底包括多少个安全要素"，载微信公众号"坡上的国安学"2021 年 11 月 20 日，网址 https://mp.weixin.qq.com/s/UrrSoL8_SG9YjhfggP5nSQ，最后访问日期 2022 年 1 月 11 日。）

[101] See Kim R. Holmes, 'What is National Security?', *Heritage Foundation, 2015*, 17-26, pp. 19-20, retrieved 11 January 2022, from https://www.heritage.org/sites/default/files/2019-10/2015_IndexOfUSMilitaryStrength_What%20Is%20National%20Security.pdf. See also Liu Yuejin (ed.), *National Security Studies,* China University of Political Science and Law Press, 2004. p. 52.（刘跃进主编：《国家安全学》，中国政法大学出版社 2004 年，第 52 页。）

[102] More discussions on these Principles, see Sandra Coliver, 'Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information', *Human Rights Quarterly 20(1)*, 1998, 12-80.

to restrict human rights, people can accept that some restrictions are legitimate if a government needs to prevent an imminent terrorist attack. But they may question why updating surveillance technology could also be claimed to be protecting national security and thus constitute legitimate interference with individual freedoms, as in the case of a real and specific terrorist attack. Based on the definition used in this research, the latter could be recognised as building and improving capacity, and would therefore fall within the scope of national security concerns. This interpretation allows people to form a clearer expectation of what a government is attempting to or should convey when using the term 'national security'.

Threats to national security

Threats to national security can be of a natural or social nature. Natural disasters such as floods, droughts, earthquakes and communicable diseases can endanger the security of a state, with the most well-known threats of such nature being global warming and an oil shortage. These threats may have a direct impact on the security of citizens and on economic and ecological security. As we have seen recently, a pandemic can also pose a threat to countries' security in a variety of ways.

Threats of a social character consist of internal threats like civil wars, mass disorder and secession, or external threats such as military invasions, political subversion and espionage. Political extremism and terrorism are two of the serious problems that many countries have recently been facing.

Institutions and mechanisms for protecting national security

The state establishes 'hardware' and 'software' out of concern for security. 'Hardware' refers mainly to the institutions, including armed forces and intelligence services, whose primary duty is to tackle security threats. Other institutions, such as the police and foreign affairs departments, also undertake these duties, but are not created specifically for that purpose. 'Software' includes national security systems, laws, regulations, policies, strategies, approaches and other mechanisms.

In this thesis, national security refers to 'an objective situation in which a state is free from internal and external dangers or harms'. In practical terms, state authorities asserting that they are protecting national security are either eliminating identified threats, or establishing and improving their capacity to address them. Under the ECHR, I find the terms 'economic well-being of the country', 'territorial integrity' and 'national security' used in the limitation

clauses to fall within the meaning of national security as defined here.[103] In addition, 'war' and 'other public emergency threatening the life of the nation', as provided in the derogation clause, may also comply with the definition.[104] When it comes to China, the 2015 National Security Law provides a comprehensive definition of the term: 'national security means a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status.'[105] In a general sense, this definition does not display an understanding radically different from the one I use in this thesis and it will be helpful for analysing both the Chinese and the European systems, given that both systems refer essentially to something covered by such a description.[106]

1.4 Head-on Collision between Human Rights and National Security?[107]

It is always easy to find examples of explicit conflicts between national security and human rights, no matter whether a state is in lasting peace, sporadic local disturbance, or turmoil. Before answering the main questions in the thesis, we need to zoom out slightly to reflect on the dynamics of the notion of national security, and its interaction with human rights in both practice and theory.

1.4.1 Expansion of Scope and Conflicts of Interest

National security has a considerable impact on human rights; indeed, one could say it is now challenging it. There are two main reasons for this. Firstly, the scope of national security is dynamic and expanding. Generally speaking, national security's scope originally comprised military and political elements, but then expanded to the fields of culture, technology, ecology and cyberspace.[108] Although it is hard to draw a clear distinction between internal

[103] Articles 6, 8, 10, 11, Article 2 of Protocol No. 4, and Article 1 of Protocol No. 7 of the ECHR.
[104] Article 15 of the ECHR.
[105] Article 2 of the National Security Law. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.
[106] I will make a further analysis on this matter in Section 5.1.
[107] Part of this section has been published by the *Cross-cultural Human Rights Review*. See Jing Chao, 'Freedom from Fear: Has it Faded since the UDHR – On the Approaches Adopted by Europe and China', *Cross-cultural Human Rights Review 1(1)*, 2019, 130-152.
[108] Liu Yuejin, 'On the Basic Meaning of National Security and Its Emergence and Development', *Journal of North China Electric Power University (Social Sciences) (4),* 2001, 62-65, p. 62. （参见刘跃进："论国家安全的基本含义及其产生和发展"，载《华北电力大学学报（社会科学版）》2001 年 4 期，第 62 页。）

and external threats, recent practice in many countries indicates a tendency to focus more on internal threats.[109] In these cases, an issue of public order may raise national security concerns. For example, police in Hong Kong accused the Civil Human Rights Front, a non-governmental organisation (NGO), of violating Hong Kong's national security law by organising large-scale demonstrations during the 2019 pro-democracy protests.[110] The expansion of the elements covered by national security mean a state invoking national security may now reduce its human rights obligations more often than before. To protect national security, government authorities may interfere with people's exercising of their basic rights, such as the freedom of expression, the right to privacy, and the right to a fair trial.[111]

The second reason why national security is challenging human rights lies in an underlying conflict of interests: national security represents the value of security, whereas human rights stand for liberty.[112] Although the balance between these two values is never an either-or situation, people appear to prefer to trade liberty for security. This trade-off as a function of human society is perhaps best understood through the theory of the Social Contract, which suggests that individuals in the state of nature, a society absent of any political order, gave up some of their liberties to a civil authority in order to prevent disputes from devolving into an endless war.[113] Therefore, a government is established in the first instance for its members' safety, providing they renounce some of the freedoms they once enjoyed in the state of nature.[114] While the state of nature is a purely hypothetical status, a trade-off of this kind can be observed in practice. Where people look to their governments for protection from violence and terrorism, 'fear sometimes appears to eclipse

[109] See Margriet Drent, Rosa Dinnissen, Bibi van Ginkel, Hans Hogeboom, and Kees Homan, 'The Relationship between External and Internal Security', *Clingendael Strategic Monitor Project*, 2014, p. 7, retrieved 11 January 2022, from https://www.clingendael.org/sites/default/files/pdfs/The%20relationship%20between%20external%20and%20internal%20security.pdf.

[110] See Iain Marlow, "Biggest Hong Kong Protest Group Faces Threat of Police Probe", *Bloomberg, 13 August 2021*, retrieved 11 January 2022, from https://www.bloomberg.com/news/articles/2021-08-13/biggest-hong-kong-protest-group-faces-threat-of-police-probe.

[111] See Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/HRC/13/37(2009).

[112] See Jeremy Waldron, 'Security and Liberty: The Image of Balance', *The Journal of Political Philosophy 11(2)*, 2003, 191-210, p. 192.

[113] See Thomas Hobbes, *Leviathan*, edited by John Charles Addison, Oxford University Press, 1998, Chapters XIII and XXX. See the Internet Encyclopedia of Philosophy (IEP), "Social Contract Theory", *IEP*, retrieved 19 December 2016, from https://iep.utm.edu/soc-cont/#H2.

[114] See John Locke, 'Of the Ends of Political Society and Government', in John Locke, *Second Treatise of Government*, CreateSpace Independent Publishing Platform, 2016.

sanity.'[115] Through the lens of national authorities, 'when placed in the balance of liberty and security, even the most fundamental individual liberty interests may be outweighed by broader societal interests.'[116] Since 9/11, this approach seems to have served as the primary model worldwide for devising national security laws and policies.[117]

On a more concrete level, an 'us versus them' mentality, in my understanding, is making conflicts personal. The choice between security and liberty is to some extent being transposed into a choice between *my* security and *hooligans'* liberty, thus making the decision emotional. The spectrum of 'them' is also increasingly widening, stretching from insurgents, conspirators, spies, terrorists and criminals to immigrants and minorities. And the 'us' always stands for the 'normal' and 'ordinary' people, the majorities to whom almost all citizens believe they belong. Since the recent migrant crisis and terrorist attacks, for instance, far-right and nationalist parties have challenged Europe,[118] pledging to restrict or deny other people's liberty so as to safeguard the majority's well-being. Some claim that the changes in European governments' immigration and security policies in recent decades represent justified responses to the threats of public disorder and terrorism, which require 'a new balance' between liberty and security. As Ronald Dworkin rightly points out, however, the only conflicts of interest here are the majority's security and other people's liberty.[119] A similar mentality can also be observed on the other side of the world, in China, where some local authorities have framed a few petitioners as being a threat to public security when they complained, through legal channels, about these authorities' abuse of power.[120] In effect, thus, such authorities placed public interests above the interests of a few individuals or, worse, abused their power.

Outwardly, the 'us versus them' mentality is a form of utilitarianism in that it creates advantages in a cost-effective manner. It sounds economically

[115] OHCHR, "Closing Keynote/Peter Baehr Lecture at the 2016 AHRI Human Rights Research Conference: 50 Years of the Two UN Human Rights Covenants: Legacies and Prospects", *OHCHR*, 3 September 2016, retrieved 19 December 2016, from http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20447&LangID=E.
[116] Evan Fox-Decent and Evan J Criddle, 'Interest-balancing vs. Fiduciary Duty: Two Models for National Security Law', *German Law Journal 13(5),* 2012, 542-559, p. 546.
[117] See Paul De Hert, 'Balancing Security and Liberty within the European Human Rights Framework. A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11', *Utrecht Law Review 1(1)*, 2005, 68-96, p. 68.
[118] See BBC News, "Guide to Nationalist Parties Challenging Europe", *BBC*, 23 May 2016, retrieved 21 January 2017, from http://www.bbc.com/news.
[119] See Ronald Dworkin, 'Terror & the Attack on Civil Liberties', *New York Review of Books 50(17),* 2003, 37-41.
[120] See Xu Xing, 'The Mistakes of Stability Maintenance: Dissimilation and Challenge', *People's Tribune (27),* 2010, 14-15, p. 14.

defensible for government authorities to seek to protect most of the people at the cost of reducing the liberty of a few other individuals, as well as morally right to give precedence to public interests, which also extend to those minorities. When linked to nationalism, this approach can be a vote-winner. During the 2016 US presidential election campaign, for example, this was the approach adopted by the future president, Donald Trump. He also continued to pursue it after taking office in January 2017, with some of the first executive orders he signed being the order to construct 'a physical wall' to keep illegal immigrants from crossing the southern border [121] and the order banning immigrants from seven, mainly Muslim, countries, ostensibly in order to protect the nation from foreign terrorists entering the US.[122]

The expansion of national security's scope and the underlying conflict of interests can be further construed in the context of human security. National security is a state-centric notion of security, which, in its traditional formulation, is about protecting sovereignty and territorial integrity from threats by other states.[123] Although, since the end of the Cold War, the notion has gradually shifted its focus towards internal security, and incorporated non-traditional security issues like terrorism, infectious diseases, natural disasters, cyber-attacks and other non-military threats,[124] the state remains the referent object of national security. In the meantime, the concept of 'human security' has been proposed to mark the change in the security landscape,[125] with proponents arguing that it should be the protection and welfare of individuals and human beings that is at the centre of security.

No consensus has yet been achieved on the definition of human security. While some scholars claim that the concept is too ambiguous to provide a useful theoretical construct for academic research or a practical guide for policymaking,[126] others have provided various definitions. Sakiko Fukuda-Parr

[121] See the White House, "Executive Order: Border Security and Immigration Enforcement Improvements", *The White House*, 25 January 2017, retrieved 4 February 2017, from https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements.
[122] See the White House, "Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States", *The White House*, 27 January 2017, retrieved 4 February 2017, from https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states.
[123] See Kanti Bajpaiformat, 'The Idea of Human Security', *International Studies 40(3)*, 2003, 195-295, pp. 195-196.
[124] See Divya Srikanth, 'Non-Traditional Security Threats in the 21st Century: A Review', *International Journal of Development and Conflict 4*, 2014, 60-68.
[125] See Des Gasper, 'Climate Change and the Language of Human Security', *International Institute of Social Studies of Erasmus University Working Paper Series/General Series no. 505*, 2010, 1- 28, p. 17, retrieved 27 June 2023 from https://repub.eur.nl/pub/19843.
[126] See Roland Paris, 'Human Security: Paradigm Shift or Hot Air?', *International Security 26(2)*, 2001, 87-102, pp. 92-93. Shahrbanou Tadjbakhsh and Anuradha Chenoy, *Human Security: Concepts and*

and Carol Messineo have categorised these definitions into two groups: narrow and broad.[127]

The broad formulation includes overall human vulnerability and encompasses various pervasive threats, ranging from physical to economic and environmental. One of most often cited definitions comes from the United Nations Development Programme (UNDP).[128] In its 'Human Development Report 1994: New Dimensions of Human Security', UNDP stated that 'Human security can be said to have two main aspects. It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life – whether in homes, in jobs or in communities.'[129] Based on this definition, the UNDP also set out seven main categories of concerns:[130] (a) economic security;[131] (b) food security;[132] (c) health security;[133] (d) environmental security;[134] (e) personal security;[135] (f) community security;[136] and (g) political security.[137] We may find these concerns regarding human security have some overlaps with national security, especially in its later expansion to include 'non-

Implications, London: Routledge, 2007, pp. 39-71. Heather Owens and Barbara Arneil, 'The Human Security Paradigm Shift: A New Lens on Canadian Foreign Policy?', *Canadian Foreign Policy Journal 7(1)*, 1999, 1-12, p. 2. Astri Suhrke, 'Human Security and the Interests of States', *Security Dialogue 30(3)*, 1999, 265-276, pp. 270-271.

[127] See Sakiko Fukuda-Parr and Carol Messineo, 'Human Security: A Critical Review of the Literature', *Centre for Research on Peace and Development Working Paper No. 11*, 2012, p. 5, retrieved 27 June 2023 from http://sakikofukudaparr.net/wp-content/uploads/2013/01/HumanSecurityCriticalReview2012.pdf.

[128] Some scholars adopted this broad definition given by UNDP. See, for instance, Shannon D. Beebe and Mary H. Kaldor, *The Ultimate Weapon is No Weapon: Human Security and the New Rules of War and Peace*, New York: PublicAffairs, 2010, pp. 5-6. Lincoln Chen and Vasant Narasimhan, 'Human Security and Global Health', *Journal of Human Development 4(2)*, 2003, 181-190.

[129] United Nations Development Programme, *Human Development Report 1994: New Dimensions of Human Security*, New York: Oxford University Press, 1994, p. 23.

[130] See United Nations Development Programme, *Human Development Report 1994: New Dimensions of Human Security*, New York: Oxford University Press, 1994, pp. 24-33.

[131] Economic security requires an assured basic income – usually from productive and remunerative work, or in the last resort from some publicly financed safety net.

[132] Food security means that all people at all times have both physical and economic access to basic food.

[133] Health security refers to an individual's freedom from various diseases and debilitating illnesses, and his or her access to health care.

[134] Environmental security refers to the integrity of land, air and water, which make human habitation possible.

[135] Personal security refers to an individual's freedom from crime and violence, especially women and children, who are more vulnerable.

[136] Community security refers to cultural dignity and to inter-community peace within which an individual lives and grows.

[137] Political security refers to protection against human rights violations. Regarding the substance of each category, see United Nations Development Programme, *Human Development Report 1994: New Dimensions of Human Security*, New York: Oxford University Press, 1994, pp. 24-33. See also Kanti Bajpaiformat, 'The Idea of Human Security', *International Studies 40(3)*, 2003, 195-295, p. 203.

traditional' concerns. But what makes human security distinct from the latter is that its overarching focus is on the individual, and that it integrates non-military mechanisms, such as development programmes and humanitarian aid, as a means to achieving security.

In the narrow sense, human security focuses on violent threats against the individual. S. Neil MacFarlane and Yuen Foong Khong, for instance, defined the term as 'freedom from organized violence' and thereby attempted to 'direct attention to the source of that violence – a perpetrator – and what makes that violence potent – it is organized.'[138] Also reading it in a narrow formulation, the Human Security Centre[139] defined the term by focusing on political violence.[140] Compared with the broad definition, the narrow reading restricts the concerns to those needing immediate intervention rather than long-term planning and investing for development.[141]

The tensions between national security and human rights appear to weaken after security is reframed to an individual-centric perspective. Indeed, human security and human rights have extensive overlaps.[142] As human rights involve civil, political, economic, social and cultural rights, as well as the right to development, many threats to human security can also be seen as human rights concerns. The spread, for instance, of deadly infectious diseases raises concerns about both health security and the right to health. Similarly, terrorism is related to personal security and the right to life. It can be argued, therefore, that resolving threats to security can contribute to the protection of some human rights. More importantly, both human security and human rights are needs of individuals; individuals are their focus and bearer. In this understanding, the measures to address threats are not designed for, or not merely for, ensuring the survival of the state, but for fulfilling individuals' needs, even though these measures could also reduce certain freedoms. This then brings the arguments back to the trade-off between security and liberty as discussed above.

---

[138] S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History*, Bloomington: Indiana University Press, 2006, p. 245.

[139] The Human Security Centre is an international, independent, not-for-profit foreign policy think-tank based in London, United Kingdom.

[140] See Andrew Mack, 'Human Security Report 2005: War and Peace in the 21st Century', *Die Friedens-Warte 80(1/2)*, 2005, 177-191. Human Security Centre, *Human Security Report 2005: War and Peace in the 21st Century*, New York: Oxford University Press, 2005. See also David Roberts, 'Review Essay: Human Security or Human Insecurity? Moving the Debate Forward', *Security Dialogue 37(2)*, 2006, 249-261.

[141] See Peter H. Liotta and Taylor Owen, 'Why Human Security?', *Whitehead Journal of Diplomacy and International Relations 7(2)*, 2006, 37-54, p. 43.

[142] See Shahrbanou Tadjbakhsh and Anuradha Chenoy, *Human Security: Concepts and Implications*, London: Routledge, 2007, p. 123.

By putting individuals at the centre, the human security paradigm sheds new light on 'national security' threats, and thereby offers non-coercive ways of responding. Take terrorism, for example. During the ongoing 'war on terror', commentators and policymakers have tried to identify underlying problems that breed terrorism, and to deal with its root causes. Among the causes commonly identified are poverty, unemployment, social inequality, a clash of values, marginalisation, discrimination and the abuse of human rights.[143] These root causes fit into the paradigm of human security and constitute threats to human security. In other words, terrorism is not only a form of human insecurity, but can also be seen as a result of human insecurity. Taking police and military measures against terrorism is not necessarily the only option, and such measures are arguably less effective as they address merely manifestations of the problem. By contrast, facilitating social and economic development, ensuring equality and the principle of non-discrimination and developing narratives that foster cross-cultural understanding can contribute to addressing underlying causes of terrorism, and thus to achieving sustainable security. This is certainly not intended to oust or replace coercive counterterrorism measures, but rather to provide a comprehensive approach to responding to such threats.

In summary, conflicts of interest exist between national security and human rights, with recent practice showing that precedence is frequently given to the former. When balancing these two interests, governments may take even some marginal, speculative or remote benefits into account when seeking to ensure security. In addition, the ambiguity and expansion of 'national security' would seem to provide an opportunity for national authorities to use the notion as a pretext for reducing their human rights obligations. In my reading, these are the reasons why we see national security appearing to pose an obstacle in policies, laws and judicial judgments for a government seeking to guarantee people's fundamental rights. The conflicts may appear less intense if security is reframed from a state-centric to an individual-centric concept, which is often referred to as human security. The human security approach will also help to expand political deliberations and the response options for addressing insecurity threats. It should be noted that the human security approach is essentially a political strategy or agenda,[144] which allows for prioritisation of multiple

[143] See Edward Newman, 'Exploring the "Root Causes" of Terrorism', *Studies in Conflict & Terrorism 29(8)*, 2006, 749-772, pp. 751-754. See also Tim Krieger and Daniel Meierrieks, 'What Causes Terrorism?', *Public Choice 147*, 2011, 3-27, pp. 9-14.

[144] See Wolfgang Benedek, 'Human Security and Prevention of Terrorism', in Wolfgang Benedek and Alice Yotopoulos-Marangopoulos (eds.), *Anti-Terrorist Measures and Human Rights*, Boston: Brill Nijhoff, 2004, 171-183, p. 178.

demands and policy choices. Given that human rights are only a subset of human security in its broad formulation, this may prompt questions such as whether fulfilment of human rights is a policy choice, and whether governments can pick and choose the rights they protect.[145] As, however, the interrelation between human security, national security and human rights is not the main topic of this research, I will continue my analysis based on the legal framework of human rights.

1.4.2 How National Security Collides with Human Rights in Human Rights Law

After witnessing counterterrorism actions, migrant crises and many other collisions between national security and human rights in recent decades, we may start to wonder whether the two subjects can ever be compatible. Is the collision inherent to human rights and national security by being rooted in the contrasting essences of security and liberty?

This can hardly be seen as the case. As Tom Zwart points out, 'human rights' is an ambiguous concept in which legal and philosophical discourses are mixed, whereby legal discourses usually refer to rights enshrined in human rights instruments.[146] In my understanding, the collision is reflected in the legal instruments rather than in philosophical discourses. For example, the essential 'freedom from fear' shows that national security can in fact be compatible with human rights, and be one of the latter.

Freedom from fear, along with the three other essential freedoms, were addressed by the then US President Franklin Roosevelt,[147] and later enshrined in the preamble of the UDHR in 1948.[148] These Four Freedoms attempted to provide some shared values or a blueprint of the future world that would be accepted by people from all nations.[149] As fear has both subjective and psychological features, it is not fear itself which the freedom aims to dispel, but rather incidents triggering this state of emotion. In Roosevelt's 1941 speech, the need for freedom from fear was mentioned in the context of incidents caused by war.[150] In this sense, freedom from fear defined a demand for world peace

[145] See Rhoda E. Howard-Hassmann, 'Human Security: Undermining Human Rights?', *Human Rights Quarterly 34(1)*, 2012, 88-112, p. 95.
[146] See Tom Zwart, 'Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach', *Human Rights Quarterly 34(2)*, 2012, 546-569, p. 553.
[147] Franklin D. Roosevelt, "The Four Freedoms", *Voices of Democracy*, 6 January 1941, retrieved 4 February 2017, from www.voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/.
[148] United Nations, Universal Declaration of Human Rights 1948, A/RES/217(III).
[149] William J. Vanden Heuvel, 'The Four Freedoms', in Stuart Murray and James McCabe, *Norman Rockwell's Four Freedoms: Images that Inspire a Nation*, Berkshire House, 1993, p. 108.
[150] Roosevelt addressed the freedom from fear in his speech as,

and protection from aggression and violence, seen in the context of war. Given the context of that time, peace was a primary concern for people.

Collisions between national security and human rights arise mostly from the way in which the Four Freedoms' aspirations have been enshrined in the substantive provisions of subsequent human rights treaties, with freedom from fear having been somewhat forgotten and not having been translated into human rights treaties as perfectly or directly as other freedoms.[151] Two of these freedoms – freedom of speech and freedom of belief – are reflected directly in provisions in the ICCPR and the ECHR. Freedom of expression, for instance, is provided for in Article 19 of the ICCPR and Article 10 of the ECHR, and freedom of belief by Article 18 and Article 9 respective treaties, while freedom from want has been specifically assigned to a Covenant, the ICESCR. Freedom from fear, by contrast, has not been directly translated into human rights provisions and instruments. The meaning of this freedom, being derived from the context of war, has strong links with ensuring the protection of people against aggression and violence. The absence, however, of a specific right guaranteeing protection from any form of violence in general, such as a possible right to physical security, is consequently striking. Instead, freedom from fear surfaces as an underlying concept related to several human rights provisions, with its most evident current manifestation being in the context of public interests affecting national security.

International human rights treaties contain legally binding provisions relating to freedom from fear. A most evident such provision is Article 20 of the ICCPR, which prohibits propaganda for war, and national, racial and religious hatred inciting discrimination, hostility or violence. [152] The emphasis on aggression and hatred appears to be related to the memory of Nazi campaigns in Germany and the Second World War.[153] The former extends to all forms of propaganda that would threaten or result in an act of aggression or breach of

'The fourth is freedom from fear – which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – anywhere in the world.'
Franklin D. Roosevelt, "The Four Freedoms", *Voices of Democracy*, 6 January 1941, retrieved 4 February 2017, from www.voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/.

[151] James Spigelman, 'The Forgotten Freedom: Freedom from Fear', *The International and Comparative Law Quarterly 59(3)*, 2010, 543-570, p. 545.

[152] Article 20 of ICCPR reads:
'1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

[153] See Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge University Press, 2020, pp. 581-582.

the peace contrary to the UN Charter.[154] The latter prohibits incitement to violence and has some overlaps with the limitation clause of freedom of expression (Article 19(3) of the ICCPR).[155] Another such provision is the right to liberty and security, as provided for in Article 9 of the ICCPR and Article 5 of the ECHR.[156] However, the ECtHR holds that this right should be read as a whole,[157] where 'security of person' means protection against arbitrary interference with liberty.[158] This thus fails to address freedom from fear in the form of protection against aggression and violence. There are several other rights that address this freedom in a certain sense. The right to life, for example, is protected by the ICCPR and ECHR.[159] States are required, as a negative obligation, to refrain from the intentional and unlawful taking of life. At the same time, they undertake positive obligations to protect individuals whose lives are at risk from criminal acts of others.[160] The prohibition of torture is widely accepted as a basic, non-derogable right and provided for in Article 7 of the ICCPR and Article 3 of the ECHR. While its main concerns relate to governments' treatment of suspects, detainees, criminals and other individuals physically under the control of government authorities,[161] the right also imposes positive obligations on states to protect individuals from torture or ill-treatment by private individuals.[162] In case law relating to the ECHR, the Court

[154] Human Rights Committee, General Comment No. 11 – Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art. 20), 1983, para. 2. See also Mohamed Saeed M. Eltayeb, 'The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and its Relation to Freedom of Expression', *Religion and Human Rights 5*, 2010, 119-135, pp. 125-127.
[155] See Antoine Buyse, 'Words of Violence: "Fear Speech", or How Violent Conflict Escalation Relates to the Freedom of Expression', *Human Rights Quarterly 36(4)*, 2014, 779-797, pp. 792-794.
[156] The right to security is always provided together with right to liberty in both ICCPR and ECHR.
[157] See *East African Asians v. the United Kingdom*, nos. 4403/70, 4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70, 4478/70, 4501/70, 4526/70 and 4530/70, paras. 219-220, Commission decision of 14 December 1973, Decisions and Reports 78 A/B/5.
[158] *A., B., C., D., E., F., G., H. and I. v. Federal Republic of Germany*, no. 5573/72, Commission decision of 16 July 1976, Decisions and Reports 7, p. 26. See also *Bozano v. France*, 18 December 1986, Series A no. 111, pp. 18-19.
[159] Article 6 of the ICCPR and Article 2 of the ECHR.
[160] See Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, CCPR/C/GC/36(2018), paras. 7 & 20. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 130, ECHR 2014. See also Sarah Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36', *Human Rights Law Review 19(2)*, 2019, 347-368, pp. 354-356. Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart, 2004, p. 15. Nevertheless, the right cannot be interpreted as guaranteeing to every individual an absolute level of security in any activity in which the right to life may be at stake. I will elaborate on this point in the context of Article 2 of ECHR later in Section 3.2.2.
[161] Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, N.P. Engel, 2005, pp. 157-158.
[162] See Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 1992. See also Stephanie Palmer, 'A Wrong

has examined states' obligation to provide effective protection or deterrence against such serious breaches of personal integrity in the context, for example, of domestic violence,[163] sexual crimes[164] and violence inflicted on the basis of hatred.[165] The freedom from fear has faded within the discourse on human rights. By this, I mean that international human rights treaties do not provide a comprehensive right to physical security, which would better reflect the freedom from fear. The rights that do attempt to address freedom from fear focus on specific forms of violence, such as those causing death or torture, or war propaganda and hate speech inciting violence.

Freedom from fear is more closely reflected in limitation and derogation clauses. The issue concerning freedom from aggression or violence inevitably arose when the treaties were being drafted. The limitation clauses attached to rights under the ECHR and ICCPR demonstrate that their legal approach to security focuses on public interests. Freedom from fear was transformed into public interests in security, such as national security and public safety. These public interests share the same purpose as freedom from fear, which seeks to protect people against violence, disorder and crimes. Under the ECHR, apart from reservations made when states accede to the Convention, limitations and derogations on certain human rights are the legal basis available for weighing the interests of security. National security is referred to in Articles 6, 8, 10 and 11, in Article 2 of Protocol No. 4 and in Article 1 of Protocol No. 7 of the Convention, while Article 15 provides derogations in the event of an emergency. Under the ECHR, therefore, the relationship between security and human rights is portrayed as a binary opposition.

On some occasions, what is essentially behind the conflict between national security and human rights is a clash of rights. This is especially true in the case of counterterrorism. By endangering or taking innocent lives, terrorism has a direct and serious impact on the enjoyment of the right to life.[166] Protecting people's lives constitutes the moral and legal basis for states to fight terrorism. The Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism state that 'States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in

Turning: Article 3 ECHR and Proportionality', *The Cambridge Law Journal 65(2)*, 2006, 438-452, pp. 440-441.

[163] See *Talpis v. Italy*, no. 41237/14, §§ 126-131, ECHR 2017.

[164] See *M.G.C. v. Romania*, no. 61495/11, §§ 60-75, ECHR 2016.

[165] See *Burlya and Others v. Ukraine*, no. 3289/10, §§ 129-137, ECHR 2018.

[166] I will elaborate further on the relation between national security and the right to life under Article 2 of the Convention in Section 3.2.2.

accordance with the present guidelines.'[167] In this context, what is at stake is the right to life on the one hand, and the rights being interfered with by counterterrorism measures on the other hand. We can also find examples of this clash of rights in ECtHR case law, such as in *Big Brother Watch and Others v. the United Kingdom*, when concerns were raised about the right to privacy (Article 8) due to the government's bulk interception regime. To demonstrate the vital role played by bulk interception of communications in fighting terrorism, the UK government first listed several recent attacks in the UK and Europe. It then argued that the bulk interception systems were necessary to 'protect the general community from such threats' and demanded wide discretion to ensure 'the effectiveness of systems for obtaining life-saving intelligence that could not be gathered any other way.'[168] Although the right to life is seen in some literature as a kind of primary right,[169] this does not mean that this right should prevail over other rights in all circumstances. Resolving the clash requires considering factors like the imminence of danger to the right to life, and its potential impact, and adjusting the responding measures interfering with other rights so that they can be seen as legitimate and proportionate. While the underlying issue in such cases is, in effect, a clash of rights, it is more often constructed in the judicial debate and scientific discussion as a conflict between human rights and certain public interests, such as national security. When it comes to national security-related issues, I am guided by the empirical finding that, in its case law, the ECtHR normally considers such cases in the formulation of 'rights versus national security'.

In the light of the above, I argue that human rights do not exclude security philosophically. Collisions arise from human rights instruments in which national security is a legitimate excuse for reducing human rights protections. In practice, the tensions are amplified by the fact that it is national authorities who are wielding the power of preserving security.

---

[167] Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, Council of Europe, H (2002) 4, retrieved 30 June 2023 from https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf.

[168] *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, § 283, ECHR 2018.

[169] See Christian Tomuschat, 'The Right to Life – Legal and Political Foundations', in Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter (eds.), *The Right to Life*, Boston: Brill, 2010, ix-18, p. 3. Gloria Gaggioli and Robert Kolb, 'A Right to Life in Armed Conflicts: The Contribution of the European Court of Human Rights', *Israel Yearbook on Human Rights 37*, 2007, 115-164, p. 127. The ECtHR appears to adopt a similar view on the importance of the right to life. In some cases, it qualified the right as 'the supreme value in the international hierarchy of human rights'. *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, §§ 87 & 94, ECHR 2001-II.

1.5 Political Systems and Sources of Legitimacy

When comparing European countries and China, which have quite different cultures, one should be wary of the potential pitfall of mirror-imaging, a mindset of 'everybody thinks like us'. When balancing security and liberty, for instance, interpreting the other's policy through one's own lens could result in China saying that prioritising liberty leads to Europe struggling with terrorist attacks; likewise, European countries might say that China's 'better safe than sorry' approach seriously curtails people's freedoms.

In fact, China perceives its national interests differently from the way European nations do, and *vice versa*.[170] In my reading, both societies run on their own terms, and their political systems function on their own rationales. These rationales derive, among other things, from history, culture and traditional customs. While a detailed analysis about how these factors determine a country's political system and institutions is not the topic of this thesis, it is nevertheless necessary, having recognised the mirror-imaging pitfall, to briefly depict the two political systems to show how they derive the legitimacy of their ruling power and thus reveal the national authorities' major concerns through their own lens.

In general, while most Western European nations are democratic, those in Central and Eastern Europe have been described as ranging from authoritarian regimes to liberal democracies.[171] Nevertheless, by ratifying the ECHR, all member states commit themselves to the idea of democracy,[172] and democracy means that the legitimacy of ruling power derives from elections. This logically requires there to be multiple political parties, and people to enjoy political rights. These requirements directly correspond to political participation rights, including the freedom of expression, the freedom of assembly and association, and the right to vote.[173] Politically speaking, government leaders need strong

[170] See Richards J. Heuer, *Psychology of Intelligence Analysis*, Center for the Study of Intelligence, 1999, pp. 70-71.
[171] See Dani Rodrik, 'Is Liberal Democracy Feasible in Developing Countries?', *Studies in Comparative International Development 51*, 2016, 50-59, pp. 51-52. See also Armen Harutyunyan, 'The Future of the European Court of Human Rights in the Era of Radical Democracy', *European Convention on Human Rights Law Review 2(1)*, 2021, 20-26, p. 21.
[172] See Joseph Zand, 'The Concept of Democracy and the European Convention on Human Rights', *University of Baltimore Journal of International Law 5(2),* 2017, 195-227, pp. 197-198.
[173] See Katja S. Ziegler, 'Building a Peoples' Europe: Political Rights of Foreigners: Freedom of Expression, Assembly and Association and Electoral Rights from the Perspective of EC Law and the ECHR', in Hartmut Bauer, Pedro Cruz Villalón, and Julia Iliopoulos-Strangas (eds.), *The 'New Europeans': Migration and Integration in Europe*, Nomos, 2009, 385-424, pp. 385-388. Hans-Martien ten Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance', *European Constitutional Law Review 5(3)*, 2009, 464-480, pp. 465-467. In a sense, all rights embodied in the ECHR are fundamental to democracy, including for example the right to privacy, which

reasons to restrict the exercising of these political rights. Being elected also implies that a ruling party or parties can be replaced. Although political security is an important concern for government leaders, challenging the regime in power does not necessarily amount to a challenge to national security, unless the means or purpose of the challenge goes against democracy. In other words, political leaders' legitimate concern is not whether they might be substituted, but how.

Apart from elections, democracy also means governance based on the will of the majority. However, to avoid the danger of dictatorship by the majority, human rights have a role to play. In my understanding, human rights are in essence for the protection of the minority. By recognising human rights, governing authorities take account of minority interests. The purpose of the ECHR is not just to uphold democracy, but specifically to promote *liberal* democracy. Under no circumstances, therefore, may majority rule extinguish the very essence of human rights.

China, however, is another story. The People's Republic of China is a socialist country, whose political system runs on the basis of the principle of democratic centralism. The ruling party is the Chinese Communist Party (CCP), which differs from political parties in Western countries in that it believes that the interests it represents cover the majority. The CCP derives its ruling legitimacy from three main aspects: history, capacity and performance, and ideology. In terms of history, the CCP claims it acquired state power by 'the choice of history and of the people'.[174] This history includes the especially relevant period of 1921-1949, when the CCP and the Chinese Nationalist Party (KMT) first fought for the country's unity after the collapse of China's last dynasty. The CCP then attempted to redistribute landlords' land to peasants in the rural bases it established; this won support for the party by the poorer classes. During the Japanese invasion, the CCP firmly campaigned for armed resistance, and contributed substantially to the Sino-Japanese War. It won the subsequent civil war against the KMT and conquered mainland China. This, then, is how the CCP acquired its power.

promises a space 'separate from the pressures and conformities of collective life'. Benjamin J. Goold, 'How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy, and the Political Value of Privacy', in Dag Wiese Schartum (ed.), Overvåkning i en rettsstat – Surveillance in a Constitutional Government, Bergen: Fagbokforlaget, 2010, 38-48, pp. 42-44. See Andy Aydın-Aitchison and Ceren Mermutluoğlu, 'Mapping Human Rights to Democratic Policing through the ECHR', *Security and Human Rights 30(1-4)*, 2019, 72-99, pp. 78-92.

[174] See Guangming Online, "Why do History and People Choose the CCP", *Guangming Online*, retrieved 8 August 2021, from https://theory.gmw.cn/2019-01/23/content_32398727.htm. （参见光明网："历史和人民为什么选择中国共产党"，载光明网，网址 https://theory.gmw.cn/2019-01/23/content_32398727.htm，最后访问日期 2021 年 8 月 8 日。）

In the CCP's version of history, it helped the people of China to deal with domestic unrest, capitalist exploitation and imperialism. History, however, is written by the victors. How the contents of history are selected, described and interpreted remains an important source of legitimacy for the CCP. Politically speaking, now that the CCP has been in power for more than 70 years, it should be noted that the history-based justification for its power has decreased considerably. During its governance, the CCP also made several serious blunders which failed its missions or led Chinese people to a wrong path. Among those blunders is the Culture Revolution (1966-1976). The movement was initiated by Chairman Mao Zedong, the *de facto* leader of the country, advocating for criticising those persons in authority who were taking the capitalist road.[175] The movement drove the country into disorder, factionalism and violence; the legal system was abandoned and many basic rights of individuals were violated by others without accountability, to name but a few catastrophes.[176] The CCP reflected on the Cultural Revolution afterwards. It concluded that the movement was 'wrongfully launched by the leadership' and 'capitalised on by counter-revolutionary cliques', which 'led to domestic turmoil and brought catastrophe to the Party, the State and the people'.[177] In 1978, shortly after the end of the Cultural Revolution, the CCP, led by its new leader – Deng Xiaoping, decided to transfer its focus from class struggle to economic development.[178] The move, known as 'reform and opening up',

[175] Multiple explanations were given by scholars for the occurrence of the Culture Revolution. See Xi Xuan and Jin Chunming, *A Brief History of the Cultural Revolution*, Beijing: History of Chinese Communist Party Publishing House, 1996, pp. 1-70.（参见席宣、金春明：《"文化大革命"简史》，中共党史出版社 1996 年，第 1-70 页。）See also Xu Youyu, 'Studies on China's Cultural Revolution by Western Scholars', in Liu Qingfeng (ed.), *The Cultural Revolution: Facts and Analysis*, Hong Kong: The Chinese University of Hong Kong Press, 1996, 847-881, pp. 854-866.（参见劉青峰编：《文化大革命：史實與研究》，香港中文大學出版社 1996 年，第 854-866 页。）

[176] See Jiang Chuanguang, 'Deng Xiaoping's Thoughts on the Rule of Law and Milestones in China's Rule of Law Construction', *Global Law Review 39(1)*, 2017, 5-22, p. 8.（蒋传光："邓小平法制思想与中国法治建设的里程碑"，载《环球法律评论》2017 年 1 期，第 8 页。）Shi Jingwu, 'How the "Cultural Revolution" Interrupted the Construction of the Rule of Law in China', *Literary Circles of CCP History (23)*, 2014, 52-54.（施京吾："'文革'是怎样打断中国法治建设的"，载《党史文苑》2014 年 23 期。）See also Harry Harding, 'The Chinese State in Crisis', in Roderick MacFaquhar and John K. Fairbank (eds.), *The Cambridge History of China* (Volume 15, Part 2), Cambridge: Cambridge University Press, 1991, 107-217.

[177] The Sixth Plenary Session of the Eleventh Central Committee of the CCP, Resolution on Certain Questions in the History of Our Party since the Founding of the People's Republic of China, 27 June 1981, para. 20. Available at https://www.gov.cn/test/2008-06/23/content_1024934.htm, last visited 20 July 2023.（中国共产党第十一届中央委员会第六次全体会议：关于建国以来党的若干历史问题的决议，1981 年 6 月 27 日通过。）The English translation is available at https://digitalarchive.wilsoncenter.org/document/resolution-certain-questions-history-our-party-founding-peoples-republic-china, last visited 20 July 2023.

[178] See Communiqué of the Third Plenary Session of the Eleventh Central Committee of the CCP, 22 December 1978, available at

directed the country to adopt the socialist market economy, and has significantly changed the course of China.[179] It can be said that China's current economic achievement is attributed to this very change of course, which contributes to the Party's legitimacy.

The CCP also derives its legitimacy from its capacity to promote people's welfare. In my reading, this is arguably the dominant source of its ruling legitimacy. Promoting people's welfare in this context is more of a moral standard than an empirical element. Such welfare may cover a wide spectrum of subject matters constituting people's concerns, ranging from livelihood to civil and political liberty. Nevertheless, the CCP holds that, in China's current position, most matters can or will be addressed, directly or indirectly, by achieving economic growth. This is where the CCP's performance has a role to play. The country's economic performance is an empirical solution – and currently the primary one – offered to explain how the CCP acquires moral legitimacy. More importantly, for the longer term, this solution has to be dynamic, and to change in response to shifts in the paramount concerns of the Chinese people. Since 2005, for instance, the CCP has attached conspicuously more importance to social equity[180] in response, *inter alia*, to people's growing concerns about the extent to which they can benefit from economic growth. In my understanding, this moral legitimacy is embedded with an underlying

http://cpc.people.com.cn/GB/64162/64168/64563/65371/4441902.html, last visited 20 July 2023. （参见中国共产党第十一届中央委员会第三次全体会议公报，1978 年 12 月 22 日通过。）The shift of focus is later reflected in the Constitution of 1982, which is the one now in effect. The Preamble of the Constitution provides that 'the fundamental task for our country is to concentrate on achieving socialist modernization along the road of socialism with Chinese characteristics.' The English version of the Constitution is available at http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml, last visited 20 July 2023.

[179] See the Sixth Plenary Session of the 19th Central Committee of CCP, Resolution of the Central Committee of the Communist Party of China on the Major Achievements and Historical Experience of the Party over the Past Century, 11 November 2021, section 3. Available at https://www.gov.cn/zhengce/2021-11/16/content_5651269.htm, last visited 20 July 2023. （中国共产党第十九届中央委员会第六次全体会议：中共中央关于党的百年奋斗重大成就和历史经验的决议，2021 年 11 月 11 日。）The English translation is available at https://language.chinadaily.com.cn/a/202111/18/WS6195aa45a310cdd39bc75fe0_1.html, last visited 20 July 2023. See also David Daokui Li (ed.), *Economic Lessons from China's Forty Years of Reform and Opening-up*, Beijing: Tsinghua University Press, 2021. Liu Xiahui, 'Structural Changes and Economic Growth in China over the Past 40 Years of Reform and Opening-up', *China Political Economy 3(1)*, 2020, 19-38. Cai Fang, 'Perceiving Truth and Ceasing Doubts: What Can We Learn from 40 Years of China's Reform and Opening up?', *China & World Economy 26(2)*, 2018, 1-22.

[180] See Communiqué of the Fifth Plenary Session of the Sixteenth Central Committee of the Communist Party of China, *www.gov.cn*, 11 October 2005, retrieved 9 August 2021, from http://www.gov.cn/test/2008-08/20/content_1075344.htm. （中国共产党第十六届中央委员会第五次全体会议公报，载中央政府门户网站 2005 年 10 月 11 日，网址 http://www.gov.cn/test/2008-08/20/content_1075344.htm，最后访问日期 2021 年 8 月 9 日。）

performance requirement: in other words, knowing when majority concerns about welfare change, and offering the empirical solution.

Ideology is another domain that the CCP takes very seriously, with its dominant political ideologies being communism and nationalism. The ultimate objective of the CCP is to establish a communist society; in theory, this is the party's *raison d'être*. In the Chinese context, seeking always to frame the country's governance as communist in nature has become a political tradition. Generations of leaders have devoted efforts to explaining why China's current policies are in line with the communist goal by, for example, introducing a series of Marxist theories adapted to Chinese circumstances, such as Maoism and Deng Xiaoping Theory. Nationalism is anchored in the history of the nineteen centuries during which China collapsed as a result of being invaded by Western countries. The CCP is determined to prevent China from suffering such weakness again and is aiming, instead, to bring about a great rejuvenation of the Chinese nation. Nowadays, these ideologies are more of a means for upholding legitimacy rather than just a source of it.[181] The CCP is trying to add these ideologies to the system of values and beliefs, whereby its leadership is seen as a prerequisite for the rise of the country, the stability of society, and the happiness of people. Maintaining legitimacy through ideology is consequently also a major concern of the Chinese authorities.

Finally, culture is a factor that could explain why the CCP enjoys strong support among Chinese citizens. China's long history has left its mark on the country, most influentially in the form of Confucianism. This doctrine highlights an individual's responsibility to others, society and the nation, arguing that public interests outweigh personal interests. It also requires governing authorities to act in the interests of the people, and to be responsive to their needs. In turn, it informs people's legitimate expectation of the authorities, corresponding to the moral legitimacy described above. Since citizens' expectations will change from time to time, it is imperative for governing authorities to respond accordingly and in time by delivering public goods and services.

[181] See Zeng Jinghan, *The Chinese Communist Party's Capacity to Rule: Ideology, Legitimacy and Party Cohesion*, Palgrave Macmillan, 2016, p. 97.

CHAPTER 2

ROLE OF NATIONAL SECURITY IN THE ECHR

2.1 FROM DRAFT TO PROVISION

The ECHR is recognised as the first step towards the collective enforcement of the UDHR in its preamble and by the ECtHR. While the UDHR expresses the permitted restrictions in only its penultimate article, they turn up in almost every substantial provision stipulating specific rights and freedoms in the ECHR. National security is listed as one of the specific justifications serving to reduce rights in Articles 6, 8, 10 and 11, in Article 2 of Protocol No. 4 and in Article 1 of Protocol No. 7, while, according to the definition given above, Article 15 on 'derogation in time of emergency' also falls within the meaning of national security in this respect.

The Vienna Convention on the Law of Treaties defines the preparatory work of the treaty as only a supplementary means of interpretation.[182] Furthermore, the ECHR is commonly depicted as a 'living instrument'[183] subject to evolutive interpretation. Bearing the above in mind, I do not attempt here to interpret provisions in light of the *travaux préparatoires*. Instead, I revisit the history to provide a wider picture by presenting how national security appeared in the text and discussing the functions it was expected to perform. I found that the existing studies did not normally give a detailed description of where the term 'national security' and other similar terms came from.

Compared with its UN counterpart – the International Covenant on Human Rights (later divided into the ICCPR and ICESCR) – which took more than 15 years to draft, the process of preparing the ECHR was rather efficient as it was completed in little more than a year. This result may be attributed to 'the common heritage of political traditions, ideals, freedom, and the rule of law' shared by the European countries involved. Be that as it may, the *travaux préparatoires* of the Convention still document different proposals for the

[182] See Article 32 of the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[183] See Paweł Łącki, 'Consensus as a Basis for Dynamic Interpretation of the ECHR – A Critical Assessment', *Human Rights Law Review 21(1)*, 2021, 186-202, p. 186.

provisions and arguments about the drafts. As we can conclude from ECtHR practice and most academic views, these preparatory works do not provide an authoritative interpretation of the Convention.[184] When it comes, however, to studying the role of terms such as national security in the Convention instead of their legitimate interpretation, the *travaux préparatoires* contribute by revealing why the wording was used at the outset.

The drafting process can be divided into three distinct phases. The first phase (August – September 1949) involved a draft European Convention on Human Rights being prepared and discussed by the Consultative Assembly of the Council of Europe. The second phase (November 1949 – June 1950) was dominated largely by the Committee of Ministers, who also appointed a committee of governmental experts and convened a meeting of senior officials. The final phase involved Assembly and Committee participation, in which the latter had the last word on the text signed on 4 November 1950. I will now outline how the term 'national security' and other similar terms were presented in each phase.

2.1.1 Initial Phase of the Draft

During the initial stage, neither national security nor restrictions on rights were ever the primary subject of debate. At this early stage, the Consultative Assembly argued predominantly about whether Europe needed a convention for itself as a collective guarantee for human rights. After agreeing on this preliminary question, the representatives moved to settle two fundamental problems: firstly, the list of rights and freedoms to be guaranteed and, secondly, the machinery of such collective guarantees. It was only when the Assembly was considering the former problem that the state representatives mentioned national security, along with restrictions of rights, and even then this was only a marginal issue.

The proposed draft was clearly inspired by the UDHR, both in terms of content and form. France's representative, Pierre-Henri Teitgen,[185] declared that the draft had been based on the UDHR 'as far as possible'.[186] As a result, there was only one general limitation clause, stipulated in Article 3, and no

[184] See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University, 2007, p. 66. See also Maša Marochini Zrinski, 'The Interpretation of the European Convention on Human Rights', *Zbornik radova Pravnog fakulteta u Splitu 51(1)*, 2014, 63-84, p. 68.
[185] Pierre-Henri Teitgen was the France representative in Consultative Assembly of the Council of Europe, who, with other representatives, initially put forward the very first draft Convention to the Assembly for reference, and later played a crucial role in the drafting process as the rapporteur appointed by the Committee on Legal and Administrative Questions.
[186] See Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 1, Martinus Nijhoff Publishers, 1975, pp. 266-268.

mention of the derogation.[187] As in the case of the UDHR, this general limitation article did not list security, let alone national security, as one of the 'just requirements'. Nevertheless, from the words 'the safety of the community' placed in brackets following 'public order', we can still conclude that the drafters believed that the contents of 'public order' already included national security concerns.

During this initial phase, most of the major amendments were made by the Committee on Legal and Administrative Questions. With regard to the limitation clause, the final version reads as follows:

> Article 6 – In the exercise of these rights, and in the enjoyment of the freedoms guaranteed by the Convention, no limitations shall be imposed except those established by the law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.[188]

Compared with the original draft proposed, one of the significant changes is that 'security' was made independent of 'public order', thus making it – along with others – a specific justification. Even though this detailed modification did not prompt any further discussion or explanation, some representatives raised the issue of security or national security during the meeting and briefly demonstrated the significance of a limitation clause.

Security was understood to perform three roles in the Convention. Firstly, as the Greek representative pointed out, security is the foundation of all freedoms.[189] If we want to guarantee human rights not just on paper but also in practice, security will always be needed for the freedoms to exist. In this regard, security is a prerequisite to safeguarding human rights.

Secondly, in the context of the draft Convention, the aim of listing security as a reason for restrictions is to prevent totalitarian advocates from exploiting the

---

[187] See 'Draft European Convention on Human Rights', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 1, Martinus Nijhoff Publishers, 1975, appendix, pp. 296-302.

[188] Parliamentary Assembly, Measures for the Fulfilment of the Declared Aim of The Council of Europe in Accordance with Article 1 of the Statute in Regard to the Safeguard and Further Realisation of Human Rights and Fundamental Freedoms, Doc. 108(1949), retrieved 23 September 2017, from http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD01MSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTUx.

[189] See Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 1, Martinus Nijhoff Publishers, 1975, p. 108.

rights enunciated by the Convention for their own interests and in a manner that could constitute a threat to political security. It was indicated at the time that advocates of totalitarianism were more likely to seize power by pseudo-legitimate means than by means of violence.[190] The purpose of drafting the Convention, as demonstrated in its name in the agenda item,[191] was to maintain and realise human rights and fundamental freedoms in Europe. To fulfil this aim the general limitation article, which includes security, can be invoked to allow governing authorities to reduce certain rights, when necessary.

Lastly and most importantly, security under Article 6, as cited above, plays a role in restricting state authorities' discretion regarding how freedoms are protected at home. There is an underlying reason for this: during the drafting debate, one side emphatically called for international codification to determine the methods and conditions in which the rights were to be exercised in each country,[192] while the opposing camp argued that such codification would indefinitely postpone the final Convention because of the time that it could take to integrate and coordinate all the relevant domestic laws of each European country.[193] From a practical perspective, therefore, it was decided that the Convention should just establish a general definition of guaranteed freedoms, while its implementation should be left to each contracting state itself. In this context, Article 6 is used to ensure that national authorities do not suppress guaranteed freedoms in the name of organising how freedoms are exercised in their territory. With the benefit of hindsight, this role played by national security in the limitation clauses has become its prime characteristic – deterring national authorities from abusing their discretion.[194] What the limitation clauses introduce are legitimate restrictions on the enjoyment of human rights.

---

[190] See Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 2, Martinus Nijhoff Publishers, 1975, p. 136.

[191] Drafting a European convention on human rights was listed in the meeting of the Committee of Ministers as 'Item 5: Measures for the fulfilment of the declared aim of the Council of Europe in accordance with Article 1 of the Statute in regard to the maintenance and further realisation of human rights and fundamental freedoms.' See Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 1, Martinus Nijhoff Publishers, 1975, p. 22.

[192] For the detailed argument, see Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 1, Martinus Nijhoff Publishers, 1975, pp. 272-276.

[193] For the detailed argument, see Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 1, Martinus Nijhoff Publishers, 1975, pp. 272-276.

[194] See Roza Pati, 'Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective', *Berkeley Journal of International Law 23(1)*, 2005, 223-280, pp. 250-257.

2.1.2 Intermediate Phase of the Draft

The most decisive work for the final Convention was completed during the intermediate phase. The Committee of Ministers did not give 'in principle' approval of the text drafted by the Consultative Assembly.[195] Instead, it first convened a meeting of experts and then a conference of senior officials from member states. After obtaining input from both groups, it presented the draft of the Convention most similar to the one we read today.

The Committee of Experts focused mainly on technical legal issues, while the Conference of Senior Officials was later convened to provide suggestions on political decisions. During the intermediate phase, opinions were still divided on whether a precise definition of rights would be an essential prerequisite for a legally binding Convention, about which there had already been arguments in the Assembly. As a result, the Committee of Experts offered two options: 'Alternative A' adopted the system of simply enumerating the rights, as in the Assembly's proposal; 'Alternative B' adopted the system of defining the rights, following the method of the International Covenant on Human Rights, which was being drafted by the former Commission on Human Rights of the UN during the same period.[196] Choosing from these alternatives was defined as a political problem, and thus a matter for the senior officials. Even though the Convention we read today bears many similarities to Alternative B, it may be considered surprising that the senior officials did not simply select one of the two options on the table. Instead, the Convention is a result of a compromise, using Alternative B as the basis while introducing several general principles of Alternative A into the final text.[197]

The compromise reached in this phase, using two methods of procedure, meant the addition of a new role for national security. Alternative B was initially proposed and continually insisted on by the British delegates. In this system of defining rights, national security – together with other legitimate reasons – was used to clarify the 'nature and extent'[198] of the obligations imposed on the state parties. However, the list of these legitimate reasons was inevitably a diplomatic compromise. Being vague and general, they cannot be used to

[195] The draft text was made as a recommendation to the Committee of Minsters, which was named 'Measures for the Fulfilment of the Declared Aim of the Council of Europe in Accordance with Article 1 of the Statute in Regard to the Safeguard and Further Realisation of Human Rights and Fundamental Freedoms, Doc. 108(1949)'.

[196] In fact, there were Alternation A/2 and Alternative B/2, which had the same provisions as A and B, except there was no court to be established.

[197] See Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 4, Martinus Nijhoff Publishers, 1977, p. 258.

[198] See the argument presented by Sir Oscar Dowson, the expert of the United Kingdom, in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 3, Martinus Nijhoff Publishers, 1976, pp. 254-256.

specify the nature and extent of the state's human rights obligations. In terms of the three roles of security summarised above, the third role, regarding the restriction of government authorities' discretion, remains in place, while the second role, preventing totalitarian advocates from exploiting human rights, was taken care of in a new article,[199] and the first role, whereby security is the foundation of all freedoms, was never mentioned again.

Although Alternatives A and B listed a derogation article in their texts, this did not appear in the Assembly's draft. It was seen as no more than a *lex specialis* to the limitation clause, applicable merely in times of war or during other public emergencies.[200] Moreover, the significance of the derogation article was the fact that it would exclude several rights from being derogated even in exceptional circumstances. It was also significant because of the procedures it required states to follow.[201] This links to the third role mentioned above – deterring authorities from abusing their discretion.

Of the amendments proposed in the Committee of Experts, the term 'national security' and the derogation clause seem to have been introduced suddenly. The Swedish expert's amendment listed 'national security' as a legitimate reason for restricting freedom of expression.[202] This was the first appearance of the term 'national security' in the official record of the draft,[203] although the proposal was in fact to add restrictions on only one particular right rather than to modify the general limitation clause, which was to some extent a duplication of work. As for the derogation article, it was initially proposed by Sir Oscar Dowson, the expert from the United Kingdom,[204] and the text that first appeared in the relevant proposal was nearly the same as the version we read today.

---

[199] This Article later became Article 17 of the Convention, namely 'prohibition of abuse of rights'.
[200] See Report of the Conference of Senior Officials, in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 4, Martinus Nijhoff Publishers, 1977, p. 260. Also see the views of French and Italian representatives in the Meetings of the Committee of Experts, in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 4, Martinus Nijhoff Publishers, 1977, p. 30.
[201] See Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 4, Martinus Nijhoff Publishers, 1977, p. 30.
[202] The expert from Sweden was Mr. Torsten Salen, who was the judge of Sweden Supreme Court. For his proposal, see 'The Amendments to Art. 2, para. 6 of the Recommendation of the Consultative Assembly Proposed by the Swedish Expert (Doc. A 777)', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 3, Martinus Nijhoff Publishers, 1976, p. 184.
[203] Its appearance may not be attached with too much significance. As we can see from other amendments proposed in the same period, the term was not widely accepted as a substitute or supplement for the 'order and security' in the Assembly's draft.
[204] Sir Oscar Dowson was the former Legal Adviser to the Home Office. For his amendments, see 'The Amendments to Articles 4 and 7 of the Recommendation of the Consultative Assembly Proposed by the Expert of the United Kingdom (Doc. A 782)', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 3, Martinus Nijhoff Publishers, 1976, p. 188.

Owing to a shortage of staff in the Council of Europe's secretariat, the detailed discussions among the Committee of Experts on these amendments were not recorded. Consequently we cannot know today whether delegations provided explanations for bringing in the derogation article and 'national security' or what their deliberations entailed. However, there was a clear connection between these amendments and the International Covenant on Human Rights drafted at the time.[205] As early as when deciding to convene a meeting of experts, the Committee of Ministers underlined the importance of the draft of the UN Covenant on Human Rights.[206] And these experts did indeed draw lessons from it. In his proposal for including the derogation article, Sir Oscar referred directly to the UN Covenant.[207] Meanwhile, in this same draft Covenant, the term 'national security' was enumerated in the limitation clause of Article 17 referring to the freedom of expression,[208] with this being the same article that the Swedish expert proposed amending. This may also explain why national security does not appear in the limitation clause of the 'freedom of thought, conscience and religion' in the final text.

When it comes to 'territorial integrity', matters become somewhat puzzling. In the Convention, only Article 10, on freedom of expression, lists territorial integrity as one of the specific justifications for limiting the right. During the meetings of the Committee of Experts, the notion of territorial integrity was initially proposed by the Turkish representative as another higher interest that could justify the restricting of human rights. The interesting question here, given that his amendment targeted the general limitation clause in Alternative A, is how did it end up in only one specific article in a draft convention that was a compromise between the alternatives? The Committee of Experts' report may give us a clue. The inclusion of 'territorial integrity' was intended to justify a country's need to prevent its own disintegration, 'both

[205] The latest draft of the International Covenant on Human Rights at that time can be found in Economic and Social Council, Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council, E/1371(1949), Annex 1, pp. 27-51.
[206] See 'Letter Addressed on 18 November 1949 by the Secretary General to the Ministers for Foreign Affairs of the Member-states (Ref. D 26/2/49)', para. 2, in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 2, Martinus Nijhoff Publishers, 1975, p. 302.
[207] See 'The Amendments to Article 2 of the Recommendation of the Consultative Assembly Proposed by the Expert of the United Kingdom (Doc. A 779)', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 3, Martinus Nijhoff Publishers, 1976, p. 186.
[208] This Article can be seen in Economic and Social Council, Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council, E/1371(1949), Annex 1, p. 34.

from the territorial and the moral point of view'.[209] In this context, the Committee of Experts emphasised that this was not intended to allow government authorities to prevent national minorities from expressing their views by democratic means.[210] 'Territorial integrity' was therefore tied to freedom of expression by a general limitation article being divided into limitation clauses attached to each separate right.

2.1.3 Final Phase of the Draft

Before the final text of the Convention was signed at Rome, it had been reviewed by both the Committee of Ministers and the Consultative Assembly. The text on which this phase's discussions were based was the draft proposed by the Conference of Senior Officials. During this final phase, a pragmatic attitude clearly prevailed among the representatives, with the Committee of Ministers stressing that the meetings should do 'everything possible' to provide a convention for human rights in Europe 'without delay'.[211] Before making any amendments, the Assembly also expressly indicated that the Committee of Ministers was the decision-making body,[212] and that a 'weakened convention' would be better than no convention.[213]

Not surprisingly, national security was still not the main topic in this final phase of drafting. Before sending the text to the Assembly to seek its views, the Committee of Ministers made a few amendments, and the Consultative Assembly and its Committee on Legal and Administrative Questions both then subjected it to a critical review. After all, it was the Assembly that had proposed the first draft of the Convention.[214] In spite of the obvious change in the text's

[209] See 'Preliminary Draft of the Report to the Committee of Ministers', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 3, Martinus Nijhoff Publishers, 1976, p. 264.
[210] See 'Report to the Committee of Ministers Submitted by the Committee of Experts Instructed to Draw up a Draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 4, Martinus Nijhoff Publishers, 1977, p. 24.
[211] See 'Conclusion of the Meeting of the Representatives of the Ministers for Foreign Affairs Held on 2 August 1950', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 5, Martinus Nijhoff Publishers, 1979, p. 50.
[212] See 'The Address Made by Sir David Maxwell-Fyfe from the UK in the General Debate of the Draft Convention for the Protection of Human Rights and Fundamental Freedoms', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 5, Martinus Nijhoff Publishers, 1979, p. 224.
[213] See 'The Address Made by Sir David Maxwell-Fyfe from the UK in the General Debate of the Draft Convention for the Protection of Human Rights and Fundamental Freedoms', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 5, Martinus Nijhoff Publishers, 1979, p. 228.
[214] See Parliamentary Assembly, Measures for the Fulfilment of the Declared Aim of the Council of Europe in Accordance with Article 1 of the Statute in Regard to the Safeguard and Further Realisation of Human Rights and Fundamental Freedoms, Doc. 108(1949), retrieved 7 January 2018, from

form, the Assembly focused mainly on content, and suggested eight amendments. These amendments included the Preamble, the right to own property, the right of parents as to their children's education, the right to free elections, individual rights of appeal to the Commission on Human Rights, the number of states required to have accepted the compulsory jurisdiction of the Court before the latter may be set up, the colonial clause, and the addition of a third paragraph to Article 64 of the Committee's draft. When these recommendations came back to the Committee of Ministers, the latter rejected all but two of these proposed amendments.[215] The final text of the Convention for the Protection of Human Rights and Fundamental Freedom was ultimately signed in Rome, at 4 p.m. on 4 November 1950. The three most controversial rights that had been rejected were subsequently all included in the first Protocol to the Convention in 1952.

As to the economic well-being of the country, this is stipulated only in Article 8 on the right to respect for private and family life. Historically speaking, this feature was contributed by the British delegate in the amendment to Article 8 that he proposed during this final phase. One of his arguments was that the term could provide justification, *inter alia*, for government authorities to examine letters suspected of being used to export currency in breach of exchange control regulations. The fact that this amendment was adopted by the Committee is the primary reason for the term 'economic well-being of the country' being included only in Article 8. Nevertheless, sending currency by international post would not necessarily amount to an act so serious as to endanger the economic security of a state.

2.1.4 Summary

The drafting history shows that national security was not among the country representatives' major concerns in their discussions on the draft Convention. As the draft was directly inspired by the UDHR, security concerns had been embedded in restrictions on rights since the term 'national security' first appeared in the draft. The later use of the term, as well as the inclusion of a derogation clause, displayed a clear connection with the UN International Covenant on Human Rights then drafted (and which was divided into the ICCPR

http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD01MSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTUx.

[215] See 'Resolutions of the Committee of Ministers Adopted in Connection with the Recommendations of the Consultative Assembly during Their Sixth Session', in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Volume 7, Martinus Nijhoff Publishers, 1985, pp. 42-44.

and ICESCR when adopted). The terms immediately relevant to national security, i.e. 'territorial integrity' and 'economic well-being of the country', were proposed by state representatives because of certain specific concerns at a late stage. Although the state representatives did not provide an explicit definition of these terms, the lack of definitions in the preparatory works does not necessarily create an obstacle to their being interpreted by the ECtHR in case law.

The role expected to be played by security (national or otherwise) in the Convention can be identified in the context of limitation clauses, where it serves as a legitimate reason to restrict the exercising of rights. At a very early stage, security within limitation clauses was understood to play a role in restricting state authorities' discretion regarding how freedoms were protected at home. This understanding remained unchanged throughout the drafting process. Since the adoption of the Convention, the interpretation and implementation of the limitation clauses have mainly been in line with the expected function: while a state may restrict the exercising of some rights, the restrictions must be imposed for legitimate reasons, such as national security, and be in accordance with law and necessary in a democratic society.

A collision may be found between the limitation clause as a whole and the specific justifications it lists. As discussed above, the limitation clauses serve to deter governing authorities from abusing their discretion when implementing human rights and fundamental freedom. Their aim is to reduce the legitimate restrictions imposed on rights to the minimum. However, introducing new terms – such as national security, territorial integrity and the economic well-being of the country – into the list of legitimate reasons allows states, in turn, to invoke the limitation clause in more cases. Moreover, the wording of the reasons given is vague and thus needs to be further interpreted in practice. For that reason, I will now turn to the question of how the ECtHR has implemented the Convention, with a focus on the 'margin of appreciation' it has developed in practice.

2.2 From Provision to Interpretation

The limitation clauses provide the opportunity for governments to reduce their treaty obligations as they can be invoked by state parties to impose restrictions on the exercising of rights and freedoms. In this regard, it is left to states to decide when and how to use these clauses. Compared to other situations, governments are given relatively wide discretion in dealing with national security threats. This discretion includes their evaluating of threats to their

national security and adopting different methods to combat them.[216] In doing so, a state inevitably has to interpret the term 'national security' in light of its own specific circumstances. However, the question remains as to what extent a state may exercise its discretion. The Court exercises its monitoring role by reviewing cases submitted by applicants against a government decision.

In national security cases, the Court often bases its reasoning on existing jurisprudence.[217] Even though Article 46 of the Convention stipulates that a Court judgment has binding force only with regard to the parties, the interpretation or *opinio juris* of similar decisions is regularly cited in subsequent decisions. As jurisprudence forms an important body of data on how the Court keeps national authorities in check, I will now outline the features of judgments and analyse how the Court applies the 'margin of appreciation' when interpreting the meaning of national security.

2.2.1 Merits of the Case

The ECtHR sees the restrictions on rights as an 'interference' conducted by the state through laws or, more frequently, through government action. After confirming the existence of an interference, the Court will consider its justification, usually by assessing the merits of the case.

Recalling that the drafters of the ECHR did not provide any further definition of the term 'national security', the Court has similarly not signalled any intention to do so. To examine the merits of the case, Court judges usually apply a three-part test: legality, *aim(s)*, and necessity. When examining the aim pursed by national authorities, the Court will assess whether it is a legitimate purpose prescribed by the Convention. In terms of national security case law, the Court's reasoning in this respect is quite succinct: it normally reiterates either some detailed facts of the case, or merely the arguments of the government.[218] The state has been given considerable discretion regarding how to define national security. The Court is often ready to accept a state's assessment of its own situation, except where applicants make arguments

[216] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, Summary, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

[217] See Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"', in Janneke Gerards and Joseph Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of The ECtHR in National Case-Law: A Comparative Analysis*, Intersentia, 2014, 13-94, pp. 21-23.

[218] The exceptions do exist. For instance, in the case of *C.G. and Others v. Bulgaria*, the Court held that the applicant's involvement in the unlawful trafficking of narcotic drugs in concert with some Bulgarian nationals did not pose a threat to national security. See *C.G. and Others v. Bulgaria*, no. 1365/07, § 43, ECHR 2008. Occasionally, the government even did not invoke any specific legitimate aim, and it was the Court who proposed them. But its analysis was also succinct. For example, *Ciubotaru v. Moldova*, no. 27138/04, ECHR 2010.

based on the government's purpose, and the government simply alleges that the case raises 'national security concerns'.

The assessment of whether national security is at stake is always under a specific right, given that each right is subject to its own limitation clause. Nevertheless, this work does not need to be duplicated if a case involves multiple rights. In these circumstances, the Court's conclusion will be consistent, for every right, on whether national security is at stake in the specific case. In *C.G. and others v. Bulgaria*, for instance, when it came to the alleged violation of Article 1 of Protocol No. 7 to the Convention, the Court found there to be no need to proceed because it had already found in the assessment that national security was not a genuine reason for reducing the rights under Article 8 in this case.[219] When applying the 'aim' test, the Court seems to see it more as a factual matter than a legal issue.

As to the derogation of rights, this assessment can be found either separate from or attached to the rights in question. Most of the derogations made by governments clearly indicate the articles or the rights involved. Accordingly, the Court will review the validity of the state's derogations from its obligations under the articles in question. The Court examines the merits of the case by the *situation* and necessity. When evaluating the situation, the Court checks whether the country is facing a 'war' or 'other public emergency threatening the life of the nation', in line with Article 15(1).[220] The analysis is not always carried out under the derogated right. If a state does not explicitly specify which ECHR articles are subject to derogations, the Court will make a separate decision on the country's current situation. Where a state does not specify the rights to be derogated, the Court has expressed doubts as to whether the state complies with the Convention.

2.2.2 Doctrine and Practice

States enjoy a wide margin of appreciation when determining whether actions are taken out of concern for national security. I have found the Court to be often ready to accept a government's claim that national security is at stake. Although the vagueness of the term means a long list of measures could conceivably be imposed by government authorities under the pretext of protecting national security, this is not the case in fact. National security is generally invoked within its ordinary meaning, and government authorities have not radically expanded the notion.

[219] See *C.G. and Others v. Bulgaria*, no. 1365/07, § 77, ECHR 2008.
[220] See Section 3.1.2 for more details.

The margin of appreciation refers to 'the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties.'[221] It was first applied by the Court when reviewing cases related to derogations and then became one of prevailing doctrines in accessing restrictions on rights and freedoms. There are three reasons why the Court grants a wide margin of appreciation to governments in interpreting the meaning of national security: the primary role played by states in implementing the Convention, the better knowledge states have of their own situation, and the lack of consensus on European standards. The first of these is a historical and legal reason. As mentioned in the final section on the Convention's drafting history, and based on a pragmatic attitude, the representatives adopted a list of guaranteed human rights without precisely defining them, and asked states to implement them at home. The legal aspect of this reason is that, despite being signed by states, treaties on human rights concentrate on the relations between a state and its people, and national authorities should provide primary protection.[222] This feature of human rights treaties inevitably asks the state to play a primary role. Despite this, the Court highlights its own monitoring role when examining a government's interference with human rights.

The second reason is a practical one. The Court believes the respondent government is better equipped than the Court itself, as an international organisation based at Strasbourg, to assess local situations. The seriousness of national security threats may mean a state sometimes needs to make decisions based on intelligence that would usually be regarded as state secrets. Nevertheless, a contracting state should not use its domestic legislation or special situation as an excuse for violating treaty obligations.

The third reason is the root cause: the lack of consensus on the definition of national security. The Convention bodies have discussed the definition in case law and concluded that a comprehensive definition cannot be achieved[223] and that, instead, it is a matter of interpretation in practice. In the meantime, the Court requires the concept to be used in line with its common meaning.[224] Although the Court has not provided a comprehensive interpretation of national security, the close connection between the ECHR and ICCPR means that

[221] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002, p. 2.
[222] See Gabriel Füglistaler, *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*, *IDHEAP*, 2016, p. 6.
[223] See *Christie v. the United Kingdom*, no. 21482/93, Commission decision of 27 June 1994, Decisions and Reports 78-A, pp. 121-122. *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria,* no. 62540/00, § 84, 28 June 2007.
[224] See *Al-Nashif v. Bulgaria*, no. 50963/99, § 124, 20 June 2002.

some guidance can be drawn from the latter's interpretation of this matter. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted by the UN Economic and Social Council,[225] describe the circumstances in which the term can be invoked: 'National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.'[226] In his commentary on the Siracusa Principles, Alexandre Kiss further elaborated that the term could be invoked to 'justify the adoption of laws concerning treason, espionage, sabotage, sedition, terrorism, the protection of military secrets, or the imposition of special limits on members of the armed forces.'[227] On the one hand, this interpretation of national security focuses on those traditional fields, which, as we will see in this research, remain major concerns in ECtHR's national security case law. On the other hand, considering that the Siracusa Principles were drafted nearly four decades ago, the notion of national security has evolved over time, such that, in practice, the term can arguably be invoked in some new circumstances. I will present some ways in which governing authorities have interpreted national security within its common meaning in case law under Article 8.

States have invoked national security under Article 8 in cases involving counterterrorism and counterespionage. These two subject matters have commonly been dealt with under the heading of national security. The fighting power and operational effectiveness of armed forces are also closely linked to a state's national security concerns. Governments are usually sensitive when it comes to military issues – even, for example, with regard to the sexual orientation of military personnel [228] – as these may undermine the government's effectiveness. Another topic of concern regarding national

[225] UN Economic and Social Council, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4 (1984). The instrument was initially drafted and adopted by professors, practitioners and other experts in human rights in an international conference held in Siracusa, Italy in 1984. The conference examined limitation and derogation clauses in the ICCPR, including their legitimate objectives, the general principles of interpretation which govern their imposition and application, and some of the main features of the grounds for limitation or derogation. Later, at the request of the Government of the Netherlands, the Siracusa Principles were circulated as an official document of the 41st session of the Commission on Human Rights (the predecessor of Human Rights Council) under the agenda item pertaining to the International Covenants on Human Rights.

[226] UN Economic and Social Council, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4 (1984), para. 30.

[227] Alexandre Kiss, 'Commentary by the Rapporteur on the Limitation Provisions', *Human Rights Quarterly 7(1)*, 1985, 15-22, p. 21.

[228] See *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI. *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999.

security is the control of the entry and residence of aliens,[229] given that this power originates from the principle of state sovereignty and territorial supremacy.[230] The term has also been invoked by governments in 'customised' cases relating to special social circumstances, and sometimes against the broader background of history, such as when:

- Moldova treated ethnic identity as a national security issue;[231]
- Russia viewed the negative influence of foreign religious organisations and missionaries as national security threats;[232]
- Sweden held that, in the 1970s, the keeping by its security police of files on individuals connected with the communist party or its activities was a national security concern, considering that it was in the context of the Cold War.[233]

A newly established country may also have some special concerns. Its existence is assumed to be vulnerable, and invoking national security is therefore considered reasonable. Such cases include:

- Lustration measures in some Central and Eastern European countries, including Lithuania and the Former Yugoslav Republic of Macedonia. In each case, national security was the aim the state sought to achieve when restricting former secret collaborators' employment in the public sector and certain branches of the private sector;[234]
- Citizenship and residence arrangements while the state is in the process of gaining independence, as in the cases of Slovenia, when it broke away from the Socialist Federal Republic of Yugoslavia, and Latvia, when it broke away from the Union of Soviet Socialist Republics (the USSR).[235]

Regarding the 'economic well-being of the country', states sometimes invoke this concept for issues not qualified to be regarded as national security threats. It has been invoked in respect, for instance, of measures imposing controls on the entry and residence of aliens on the ground of labour market or welfare benefits allocations.[236] In some cases, a state has used it to defend the policy on

[229] For example, *A.M. et autres c. France*, no. 24587/12, CEDH 2016; *A.B. et autres c. France*, no. 11593/12, CEDH 2016; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, ECHR 2006-X.

[230] Lambert Hélène, *The Position of Aliens in Relation to the European Convention on Human Rights*, Council of Europe, 2006, p. 15.

[231] See *Ciubotaru v. Moldova*, no. 27138/04, ECHR 2010.

[232] *Nolan and K. v. Russia*, no. 2512/04, ECHR 2009.

[233] See *Segerstedt-Wiberg v. Sweden*, no. 62332/00, ECHR 2006-VII.

[234] Such cases include, *Ivanovski v. the Former Yugoslav Republic of Macedonia*, no. 29908/11, ECHR 2016. *Žičkus v. Lithuania*, no. 26652/02, ECHR 2009.

[235] See *Kurić and Others v. Slovenia*, no. 26828/06, ECHR 2012. *Slivenko v. Latvia*, no. 48321/99, ECHR 2003-X.

[236] Such cases include, *Hasanbasic c. Suisse*, no. 52166/09, CEDH 2013; *Darren Omoregie and Others v. Norway*, no. 265/07, ECHR 2008; *Bensaid v. the United Kingdom*, no. 44599/98, ECHR 2001-I; *Cılız v.*

ownership of real estate and land. Meanwhile in cases where the economic security of the state is at stake,[237] the respondent government has usually invoked both the 'economic well-being of the country' and 'national security'.

2.2.3 Summary

To sum up, national security was not a main topic during the ECHR drafting process and remained a general term. When implementing the Convention, the Court gives a wide margin of appreciation to state authorities to assess the situation. As it is a legitimate aim of the limitation clauses and the particular circumstances required by the derogation clause, the definition of national security does not play a pivotal role either in the provisions or in the case law.

What can be concluded from the case law is that, although usually remaining unexamined in detail, national security is commonly accepted to include protecting a state against 'espionage, terrorism, support for terrorism, separatism and incitement to breach military discipline'.[238] As to a 'public emergency threatening the life of the nation', the conditions become clearer and more concrete in case law stating that: (a) the situation is actual or imminent; (b) the affected area covers the whole nation; (c) the severity amounts to threatening the continuance of the organised life of the community; (d) the usage of it is exceptional, and there is no less grave alternative.[239] In this way, the Strasbourg bodies seem inclined to give up the aim of restricting governing authorities' discretion by *defining* national security and focusing, instead, on checking whether interferences based on national security-related allegations are *justified*.

the Netherlands, no. 29192/95, ECHR 2000-VIII; *Berrehab v. the Netherlands*, 21 June 1988, Series A no. 138.

[237] The cases include, *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, ECHR 2018; *Roman Zakharov v. Russia*, no. 47143/06, ECHR 2015; *Žičkus v. Lithuania*, no. 26652/02, ECHR 2009.

[238] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, para. 5, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

[239] *A. and Others v. the United Kingdom*, no. 3455/05, § 176, ECHR 2009. *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, § 153, Commission's report of 5 November 1969, Yearbook 12, p. 72.

CHAPTER 3

IMPACT OF NATIONAL SECURITY ON HUMAN RIGHTS UNDER THE ECHR

3.1 LEGAL BASIS OF THE IMPACT

In practice, state parties may find from time to time that they need to reduce their ECHR obligations out of concern for national security. National security concerns are not an implicated exception in international law doctrine and practice.[240] The Convention provides only three legal options for governments: limitations, derogations and reservations.

3.1.1 Limitations

As pointed out at the start of Chapter 2, national security is accommodated in Articles 6, 8, 10 and 11, Article 2 of Protocol No. 4 and Article 1 of Protocol No. 7 of the Convention. Compared to derogations and reservations, this is a more basic tool for states because invoking it requires neither the seriousness and urgency of derogations, nor a statement of reservations when signing or ratifying the treaty. The relative ease of invoking a limitation is reflected by the considerable number of cases for limitations – more than 200 – reviewed by the Court, compared with the 30 cases filed for derogations.[241] However, national security exceptions are not open-ended. With regard to the aim to restrict

[240] See Rose-Ackerman Susan and Billa Benjamin, 'Treaties and National Security', *New York University Journal of International Law and Politics 40(2)*, 2008, 437-496, p. 443.

[241] Based on HUDOC database of European Court of Human Rights, available at https://hudoc.echr.coe.int/, last visited 1 October 2021. As for the number of cases filed on the basis of limitations, I set the search filter as follows: the 'Keywords' filter of Article 8 selects parameters of 'national security', and 'economic well-being of the country', Article 10 selects 'national security', and 'territorial integrity', Article 11 selects 'national security', Article 2 of Protocol No. 4 selects 'national security', and Article 1 of Protocol No. 7 selects 'national security'; the 'Judgments' filter selects parameters of 'Grand Chamber' and 'Chamber'; and the 'Language' filter selects 'English'. As for the number of cases filed for derogations, the filters of 'Judgments' and 'Language' remain the same, whereas the 'Keywords' filter selects parameters of 'public emergency', 'threat to the life of the nation', 'war', 'derogation', and 'extent strictly required by situation' under Article 15.

authorities' discretion, three layers of requirements can be identified: legality, aim and necessity.[242] Failure on one will invalidate the limitation in all respects.

Legality

The legality requirement, as described in limitation clauses, means that intervention by a state must be 'in accordance with the law' or 'prescribed by law'. It obliges a state to ensure that interference with human rights is regulated by certain domestic laws. This has been further developed in case law, which demands that these laws have certain qualities, specifically accessibility and foreseeability.[243]

Aim

This requirement refers to the 'objective' of the limitation. These are the purposes that states are permitted to invoke to rationalise their interference in the enjoyment of human rights. Among the exhaustive list of such objectives are 'national security', 'economic well-being of the country' and 'territorial integrity'. I investigated these legitimate aims in the previous chapter.

Necessity

Necessity refers to the requirement for the state's intervention to be 'necessary in a democratic society', as laid down in the provisions.[244] The interference with rights and freedoms are justified only if the reasons given are relevant, sufficient and proportionate to the pursued aim. 'Relevant' means that the national security concerns should be able, logically, to justify the interference in the specific case. Such concrete concerns also need to be 'sufficient' – in other words, weighty enough – for the state to take the measures in question. Lastly, the purpose pursued by the government must be proportionate to the harm caused by the measures. The requirement for necessity will be reviewed in more detail in Section 4 of this chapter.

3.1.2 Derogations

A derogation is another permissible option for a state wanting to reduce its human rights obligations in the name of national security concerns. It is more like a *lex specialis* to the stipulations of limitations and invoked in more serious

[242] See Mao Junxiang, *Study on Limitation Clauses of the International Conventions on Human Rights*, Law Press 2011, p. 35. （参见毛俊响：《国际人权条约中的权利限制条款研究》，法律出版社 2011 年，第 35 页。）

[243] For example, *Dmitriyevskiy v. Russia*, no. 42168/06, § 78, ECHR 2017.

[244] For example, Article 8(2) reads: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and *is necessary in a democratic society* …' [emphasis added]

situations, with both substantial and procedural requirements. As for political motivations for invoking the derogation, an empirical study found that countries with stable democracies and strong courts often try to buy time and legal 'breathing space' from domestic voters, NGOs and courts.[245] By declaring the derogation at an international level, government authorities can send a signal back home that the situation is pressing and the responding measures are necessary, temporary and subject to both domestic and international monitoring.

War or other public emergency threatening the life of the nation

While the national security concerns in limitation clauses range from terrorism and espionage to citizenship arrangements, cases of derogation are confined to rather serious concerns. They relate directly to issues such as military security, territorial security, sovereignty security, political security or security of citizens, and these issues are mostly in the domain of traditional security concerns.[246]

To date, sixteen countries – Albania, Armenia, Estonia, France, Georgia, Greece, Ireland, Latvia, Moldova, North Macedonia, Romania, Serbia, San Marino, Turkey, the United Kingdom and Ukraine – have availed themselves of their right of derogation.[247] Ten of these countries used Article 15 for concerns relating to COVID-19,[248] and many of them have exercised it more than once. Except for Albania, which was involved in a civil war, none of these countries was at war at the time they invoked this right. With regard to international armed conflicts, such as when UK forces were operating in Iraq, states usually abide by the Third and Fourth Geneva Conventions rather than invoking the derogation article under the Convention.[249] A 'public emergency' is more commonly invoked. Derogations have frequently been triggered by terrorism, *coup d'états* and serious political crises. These tend to be accompanied by a government's declaration of a public emergency in a certain region or the applying of special laws and decrees.

---

[245] See Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties', *International Organization 65(4)*, 2011, 673-707, pp. 680-684 & 692-695.

[246] See Fulvio Attinà, 'Traditional Security Issues', in Wang Jianwei and Song Weiqing (eds.), *China, The European Union, and The International Politics of Global Governance*, Palgrave Macmillan, 2016, 175-193, p. 175.

[247] Press Unit of European Court of Human Rights, 'Factsheet – Derogation in Time of Emergency', *ECtHR*, January 2022, p. 2, retrieved 23 January 2022, from https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.

[248] These countries are Latvia, Romania, Armenia, Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, and San Marino. Press Unit of European Court of Human Rights, 'Factsheet – Derogation in Time of Emergency', *ECtHR*, January 2022, p. 2, retrieved 23 January 2022, from https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.

[249] See *Hassan v. the United Kingdom* [GC], no. 29750/09, § 101, ECHR 2014.

The former European Commission of Human Rights has defined the following characteristics for a public emergency:[250]

(a) It must be actual or imminent;

(b) Its effects must involve the whole nation;

(c) The continuance of the organised life of the community must be threatened;

(d) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.

In most cases, however, it was not the entire country, but only the capital or certain regions, that was involved in an emergency.[251] As this practice differs from the second characteristic defined by the Commission, the Court later corrected it in its case law by stating that a crisis concerning only a particular region may amount to a situation threatening 'the life of the nation'.[252]

A *coup d'état* or other serious political crises, such as mass anti-government demonstrations combined with violence, are seen as imminent threats to political security, as has been seen, for example, in Armenia, Georgia and Turkey. The life of the nation is also under threat if part of its territory is occupied by another country, such as in the case of Ukraine.[253] Based, however, on the selected case law, I have found that terrorism does not necessarily constitute a public emergency; other factors, such as the features of a terrorist group and situation, have to be weighed. States have used the right to derogation in the case of disturbances caused by groups as large as the Kurdistan Workers' Party (PKK), the Irish Republican Army (IRA) or Islamic State (ISIS). On some occasions, terrorist threats were deemed to be more than a possibility, such as when the UK assessed the threats it faced after 9/11; on other occasions, terrorist attacks have caused heavy casualties and show high potential to happen again, such as the series of attacks that occurred in Paris in 2015. As Jan-Peter Loof observed, while the Strasbourg bodies first developed fairly strict standards for determining whether a situation amounts to 'public emergency threatening the life of the nation', they apply a very wide margin of

[250] See *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, § 153, Commission's report of 5 November 1969, Yearbook 12, p. 70.

[251] For instance, in 1990 the Turkish government declared a state of emergency in South-East provinces and informed the Secretary General of the Council of Europe. *Aksoy v. Turkey*, no. 21987/93, § 31, Reports of Judgments and Decisions 1996-VI.

[252] See, for instance, *Ireland v. the United Kingdom*, no. 5310/71, § 205, Series A no. 25. *Aksoy v. Turkey*, no. 21987/93, § 70, Reports of Judgments and Decisions 1996-VI.

[253] See Ukrainian government's declarations at https://www.coe.int/en/web/conventions/concerning-a-given-treaty?module=declarations-by-treaty&territoires=&codeNature=0&codePays=U&numSte=005&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=01-05-2022, last visited 26 January 2022.

appreciation when assessing this very question.[254] There have also been derogations for serious infectious diseases (such as COVID-19 in several countries, and the H5N1 virus in the Khelvachauri district of Georgia) and for political disturbance in colonies (such as for its then colony of Cyprus in the case of the UK), crown dependencies (the UK for the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man), protected states (such as the UK for the Protectorate of Nyasaland) and other territories for whose international relations the state is responsible (such as France for the Territorial Assembly of New Caledonia).

The measures are strictly required by the exigencies of the situation

In this thesis I view derogations as a *lex specialis* to limitations, not just because both of them apply to certain circumstances prescribed under the Convention, but also because they share a requirement regarding the extent of measures applied. Moreover, and zooming out, the derogation regime and the limitation regime are designed to operate in separate tracks. The ECHR adopts a 'normalcy-rule, emergency-exception' dichotomy in terms of its derogation clause.[255] In a general sense, this dichotomy first assumes an ordinary state of affairs in which ordinary laws are being applied.[256] However, a crisis interrupting that normal situation may be so urgent or serious that ordinary laws cannot respond to it sufficiently effectively.[257] In this regard, exceptional measures need to be adopted with the aim of restoring the normal situation. The legitimacy of this exceptional power can be derived from a Latin adage, *necessitas legem non habet* (necessity has no law).[258] The Italian jurist Santi Romano argued that 'The necessity with which we are concerned here must be conceived of as a state of affairs that, at least as a rule and in a complete and practically effective way, cannot be regulated by previously established norms. But if it has no law, it makes law, as another common expression has it; which means that it itself constitutes a true and proper source of law.'[259] The

[254] See Jan-Peter Loof, *Mensenrechten en staatsveiligheid: verenigbare grootheden?: Opschorting en beperking van mensenrechtenbescherming*, Nijmegen: Wolf Legal Publishers, 2005, p. 736.
[255] See Jan-Peter Loof, 'Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights. A Threat Analysis', in Antoine Buyse (ed.), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict*, Intersentia, 2010, 35-56, p. 43.
[256] See Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice,* Cambridge University Press, 2006, p. 172.
[257] See Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights', *German Law Journal 12(10)*, 2011, 1764-1785, pp. 1767-1768.
[258] See Giorgio Agamben, *The State of Exception*, Kevin Attell trans., University of Chicago Press, 2005, p. 24.
[259] Giorgio Agamben, *The State of Exception*, Kevin Attell trans., University of Chicago Press, 2005, p. 27.

emergency-normalcy dichotomy is reflected in case law under the ECHR. One of norms for determining the existence of public emergency, as I indicated above, is 'The crisis or danger must be exceptional, in that *the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate*'[260] [emphasis added]. This norm draws a line between derogation and rights limitation.[261] Regarding the legal effect of the dichotomy, some scholars have held that, in an ECHR context, the derogation has a 'shielding' function, meaning some of the Court's interpretations are developed under the condition of a public emergency and therefore do not apply to normal jurisprudence.[262]

Other requirements

Given its considerable impact on human rights, the invoking of a derogation for reasons of urgent and serious threats has to meet additional requirements:

(a) Procedural requirement. The government must notify the Secretary General of the Council of Europe of the measures it has taken and the reasons for them and, afterwards, of the withdrawal of derogation. In practice, the state usually complies with this formal requirement by writing a letter to the Secretary General to explain the situation and sending legal texts stipulating the exceptional measures to be taken. In the case law, the Strasbourg authorities have on some occasions examined whether the measures taken were as indicated in the letter,[263] whereas on other recent occasions they have held the requirement to be satisfied even without explicitly mentioning the measures.[264]

(b) Other obligations in international law. The measures taken by the state should not infringe on other international obligations it has to abide by. In the existing case law, a state's international obligations may derive from the ICCPR and the Geneva Conventions.

(c) Non-derogable rights. Several rights under the Convention are not permitted to be derogated from under any circumstance. These include the right to life (Article 2), the prohibition of torture and other forms of ill-treatment (Article 3), the prohibition of slavery or servitude (Article 4(1)), no

[260] See *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, § 153, Commission's report of 5 November 1969, Yearbook 12, p. 70.
[261] See Ed Bates, 'A "Public Emergency Threatening the Life of the Nation"? The United Kingdom's Derogation from the European Convention on Human Rights of 18 December 2001 and the "A" Case', *The British Year Book of International Law 76(1)*, 2006, 245-336, p. 285.
[262] See Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations*, Cambridge University Press, 2019, p. 197. See also Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights', *German Law Journal 12(10)*, 2011, 1764-1785, pp. 1766 & 1783.
[263] See *Aksoy v. Turkey*, no. 21987/93, §§ 85-86, Reports of Judgments and Decisions 1996-VI.
[264] *Şahin Alpay v. Turkey*, no. 16538/17, § 73, ECHR 2018.

punishment without law (Article 7), the right not to be tried twice for the same crime (Article 4(3) of Protocol No. 7) and the abolition of the death penalty (Protocols Nos. 6 and 13).

Derogations and limitations both require government action to be necessary, whereas action in the case of the former is required to be *strictly* necessary. I regard derogation as a special case, given that it can only be applied in much more serious situations, with specific technical formalities, as well as being based on the emergency-normalcy dichotomy. Additionally, most case law relates to limitation clauses rather than to the derogation article. As the practical object of this thesis is to uncover patterns in the Court's examination of national security cases, I will confine the study mainly to case law on limitations on rights.

3.1.3 Reservations

A state is entitled to make a reservation, but only at the time of signing or ratifying the Convention. Among other reasons, a reservation can be made, in connection with any substantive articles, out of a concern for national security.[265] In practice, this includes Articles 2, 5, 6, 7, 10 and 11 and Article 1 of Protocol No. 7. [266] Most reservations relate to systems of military discipline. [267] There are also reservations for Article 15 on derogation, regardless of the fact that this is not a substantive article. Technically speaking, a reservation is a legal ground for reducing human rights. Nevertheless, my analysis in this chapter will be confined mainly to the impact of national security based on limitations rather than reservations, given that the latter has not been subject to the Strasbourg authorities' scrutiny. Moreover, the assessment of their validity and legitimacy will not be significantly different for reservations made on the grounds of 'national security' and those made for other reasons.

3.1.4 Summary

From a legal perspective, there are three legal bases that states can invoke when they reduce their human rights obligations due to national security concerns: limitations, derogations and reservations. These three legal bases vary in both

[265] See David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, pp. 27-28.
[266] See Iain Cameron, *National Security and the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2000, pp. 52-53.
[267] The countries that have made such reservations include the Czech Republic, Moldova, Portugal, Russia, Slovakia, Spain and Ukraine. The reservations made by state parties are available at https://www.coe.int/en/web/conventions/concerning-a-given-treaty?module=declarations-by-treaty&territoires=&codeNature=0&codePays=&numSte=005&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=01-27-2022, last visited 27 January 2022.

substantive and procedural requirements. First, the state may justify the interference with human rights based on the 'clawback' clauses for certain rights. Under these clauses, an interference with the right is justified if (1) it is prescribed by law, (2) it has one or more of the legitimate aims referred to, and (3) it is necessary in a democratic society for achieving such an aim or aims. The justification of limitations on rights has been at issue in a considerable number of cases relating to national security. Second, a state may defend its derogation of human rights by arguing that there is a state of emergency. The derogation regime is designed to operate in a separate track from the limitation regime. This argument is valid only if the state has notified the Council of Europe of the decision to invoke the derogation article. The state is also required, *inter alia*, to confine the invocation to war and public emergencies, and to ensure the measures taken are strictly necessary. In practice, this argument is usually used by states in the context of serious crisis and urgent incidents. Third, a state may make a reservation for national security concerns when signing or ratifying the Convention. In practice, most reservations in this respect relate to systems of military discipline.

3.2 Scope of the Impact

In this section I attempt to delimit the impact that national security can have on human rights by answering the following questions: *who* is subject to the impact, *which* rights are involved, and how do *temporal* and *regional* elements play a role? It is important to answer these questions as they show how the ECtHR evaluates the justifications given for this impact and its decision-making patterns in reviewing national security cases.

3.2.1 Who May be Subject to the Impact

Anyone may be subject to the impact of national security, while several groups of 'victims' repeatedly come up in the case law. I will now discuss the most prevalent of these.

Persons under surveillance and their victim status

When does an individual become a victim of government actions against national security threats? It is usually only when a person's freedom is genuinely interfered with by an alleged violation that he or she can claim to be a victim. An individual against whom no action has been taken is not entitled to file a claim *in abstracto* that a domestic law contravenes the Convention. One exception exists in the Court's case law regarding national security: secret surveillance. This exception was established and developed through a series of

landmark cases, including *Klass and Others v. Germany*, *Kennedy v. the United Kingdom* and *Roman Zakharov v. Russia*. If certain conditions are satisfied, an applicant is entitled to file a complaint based on the existence of secret surveillance measures or on legislation that provides such power.

There are quite a few circumstances in which surveillance has to be carried out in secret, without notifying the targeted persons. The dilemma here is that those interfered with will never know that the surveillance was performed and so will not be able to subject the case to review under the Convention. Due to considerations of effectiveness (*l'effet utile*), the Court in *Klass and Others* confirmed the admissibility of this sort of complaint in certain conditions. These conditions were subsequently clarified and developed in the *Kennedy* and *Roman Zakharov* cases.

The first condition is that the applicant should fall within the scope of subjects covered by the contested legislation. The second condition is more decisive and substantive, and rests on the effectiveness of domestic remedies:

(a) if no effective remedy is available at the national level for the person who suspects that he or she is under secret surveillance, the complaint will be admitted; or,

(b) in cases where the domestic system affords such remedies, the applicant should prove that he or she, taking the personal situation into consideration, is potentially *at risk* of being subjected to surveillance.

In *Centrum För Rättvisa v. Sweden*, the Court also stipulated the requirement that such domestic remedies must be available in the specific personal case.[268] In other words, the remedy must allow the person concerned to challenge the specific surveillance measure, rather than bring a merely abstract challenge against the legislation.

In practice, the first condition concerning potential subjects is relatively easy to meet. The impugned legislation may target either a certain group of persons or anyone at all. Compared with the assessment of *risk* required by the second condition, the Court focuses with regard to the first condition only on the *possibility* of being under secret surveillance. In the *Roman Zakharov* case, for instance, the Russian government's communication surveillance was governed by, *inter alia*, the Operational Search Activities Act (OSAA) and the Code of Criminal Procedure (CCrP). This case was about *secret* surveillance because Russian law does not provide for a person under surveillance to be notified, despite a judicial review of such authorisation being conducted. Under Section

[268] See *Centrum För Rättvisa v. Sweden*, no. 35252/08, §§ 94 & 171-178, ECHR 2018.

8(4) of the OSAA[269] and Article 186(1) of the CCrP,[270] the interception of communications may target a person who commits a crime of certain severity. With regard to the first condition, and without assessing whether the offence committed by the applicant was of the required severity, the Court held that any user of mobile telephone services could be intercepted, including of course the applicant.[271]

As to part (b) of the second condition (i.e. the potential risk of being under secret surveillance), the Court's focus is on the applicant's personal situation. The UK's Regulation of Investigatory Powers Act 2000 (RIPA), for example, allows two types of intercept warrant to be applied: a targeted warrant as provided for in Section 8(1) and an untargeted warrant as provided for in Section 8(4).[272] As stated in the Interception of Communications Code of Practice, Section 8(1) allows surveillance to be used for investigating a particular subject who has been identified, while surveillance under Section 8(4) does not need to be used for a particular subject or a set of premises, but is primarily an intelligence-gathering capability. Technically speaking, any user of electronic communications can be the subject of interception by the UK authorities, thus satisfying the first condition. The applicants in *Big Brother Watch and Others v. the United Kingdom* were human rights NGOs with activities abroad and contacts with various organisations and persons. These circumstances would not usually cause the NGOs to be an object of interest for

[269] Section 8(4) of the OSAA provides that interception of telephone and other communications may be authorised only in cases where a person is suspected of, or charged with, a criminal offence of medium severity, a serious offence or an especially serious criminal offence, or may have information about such an offence, in *Roman Zakharov v. Russia*, no. 47143/06, § 32, ECHR 2015.

[270] Article 186(1) of the CCrP provides that interception of telephone and other communications of a suspect, an accused or other person may be authorised if there are reasons to believe that they may contain information relevant for the criminal case in respect of a criminal offence of medium severity, a serious offence or an especially serious criminal offence, in *Roman Zakharov v. Russia*, no. 47143/06, § 32, ECHR 2015.

[271] See *Roman Zakharov v. Russia*, no. 47143/06, § 175, ECHR 2015.

[272] Section 8 reads:

'Contents of warrants

(1) An interception warrant must name or describe either—

(a) one person as the interception subject; or

(b) a single set of premises as the premises in relation to which the interception to which the warrant relates is to take place.

(4) Subsections (1) and (2) shall not apply to an interception warrant if—

(a) the description of communications to which the warrant relates confines the conduct authorised or required by the warrant to conduct falling within subsection (5); and

(b) at the time of the issue of the warrant, a certificate applicable to the warrant has been issued by the Secretary of State certifying—

(i) the descriptions of intercepted material the examination of which he considers necessary; and

(ii) that he considers the examination of material of those descriptions necessary as mentioned in section 5(3)(a), (b) or (c).'

the intelligence authorities conducting targeted surveillance under Section 8(1). However, the NGOs' communications were at genuine risk of being intercepted if their clients were subject to bulk surveillance under Section 8(4). Therefore, the Court held that the applicants could claim to be victims despite the existence of effective domestic remedies. In other words, the first condition focuses on the text of the legislation, whereas part (b) of the second condition examines the likelihood of coming under surveillance, considering the special features of the case.

A person may file a complaint *in abstracto* against a law related to secret surveillance. This is a legally sound compromise because, on the one hand, it is necessary and legitimate to conduct secret surveillance for reasons of national security, while, on the other hand, the practice not only interferes with people's right to privacy, but also precludes the possibility of being challenged. Since the dilemma cannot be resolved by notifying the targeted person, the Court has proposed judicial procedural arrangements as the remedy. Such arrangements reconcile the conflict by granting the applicant the right to bring the case under judicial review without having to prove that he or she is under government surveillance.

Terrorists and suspected terrorists

Terrorism is commonly seen as a threat to national security, and this has especially been the case since 9/11. It can be defined as 'the disproportionate use of violence, applied with the specific intent to cause terror and intimidation amongst parts or the whole of a population'.[273] Terrorism often pursues political or religious goals and, in a national security context, may firstly cause direct or imminent danger to the security of citizens, and then to political security, military security, sovereignty security, territorial security and cyber security, while also indirectly harming economic and cultural security.

When a case is categorised as terrorism-related, it usually implies that states are increasingly concerned about preventive strategies, assisting intelligence services, granting broad authorisation for police investigations and allowing aggravated sentences. The term 'terrorists' can refer to:

(a) persons who commit or attempt to commit terrorist acts; or,

(b) persons whose participation contributes to the committing of such offences, including by supplying information or material resources, or by funding its activities in any way; or,

[273] Anna Oehmichen, *Terrorism and Anti-terror Legislation - the Terrorised Legislator? A Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France*, Intersentia, 2009, p. 127.

(c) persons who lead or control a terrorist group, directly or indirectly.[274]

While the 9/11 terrorist attacks brought the 'war on terror' rhetoric to the forefront, the Court has attempted to fit terrorism within the existing frameworks rather than creating norms tailored specifically to terrorism cases.[275] Like any other cases before the Court, terrorism is treated as no more than a circumstantial factor, albeit a factor that usually calls for account to be taken of the exceptional danger and harm it causes to national security, particularly the security of ordinary people. The question then is what kind of impact do these considerations have on the rights of terrorists or suspected terrorists?

In case law relating to national security, being a terrorist may justify a government's interference even with absolute rights such as Article 3. Here a gap can be identified between theory and practice. Theoretically speaking, torture and inhuman or degrading treatment or punishment are strictly forbidden under any circumstance. Article 3 must not be subject to any limitations, derogations or reservations. This is precisely why the prohibition of torture is deemed absolute. In practice, however, a measure taken by a state has to be of a certain level of severity before it is defined as either torture or inhuman or degrading treatment or punishment. Therefore, the Court takes account of the special features of a case to evaluate the severity of the contested measure. These features include the potential danger the applicant might pose to national security. The *Öcalan v. Turkey* case concerned the detention conditions of the applicant, Abdullah Öcalan, the former leader of the Kurdistan Workers' Party (PKK), viewed by the Turkish government as a terrorist organisation. Bearing in mind that Öcalan was the leader of the PKK, the Court found that some extraordinary security measures used to detain him did not amount to inhuman or degrading treatment.[276] These measures involved solitary confinement, and a ban on television programmes and telephone communications. Even though other high security prisoners in Turkey did not

[274] See texts of reference used for the preparation of the guidelines on human rights and the fight against terrorism, in Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, H(2002)4, paras. 5-6, retrieved 7 January 2018, from https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf. See also the Council of the European Union, Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP, Articles 1 and 2, retrieved 7 January 2018, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001E0931.

[275] See Richard Smith, 'The Margin of Appreciation and Human Rights Protection in the War on Terror, have the Rules Changed before the ECtHR', *Essex Human Rights Review 8(1)*, 2011, 124-153, p. 140.

[276] However, in the final judgment in 2014, the Court found the conditions of detention attained the severity threshold to constitute inhuman treatment within the meaning of Article 3 of the Convention. See *Öcalan v. Turkey* (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, § 146, ECHR 2014.

face such severe restrictions, the Court ruled in 2005 that the security risks took prevalence in these circumstances.[277] Without these measures, Öcalan, as the leader of a large armed separatist movement, could have contacted members of the PKK and continued to run the armed group, thereby posing a threat to national security. The Court overturned its decision in 2014, mainly because the long period of relative social isolation raised the level of the measures' severity.[278] Likewise, in the *Ramirez Sanchez v. France* case,[279] taking into account that the applicant was seen as 'the most dangerous' terrorist in the world during the 1970s, the Court found a relatively high level of social isolation measures to be reasonable.

To fill the gap between theory and practice, the Court has drawn a bottom line: complete sensory isolation coupled with total social isolation is prohibited irrespective of the conduct of the person concerned. The higher the level of social isolation, the more convincing the reason has to be. Terrorism posing a real danger to national security, for example, may be a rather robust and persuasive reason.

In many cases, government interference in human rights does not make a substantive difference between terrorists as perpetrators, contributors or leaders. Interesting examples can be found in case law relating to Article 5(1)(c). Article 5 adopts a quite different structural pattern for limitations from that of Articles 8-11. Under Article 5, arrest or detention is permitted only if there is a 'reasonable suspicion' or if 'reasonably considered necessary'.[280] In practice, the standard of 'reasonableness' applied in terrorism cases is lower than in conventional ones owing to the fact that terrorism often comes with the 'attendant risk of loss of life' and 'human suffering'.[281]

The existing case law often concerns arrests based on information from a secret source. The dilemma here is that while the 'reasonableness' standard calls for the grounds justifying the arrest to be revealed, disclosing such material would divulge the operating methods of the law enforcement and

[277] See *Öcalan v. Turkey* [GC], no. 46221/99, §§ 192 & 195, ECHR 2005-IV.
[278] See *Öcalan v. Turkey* (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, § 109, ECHR 2014.
[279] See *Ramirez Sanchez v. France* [GC], no. 59450/00, ECHR 2006-IX.
[280] Article 5 (1)(c) reads:
'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
…
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'
[281] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, para. 83, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

intelligence agencies, as well as create risks for secret informers. Despite asserting that the essence of Article 5(1)(c) should not be impaired, the Court in fact made a substantial compromise in its case law. In *Fox, Campbell and Hartley v. the United Kingdom*, the Court demanded that the respondent government should provide at least some facts or information capable of satisfying the Court.[282] Later, in *O'Hara v. the United Kingdom*, the Court was satisfied by the 'slightly more specific detail' of the grounds,[283] which was that:

> Special Branch received intelligence that the applicant and three other persons were involved in the murder. The intelligence derived from four informants who had proved reliable in the past and had provided information leading to seizures of explosives or firearms and to prosecutions. None of the informants had a criminal record. The information given by these four informants was consistent, in that all gave the same names as being involved, and independent, in that none was aware of the existence of the others and each gave the information at separate meetings with police officers.[284]

In both cases, the severity of the terrorist crimes the applicants were suspected of was not taken into account. In the *Fox, Campbell and Hartley* case, two of the applicants were arrested for engaging in 'intelligence gathering and courier work',[285] while the applicant in the *O'Hara* case was implicated in a murder.[286] The different categories a suspected terrorist falls into have a slight impact on the standards set for 'reasonableness'.

This indiscriminate treatment of suspected terrorists, regardless of the different roles they may play, can be attributed largely to the proactive strategy adopted by the relevant government. It may be argued that, in the case of terrorism, pre-emptive actions rather than reactive actions are urgently required in order to minimise terrorism and avoid loss of life. With regard to preventive measures, irrespective of whether the person is a perpetrator, contributor or leader, the possible consequences of cases involving terrorism are too serious to distinguish between an individual's actual contribution. In other words, a government does not have to take such detailed differences into consideration in proactive actions. After all, each of these roles contributes to terrorist activities. The primary purpose of categorising 'terrorists' is to expand

[282] *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 34, Series A no. 182, p. 13.
[283] *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X.
[284] *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X.
[285] *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 10, Series A no. 182.
[286] *O'Hara v. the United Kingdom*, no. 37555/97, § 8, ECHR 2001-X.

the scope of targets of anti-terrorism measures, especially preventive measures, rather than to apply different measures in accordance with an individual's role.

By using the label of 'terrorist', the government not only criminalises anyone supporting the actions under scrutiny, but also seeks universal consent for its counterterrorism policies. An important and practical reason for states to mention terrorism whenever they can is the more or less common approach adopted in measures to tackle it. On some occasions, the considerations are more political and diplomatic than legal. In, for example, the derogation announcement concerning Russia's annexation of Ukrainian territory, Ukraine defined its measures against aggression committed by the Russian army or illegal armed groups as 'anti-terrorist operations'. Ukraine's diplomatic intention in this respect is clear, given that the case has already satisfied the 'threatening the life of the nation' requirement under the derogation article. While Ukraine identified pro-Russian rebels in eastern Ukraine as terrorists, some countries regarded them as armed groups.[287]

Personnel of national security institutions

The impact of national security on human rights is also felt by personnel from army and intelligence agencies, whose rights may be restricted by the need to protect the operational effectiveness of security institutions and mechanisms.

Members of armed forces. The primary duty of the armed forces is to protect national security. As such, the rights of personnel in the armed forces may be interfered with for two reasons. First, from the perspective of personnel, some specific duties and responsibilities are incumbent on members of the armed forces due to the characteristics of a military career or life.[288] Second, from the perspective of the institution, maintaining 'fighting power' and 'operational effectiveness' is crucial for national security.[289] Nevertheless, the Court has made it clear that military personnel's rights should not be frustrated by the armed forces' special status.

To balance these different needs, the Court requires the alleged threat to operational effectiveness, among other circumstances, to be real. In *Konstantin Markin v. Russia*, the government attempted to justify refusing parental leave to servicemen on the grounds of the adverse effect that this would have on the

[287] See Kofman Michael, Katya Migacheva, Brian Nichiporuk, Andrew Radin, Olesya Tkacheva, and Jenny Oberholtzer, *Lessons from Russia's Operations in Crimea and Eastern Ukraine*, RAND, 2017, retrieved 28 January 2022, from https://www.rand.org/pubs/research_reports/RR1498.html.
[288] *Engel and Others v. the Netherlands*, 8 June 1976, § 100, Series A no. 22.
[289] *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 67, 27 September 1999.

armed forces' fighting power and operational effectiveness.[290] The Court found such assertions not to be substantiated because the government did not perform 'any expert study or statistical research' to assess how granting such leave would affect operational effectiveness.[291] By contrast, in *Lustig-Prean and Beckett v. the United Kingdom*, the government did conduct a survey in order to evaluate the negative attitudes of military personnel towards their homosexual colleagues. Nevertheless, the Court found the survey conclusion to be unconvincing. Firstly, it showed that those serving abroad had no concerns over homosexuals serving in the allied forces.[292] Secondly, the Court held that by applying a strict code of conduct, it would be possible to overcome alleged negative attitudes and the potential problems they caused, as had previously been the case with regard to negative attitudes on race and gender in the armed forces.[293]

In earlier case law related to the freedom of expression, such as *Engel and Others v. the Netherlands*, 'operational effectiveness' was identified as the order prevailing among the armed forces. Threats to that order are required to be real. In this case, two soldiers had published and distributed an article complaining about disciplinary sanctions imposed on soldiers who had participated in a demonstration at a barracks.[294] The article caused resentment in the barracks because a promise had been given that no sanctions would be imposed on those participating in that demonstration. The risks of undermining military discipline and efficiency were considered to be real, with the main reason cited being that the article in question was published less than one month after the incident.[295] In another two cases, the Court held that the threats to operational effectiveness were not genuine. One of these cases involved a magazine issued in the barracks and containing articles critical of military life. The Court held that the magazine did not recommend disobedience or violence, or even question the usefulness of the army.[296] In another case, the criticism of the army was stronger, but it was contained in a letter written to a superior and that was never published.[297]

---

[290] See *Konstantin Markin v. Russia* [GC], no. 30078/06, §§ 112-113, ECHR 2012.
[291] *Konstantin Markin v. Russia* [GC], no. 30078/06, § 144, ECHR 2012.
[292] *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 95, 27 September 1999.
[293] *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 95, 27 September 1999.
[294] See *Engel and Others v. the Netherlands*, §§ 43-51, 8 June 1976, Series A no. 22.
[295] See *Engel and Others v. the Netherlands*, § 101, 8 June 1976, Series A no. 22.
[296] *See Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, Series A no. 302.
[297] See *Grigoriades v. Greece*, 25 November 1997, Reports of Judgments and Decisions 1997-VII.

Intelligence agency employees. An intelligence agency is another key institution responsible for state security. Its employees are subject to some restrictions on the exercising of their human rights. In the *Council of Civil Service Unions and others v. the United Kingdom* case, the staff of the Government Communications Headquarters (GCHQ) were not permitted to join any trade union other than the one designated by the UK government and were not allowed to participate in industrial action. The former European Commission of Human Rights held such measures to be in accordance with Article 11 of the Convention for two main reasons. First, the purpose of the industrial action was to disrupt GCHQ's operations, and the action actually took place.[298] Second, given that GCHQ is a security and intelligence agency, disrupting its efficient or routine operations would threaten or damage national security.

The rights of personnel who work for this sort of institution may be subject to restrictions that would not be legitimate in other circumstances. Although the Convention does not stop at the gates of army barracks nor at those of intelligence agencies, these institutions' direct connection with national security has a noticeable impact on their employees' enjoyment of their human rights.

Aliens

While the Convention prohibits discriminatory treatment on the ground of 'national origin', several articles provide exceptions regarding aliens' enjoyment of certain human rights. As international law confirms states' discretion on controlling the entry and residence of aliens, several articles in the Convention prescribe special arrangements in this respect. These include arrangements on the detention of aliens for deportation or extradition purposes under Article 5(1)(f), freedom of movement under Article 2(1) of Protocol No. 4, prohibition of collective expulsion under Article 4 of Protocol No. 4 and procedural safeguards related to expulsions under Article 1 of Protocol No. 7. Compared with Article 5(1)(c), Article 5(1)(f) sets rather low standards for restricting aliens' right to liberty. To justify the arrest or detention of an alien, there is no requirement for the action to be '*reasonably* considered necessary', but merely to be done with a view towards 'deportation or extradition'.[299]

---

[298] See *Council of Civil Service Unions and Others v. the United Kingdom* (dec.), no. 11603/85, 20 January 1987, pp. 8 & 11.

[299] Article 5(1)(f) of the ECHR reads:

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

…

Aliens may also be subject to restrictions on other rights which do not have a limitation clause specifically targeting them. In *Chahal v. the United Kingdom*, the government attempted to deport the applicant to a country where he could face ill-treatment.[300] The government argued, on the basis of *Soering v. the United Kingdom*,[301] that it was entitled to attach weight to the applicant's threats to the host country's national security when assessing the risk of ill-treatment that the applicant would face after being deported.[302] In light of the principle established in case law, a state cannot extradite or deport an alien when there are substantial grounds to suggest that, if extradited or deported, the person would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the destination country.[303] However, the UK government held that there were varying degrees of the risk of ill-treatment: the higher the risk of ill-treatment, the less weight should be accorded to the threat to national security.[304]

However, the Court made it clear that the nature of Article 3 is so absolute that the risk of ill-treatment should not be balanced against any grounds for expulsion, even if these grounds were national security concerns.[305] According to the Court, there are differences only between having substantial grounds for believing the existence of a real risk or not; no other legitimate considerations between these two options should impact on the possibility of deportation.

3.2.2 Which Rights May be Subject to the Impact

Rights are not all written in the same way in terms of their limitation clauses. The substantive rights under the ECHR can be classified into three categories: qualified rights, limited rights and absolute rights. Qualified rights are rights that may be interfered with for reasons of protecting others' rights or public interests, such as the rights under Articles 8-11.[306] Limited rights are rights that

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

[300] See *Chahal v. the United Kingdom*, 15 November 1996, §§ 25-26, Reports of Judgments and Decisions 1996-V.

[301] *Söering v. the United Kingdom,* 7 July 1989, Series A no. 161.

[302] See *Chahal v. the United Kingdom*, 15 November 1996, § 76, Reports of Judgments and Decisions 1996-V.

[303] Particularly, *Soering v. the United Kingdom,* 7 July 1989, §§ 90-91, Series A no. 161, p. 35. *Cruz Varas and Others v. Sweden*, 20 March 1991, §§ 69-70, Series A no. 201, p. 28.

[304] *Chahal v. the United Kingdom*, 15 November 1996, § 76, Reports of Judgments and Decisions 1996-V.

[305] See *Chahal v. the United Kingdom*, 15 November 1996, § 80, Reports of Judgments and Decisions 1996-V.

[306] See Council of Europe, "Some Definitions", *Council of Europe*, retrieved 1 May 2020, from https://www.coe.int/en/web/echr-toolkit/definitions.

can be limited under specific and finite circumstances,[307] such as the rights under Articles 5 and 6. Absolute rights are those rights that cannot be derogated or limited,[308] such as freedom from torture (Article 3). As we will see below, the limited rights, and on some occasions also the absolute rights, are restricted on the grounds of national security, despite national security not being explicitly listed in the provisions.

3.2.2.1 Qualified rights

This category of rights includes Articles 8-11, Article 2 of Protocol No. 4 and Article 1 of Protocol No. 7. Apart from Article 9 on the freedom of thought, conscience and religion, these qualified rights include national security in their limitation clauses.

Article 8 – Right to respect for privacy and family life

This right, primarily consisting of four aspects – private life, family life, home and correspondence, is the most frequently recurring right in national security case law. In cases under Article 8, people find their most intimate individual interest to be at odds with the most pressing social need – national security. In light of the existing case law, this conflict can be summarised in the following scenarios:[309]

- Secret and massive surveillance, either under counterterrorism or anti-espionage circumstances, in conflict with a person's private life and correspondence;[310]
- Deportation of aliens, in conflict with their family life;[311]

[307] See Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Heidelberg: Springer, 2010, p. 300. See also Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 41.

[308] See Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Heidelberg: Springer, 2010, p. 284. See also Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 39.

[309] See ECtHR's HUDOC database with its 'Keywords' filter being set as 'national security' and 'economic well-being of the country'. See also Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf. European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights – Right to Respect for Private and Family Life, Home and Correspondence', *ECtHR*, 31 August 2021, retrieved 28 January 2022, from https://echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

[310] For instance, *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, ECHR 2018; *Centrum För Rättvisa v. Sweden*, no. 35252/08, §§ 94 & 171-178, ECHR 2018; *Uzun v. Germany*, no. 35623/05, ECHR 2010; *Kennedy v. the United Kingdom*, no. 26839/05, ECHR 2010; *Weber and Saravia v. Germany*, no. 54934/00, ECHR 2006-XI; and *Klass and Others v. Germany*, 6 September 1978, Series A no. 28.

[311] For instance, *Raza v. Bulgaria*, no. 31465/08, ECHR 2010; *C.G. and Others v. Bulgaria*, no. 1365/07, ECHR 2008; and *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002.

- Ban on homosexuality among armed forces, in conflict with a person's private life;[312]
- Filing and storing private information in security files on certain individuals, in conflict with a person's private life.[313]

Article 10 – Freedom of expression

Freedom of expression is regarded as a core right underpinning a democratic society, which the Convention seeks to maintain. This right protects not only favourable, inoffensive or indifferent information or ideas, but also, and indeed more importantly, information or ideas that 'offend, shock, or disturb'.[314] The latter often raise national security concerns on the part of the government as enjoyment of the freedom of speech may involve separatist propaganda, hate speech or the promotion of illegal organisations.

Among the factors assessed, the Court always recalls the pluralism, tolerance and broadmindedness necessarily demanded by a democratic society.[315] This is an underlying justification for minorities wanting to express their views. Meanwhile, the public has the right to get information from different standpoints. Nevertheless, speech that incites violence is not tolerable and thus violates Article 10. To evaluate dangerous speech, the Court considers the content, the applicant's intention, the timing and other special features of the case.[316]

Another group of cases involves situations in which classified information concerning public interests is imparted. The secrecy of the information can be questioned. Firstly, some materials do not qualify as state secrets in terms of the sensitivity of the information they contain. Effective supervision should not be excluded just because government authorities consider certain information to be 'classified'. Secondly, a government's arguments about the importance of guarding state secrets become less convincing after the information concerned

[312] For instance, *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999; and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI.

[313] For instance, *Haralambie c. Roumanie*, no. 21737/03, CEDH 2009; *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, Reports of Judgments and Decisions 2006-VII; *Turek v. Slovakia*, no. 57986/00, ECHR 2006-II; and *Leander v. Sweden*, 26 March 1987, § 59, Series A no. 116.

[314] *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24.

[315] See *Dmitriyevskiy v. Russia*, no. 42168/06, § 90, ECHR 2017; *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 57, 8 July 1999; *Ceylan v. Turkey* [GC], no. 23556/94, § 32, ECHR 1999-IV; *Perinçek v. Switzerland* [GC], no. 27510/08, § 131, ECHR 2015; and *Bédat v. Switzerland* [GC], no. 56925/08, § 48, ECHR 2016.

[316] See Jan-Peter Loof, 'Restricting Free Speech in Times of Terror: An ECHR Perspective', in Afshin Ellian and Gelijn Molier (eds), *Freedom of Speech under Attack*, Eleven International Publishing, 2015, 185-216, pp. 200-201.

has been made public.[317] In such circumstances, the confidentiality of the information has lapsed in this circumstance.

Article 11 – Freedom of assembly and association

Article 11 involves two distinct rights: the freedom of assembly and the freedom of association. They are sometimes related to each other as both share substance in that they allow individuals to gather together to express their opinions and to protect common interests.[318]

Freedom of association is usually the right in question when it comes to the founding and operating of a political party, especially when the party's goal is to oppose or even change the existing regime. This matter touches on the essence of relations between the ruling parties and the state. In case law, the Court has provided two conditions for a political party to enjoy the freedom of association: Firstly, the means the party uses must be legal and democratic; secondly, the changes it proposes must not go against fundamental democratic principles.[319] In a liberal democracy, protecting national security does not mean protecting the existing political regime against being replaced, as long as the replacement is conducted in a democratic and legal way. In this regard, national security does not necessarily constitute a legitimate reason for governing authorities to suppress political opponents.

Freedom of peaceful assembly is frequently accommodated by public safety, or prevention of disorder, instead of national security. The right concerns, *inter alia*, organising and participating in marches or processions [320] and participating in static assemblies or sit-ins.[321] It is closely linked with the freedom of expression, and is also considered by the Court to be an essential element for a democratic society. Gatherings intended to create violence or threaten the rule of law are not protected under Article 11. Among the derogations made for the COVID-19 pandemic, freedom of assembly was a

[317] See *Vereniging Weekblad Bluf! v. the Netherlands*, no. 16616/90, §§ 43-45, 9 February 1995; *Observer and Guardian v. the United Kingdom*, no. 13585/88, §§ 66-70, 26 November 1991; and *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 55, Series A no. 30.
[318] See David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, p. 684.
[319] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, para. 61, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.
[320] See *Christians against Racism and Fascism v. the United Kingdom*, no. 8440/78, Commission decision of 16 July 1980, Decisions and Reports 21, p. 138.
[321] See *G. v. Germany*, no. 13079/87, Commission decision of 6 March 1989, Decisions and Reports 60, p. 256.

common denominator in the lists of rights being derogated.[322] This freedom has also been subject to derogations in the context of counterterrorism in France,[323] as well as in the aftermath of a failed military coup in Turkey.[324]

Article 2 of Protocol No. 4 – Freedom of movement

Article 2 of Protocol No. 4 includes two rights: freedom of movement within a state's territory and freedom to leave a state's territory. There are only three cases in which the ECtHR has related this right to national security. In all three cases, the Russian government prohibited retired government personnel who used to have access to classified information from travelling abroad. The Court held that the Russian government's measures did not comply with Article 2 of Protocol No. 4 because the impugned measures were not able to achieve the purpose alleged by the government, while Russia was also the only one of the 47 member states of the Council of Europe that still imposed this sort of international travel ban.

Article 1 of Protocol No. 7 – Procedural safeguards relating to expulsion of aliens

The procedural safeguards relating to the expulsion of aliens attempt to offer minimum guarantees to aliens not covered by other international instruments. The provision limits its applicable scope in the first paragraph. First, it prescribes merely procedural guarantees for the person concerned. Second, it prescribes that the applicant's residence in the country should be lawful in the first place. Failure to satisfy this element is the reason why the Court finds most cases to be inadmissible. Third, extradition is excluded from the concept of expulsion.

The safeguards provided are subject to exceptions, however. A government may expel an alien for national security concerns, without offering him or her those safeguards.[325] In light of the wording of the second paragraph, the

[322] Freedom of movement (Article 2 of Protocol No. 4) was also on those lists. See Stuart Wallace, 'Derogations from the European Convention on Human Rights: The Case for Reform', *Human Rights Law Review 20(4)*, 2020, 769-796, p. 779.

[323] See Helen Fenwick and Daniel Fenwick, 'The Role of Derogations from the ECHR in the Current "War on Terror"', in Eran Shor and Stephen Hoadley (eds.), *International Human Rights and Counter-Terrorism*, Singapore: Springer, 2019, 259-290, p. 276.

[324] See Emre Turkut and Thomas Phillips, 'Non-Discrimination, Minority Rights and Self-Determination: Turkey's Post-Coup State of Emergency and the Position of Turkey's Kurds', in Hasan Aydin and Winston Langley (eds.), *Human Rights in Turkey: Assaults on Human Dignity*, Switzerland: Springer, 2020, 109-129, p. 115. See also Martin Scheinin, 'Turkey's Derogation from the ECHR – What to Expect?', *EJIL: Talk!*, 27 July 2016, retrieved 3 July 2023 from https://www.ejiltalk.org/turkeys-derogation-from-the-echr-what-to-expect/.

[325] Article 1(2) of Protocol No. 7 reads: 'An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.'

government may do so insofar as the expulsion is 'grounded on reasons of national security'. This implies a relatively low bar because the expulsion does not need to be proved necessary. In other words, if expulsion is for reasons of national security, this should be accepted as sufficient justification.[326]

It is clear from existing case law, however, that the Court does not want to give government authorities a blank cheque to invoke 'national security' under this provision. In *Ahmed v. Romania*,[327] along with other related cases,[328] the Court held that if the administrative authorities and domestic court limit themselves to weighing assertions about national security but do not review the facts or the merits of a case, the alien may face arbitrary expulsion. The Court therefore requires the respondent government to indicate which facts support its decision.

Article 9 – Freedom of thought, conscience and religion

The right protected by Article 9 is divided into two dimensions: internal and external to people. The internal dimension refers to rights to thought, conscience and religion, and people exercise these rights inside their minds. The external one concerns manifesting a religion or belief, through acts such as worshipping, teaching, practice or observance. This right is considered by the Court to be the foundation of a democratic society.[329] Its essence lies in the idea that a state is not supposed to dictate to anyone what they should believe in. A person should not be subject to sanctions based solely on views they hold, or due to their changing or not changing a religion.

Only the *forum externum* or external dimension of the right, which relates to manifesting a religion or belief, is subject to the limitation accommodated in the second paragraph, but, noticeably, the legitimate aims listed do not include national security. Although the concept of 'religion or belief' has a relatively wide scope, a 'religion or belief' is required to possess a certain degree of 'cogency, seriousness, cohesion, and importance'.[330] More importantly, the practice of 'manifesting' a religion or belief should be distinguished from being motivated or influenced by a religion or belief but without 'actually expressing'

[326] Council of Europe, Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedom, Strasbourg, 22.XI.1984, para. 15.
[327] *Ahmed c. Roumanie*, no. 34621/03, CEDH 2010.
[328] For instances, *Lupsa v. Romania*, no. 33970/05, ECHR 2006-VII; and *Kaya c. Roumanie*, no. 33970/05, 12 octobre 2006.
[329] *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A.
[330] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018, p. 742.

it.[331] The difference between them should be judged by objective rather than subjective standards.

In the past decade, several European countries have successively outlawed the practice of face veils in public places.[332] Despite not targeting any specific group of people, the ban specifically affects Muslim women, a minority group in European society.[333] Therefore, observers sometimes refer to it as the 'burqa ban',[334] revealing its *de facto* target. The controversy has been taken to the ECtHR.[335] In the case law, the government based its legitimate aim on 'public security' and 'protection of the rights and freedoms of others',[336] rather than on 'national security', which is not provided for in Article 9(2) of the Convention.

3.2.2.2 Limited rights

Government measures that restrict the enjoyment of rights have to satisfy rigorous conditions prescribed by the provisions categorised as limited rights. In practice, the Court often reviews national security cases under Articles 5 and 6. Article 5 proclaims the right to liberty and security, and Article 6 the right to a fair trial.

Article 5(1)(c) & (f) – Grounds for detention

Article 5(1) lists several exceptions to the prohibition of the deprivation of liberty. Section (c) permits detention in the context of criminal proceedings, and section (f) allows a government to detain aliens in an immigration context.

For the purpose of bringing a person 'before the competent legal authority', Article 5(1)(c) prescribes three permissible grounds for arrest or detention:

- *There is reasonable suspicion of his having committed an offence*. Here, the term 'reasonable suspicion' constitutes the essence of the right. The facts and information that the suspicions are based on should satisfy an

[331] *Van Den Dungen v. the Netherlands*, no. 22838/93, Commission decision of 22 February 1995, Decisions and Reports 80-A, p. 147.
[332] See Economic Times, "Switzerland Latest European Country to Ban Islamic Full-face Veils", *the Economic Times*, 8 March 2021, retrieved 25 October 2021, from https://economictimes.indiatimes.com/news/international/world-news/european-bans-on-islamic-full-face-veils/articleshow/81393603.cms.
[333] See Strasbourg Observers, 'Belkacemi and Oussar v Belgium and Dakir v Belgium: The Court Again Addresses the Full-face Veil, but it does not Move away from its Restrictive Approach', *Strasbourg Observers*, 25 July 2017, retrieved 25 October 2021, from https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach/.
[334] See Shaira Nanwani, 'The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?', *Emory International Law Review 25(3)*, 2011, 1431-1475, p. 1431.
[335] See *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014. *Belcacemi et Oussar c. Belgique*, no. 37798/13, CEDH 2017. *Dakir v. Belgium*, no. 4619/12, ECHR 2017.
[336] See *S.A.S. v. France* [GC], no. 43835/11, § 82, ECHR 2014.

objective observer that the person concerned may have committed the offence. In case law on terrorism, however, the Court holds that detention of the applicant meets the threshold even where the respondent government provides only very limited details about the evidence.

- *It is reasonably considered necessary to prevent an offence*. The key question is whether the detention is a proportionate means to protect the individual or public interest. Among other requirements, preventive detention should not be used as a general policy against certain groups of people perceived by national authorities as being associated with risks.[337] Instead, there should be a specific and concrete crime that the state is seeking to prevent.
- *It is reasonably considered necessary to prevent flight after an offence has been committed.* This can be understood as justifying continuation of the detention.[338]

Article 5(1)(f) concerns the detention of aliens, which is permitted in two circumstances: first, to prevent unauthorised entry into the country and, second, as part of an effort to deport or extradite a person. With regard to the first circumstance, the arrest or detention is within the meaning of section (f) before the immigrant is granted leave to remain in the country.[339] As to the second circumstance, where detention has the purpose of deportation or extradition, actions by the state are not required to be reasonably considered necessary. To be compatible, however, with the overall purpose of Article 5, due diligence is needed concerning the duration of the detention for deportation, together with sufficient guarantees against arbitrariness.

Article 5(2) – Reasons for arrest to be given promptly

The aim of Article 5(2) is to provide adequate information about the legal basis and reasons for arresting or detaining the person, so that he or she can challenge the lawfulness of the arrest or detention before a court. This calls for information to be adequate, meaning that the person should be informed of the reasons for being arrested; this must comprise more than just a simple statement of the legal basis. Regarding the requirement for promptness, the Court has held in the case law that the police is not obliged to give these reasons at the time of the arrest.[340] Instead, this information can be conveyed or may become apparent during subsequent interrogations.

[337] *Ostendorf v. Germany*, no. 15598/08, § 66, ECHR 2013.
[338] See Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018, p. 456.
[339] See *Saadi v. the United Kingdom*, no. 13229/03, § 44, Reports of Judgments and Decisions 2008.
[340] See *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, §§ 40-41, Series A no. 182.

Article 5 (3) – Accountability during pre-trial detention and trial within a reasonable time

Article 5(3) is divided into two parts: the right to be brought promptly before a judge, and the right to a trial within a reasonable time or to be released pending trial. Bringing an arrested or detained person under judicial control serves two purposes. The first is that requiring the state to take such action 'promptly' supports the national judiciary in identifying unjustified deprivation of liberty as early as possible. In the case of national security issues, terrorism is one of the circumstances that may justify a lengthy period of detention without judicial review. As for the second purpose, the arrested person's initial appearance before a judge also allows for ill-treatment to be detected. In other words, it aims to provide safeguards both against the abuse of power and against ill-treatment. In addition, this judicial review should be carried out as a matter of routine and does not have to be requested by the person concerned.

The second section of Article 5(3) concerns the continuation of detention. The case law of the Court has developed four grounds for pre-trial detention:

- the risk of absconding;[341]
- obstruction of the administration of justice,[342] such as collusion between the accused or destruction of evidence;
- the danger of committing further offences;[343]
- disturbance to public order, which means the person's release may invoke social disturbance.[344]

These grounds are required to be substantiated, so that they are not merely abstract, general or stereotyped. Among other elements to be considered, the severity of the possible punishment alone is insufficient as the only basis for the four reasons above. Nevertheless, the Court has often held that organised crimes such as terrorism entail a high risk that suspects will pressure witnesses or other suspects.[345] The Court also notes that this sort of risk will decrease as time goes by.[346]

Article 5(4) – Remedy to challenge the legality of detention

Article 5(4) prescribes the right to *habeas corpus*. This right aims to guarantee a judicial review of the lawfulness of the detention, considering both procedural

[341] See *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 88, ECHR 2016 (extracts).
[342] See *Tiron v. Romania*, no. 17689/03, § 37, ECHR 2009.
[343] See *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 59, ECHR 2003-IX.
[344] See *Piruzyan v. Armenia*, no. 33376/07, § 94, ECHR 2012.
[345] See *Staykov c. Bulgarie*, no. 16282/20, § 83, CEDH 2021; *Štvrtecký v. Slovakia*, no. 55844/12, § 61, ECHR 2018; and *Podeschi v. San Marino*, no. 66357/14, § 149, ECHR 2017.
[346] See *Debboub alias Husseini Ali c. France*, no. 37786/97, § 39, CEDH 1999.

and substantive conditions. In national security case law, governments often interfere with the right to equality of arms by using secret evidence in the judicial review of the detention.

The Court holds that the very essence of judicial control over the legality of detention should not be compromised. In national security case law, denying a person access to secret evidence does not necessarily violate Article 5(4), providing the remaining evidence is sufficiently specific to allow the person to effectively challenge the government's allegations.[347] The evidence needs to be specific enough to enable the accused person to know the nature of the allegations against him or her and, more importantly, to provide adversarial information with which to refute them. In these circumstances, the Court will still deem the judicial review to be effective.

Article 6 – Right to a fair trial

This right consists of two sections: criminal and civil. Article 6(1) applies to both sections, including the right of access to a court, and certain institutional and procedural requirements. Article 6(2) and (3) are dedicated specifically to criminal offences and provide for the presumption of innocence and some guarantees for the rights of the defence.

Access to a court. This section constitutes the premise of the right to a fair trial by guaranteeing the individual the right to bring a civil claim before judicial review or to have any criminal charges against him or her determined by a court or tribunal. According to the Court, this right may be subject to underlying limitations, for instance parliamentary immunity or procedural rules, but the limitations must not extinguish the very essence of the right of access to a court.[348] In national security cases, a government sometimes takes actions based on classified information. However, the government's measures should not enjoy impunity from judicial review only because the matter involves state secrets. Otherwise, there would be no independent scrutiny whenever governing authorities invoked state secrets. Instead, the state may provide procedural arrangements to address the dilemma, for instance by arranging for an independent and vetted advocate to examine the materials on the person's behalf.

Institutional requirements. The first section requires the institution reviewing the criminal or civil issues to have judicial characteristics; in other words, the power to issue a binding decision that cannot be altered by a non-

[347] See *Ragıp Zarakolu c. Turquie*, no. 15064/12, § 59, CEDH 2020; *Ovsjannikov v. Estonia*, no. 1346/12, §§ 72-73, ECHR 2014; *Korneykova v. Ukraine*, no. 39884/05, § 68, ECHR 2012; and *A. and Others v. the United Kingdom*, no. 3455/05, § 218, ECHR 2009.

[348] See *Markovic and Others v. Italy* [GC], no. 1398/03, § 99, ECHR 2006-XIV.

judicial authority. An administrative body may therefore be deemed to be a 'tribunal' in its substantive sense, provided it is independent of the executive, as well as objectively impartial. However, most internal procedures resting on bureaucratic hierarchy are not considered by the Court to constitute a review having judicial characteristics.

The Court takes an objective approach to deciding whether an institution is sufficiently independent or impartial. Elements such as its internal organisation, how it appoints members and the guarantees it offers against outside pressures are taken into account. In national security cases, the Court has cast doubts on the independence and impartiality of a military court[349] and, in some cases, a civilian court that included a military judge.[350] In these cases, the Court has held that independence and impartiality may be compromised by the hierarchical links that hold the military together. In addition, the Court may find a violation of the right to a fair trial when a civilian is under trial by a military court. According to the ECtHR, military courts are supposed to keep a distance from criminal issues committed by a person who is not a member of the armed forces.

Procedural requirements. The procedural requirements entail three aspects: fairness, a public hearing and reasonable time. A fair trial requires the defendant to be able to effectively participate in the proceedings. The right to a fair trial calls for equality of arms, the right to remain silent and not to incriminate oneself, and other procedural safeguards.[351] The public character of judicial proceedings contributes to the protecting of litigants against secret administration of justice without public scrutiny.[352] Nevertheless, a limitation clause is included, whereby the hearing may exclude the public and media out of concern for national security if the domestic court believes this is strictly necessary.[353] Regarding the third aspect, the requirement that the case be heard

[349] See *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, §§ 30-31, ECHR 2004. *Findlay v. the United Kingdom*, 25 February 1997, § 76, Reports of Judgments and Decisions 1997-I.

[350] See *Iprahim Ülger c. Turquie*, no. 57250/00, § 26, CEDH 2004. *Incal v. Turkey*, 9 June 1998, § 72, Reports of Judgments and Decisions 1998-IV.

[351] See Paul Lemmens, 'The Right to a Fair Trial and Its Multiple Manifestations: Article 6(1) ECHR', in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2014, 294-314, pp. 307-313.

[352] See *Krestovskiy v. Russia*, no. 14040/03, § 24, ECHR 2010; *Riepan v. Austria*, no. 35115/97, § 27, Reports of Judgments and Decisions 2000-XII; and *Sutter v. Switzerland*, 22 February 1984, § 26, Series A no. 74.

[353] Article 6(1) of the ECHR reads:

> '… Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or *national security* in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.' [emphasis added]

within a reasonable time aims to ensure that the person will not be exhausted by the lawsuit. Of course, aspects such as the complexity of the case and the applicant's conduct [354] have to be considered when deciding whether the impugned proceedings are still within a reasonable time.

Presumption of innocence. The right to be presumed innocent applies specifically to criminal proceedings and is a general principle in criminal law. It derives from Blackstone's ratio, which holds that it is more important to protect the innocent than punish the guilty.[355] Nevertheless, the Court case law holds that it is acceptable to presume some simple or objective facts, providing the presumptions are reasonably proportionate to the legitimate aim pursued.[356] Terrorism cases highlight challenges to this right because, in some cases, national authorities have shifted the threshold of criminal liability to an earlier stage, meaning that some preparatory acts related to terrorism are now punishable. Meanwhile, Muslims have complained that governments are particularly targeting their communities in this respect.[357]

Guarantees for the rights of the defence. Article 6(3) lists five rights to guarantee defendants a fair trial: (a) the right to be informed of the nature and cause of the accusation; (b) adequate time and facilities to prepare the defence; (c) the right to defend oneself in person or through legal assistance; (d) the right to examine witnesses; and (e) the right to an interpreter.

The first two sections, as well as section (e) on some occasions, consist of the prerequisites for fair criminal proceedings. Sections (c) and (d) serve to ensure the adversarial character of the litigation. As to section (d), an anonymous witness can be an obstacle to equality of arms. However, the right to cross-examine witnesses is not an absolute right and may be reduced for reasons of protecting state secrets.[358] Even so, these restrictions should not result in the proceedings completely losing their adversarial character or strongly impacting on the equality of arms.[359] National authorities may also reconcile such conflicts of interests by allowing the defence lawyer to question the witness on the defendant's behalf.[360]

3.2.2.3 Absolute rights

[354] See *Liblik and Others v. Estonia*, nos. 173/15, 181/15, 374/15, 383/15, 386/15 and 388/15, § 91, ECHR 2019.
[355] See Patrick Tomlin, 'Could the Presumption of Innocence Protect the Guilty?', *Criminal Law, Philosophy 8*, 2014, 431-447, p. 435.
[356] See *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A, pp. 15-16.
[357] See Liz Fekete, 'Anti-Muslim Racism and the European Security State', *Race & Class 46(1)*, 2004, 3-29, pp. 10-12.
[358] See *Kennedy v. the United Kingdom*, no. 26839/05, § 182 & 186, ECHR 2010.
[359] See *Ellis and Simms v. the United Kingdom* (dec.), nos. 46099/06 and 46699/06, §§ 74-78, 10 April 2012.
[360] See *A. and Others v. the United Kingdom*, no. 3455/05, § 219, ECHR 2009.

Some rights stipulated in the Convention are deemed 'absolute' because, under Article 15(2), they may not be derogated even 'in time of war' or 'other public emergency threatening the life of the nation'. Despite this, some national security cases raise great concerns regarding Article 2 (right to life) and Article 3 (prohibition of torture). Although the focus of my research is on human rights restrictions, the impact of national security on these two rights deserves some deliberation here. I will concentrate my analysis of them in this section.

Article 3 – Prohibition of torture

The value of the right to be free from torture is attached to a prohibition on assaulting human dignity and physical integrity.[361] With regard to national security, the case law under this article includes three main subject matters: conditions of detention, interrogation methods and extradition. In cases concerning conditions of detention, a relatively high level of social isolation measures can be justified by the nature and extent of the threat that the detained person may pose to national security. In this regard, a gap between provisions and practice has been identified in Section 3.2.1, whereby the contested measure has to be of a certain level of severity to be defined as ill-treatment under Article 3, and the elements to be considered include the potential dangers the applicant might pose to national security.

Regarding interrogation methods, the ECtHR does not leave a gap between provisions and practice, such that special methods used to obtain information can be justified by the dangers a state is facing. The 'ticking bomb' scenario has been hotly debated by many scholars, with arguments both supporting (partly or conditionally) and opposing the idea that it is acceptable to torture a presumed terrorist who knows where a bomb is ticking.[362] In practice, cases considered by the ECtHR have not gone that far. In *Ireland v. the United Kingdom*, for example, the police used five techniques to interrogate detainees to determine whether they should be interned and to get information about the IRA.[363] The five techniques in question were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.[364] As a result, the police obtained a considerable amount of information about IRA members

[361] Aisling Reidy, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*, Council of Europe, 2003, p. 8.
[362] See, for instance, Yuval Ginbar, *Why not Torture Terrorists?: Moral, Practical, and Legal Aspects of the 'Ticking Bomb' Justification for Torture*, Oxford: Oxford University Press, 2008. Vittorio Bufacchi and Jean Maria Arrigo, 'Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument', *Journal of Applied Philosophy 23(3)*, 2006, 355-373.
[363] See *Ireland v. the United Kingdom*, 18 January 1978, § 92, Series A no. 25.
[364] See *Ireland v. the United Kingdom*, 18 January 1978, § 96, Series A no. 25.

and many previously unexplained criminal incidents.[365] It is also worth noting that, despite the existence of a public emergency in Northern Ireland within the meaning of Article 15, the Court did not take any account of this when considering the alleged violation of Article 3.[366] The Court found the five techniques to be inhuman and to constitute degrading treatment under Article 3.[367] Nevertheless, and in the context of the 'war on terror', the five techniques came to public attention again when they were used by British armed forces in Iraq.[368] In *Aksoy v. Turkey*, for example, the detainee was stripped naked, with his arms tied behind his back, and then suspended by his arms.[369] The Court held that this treatment amounted to torture in breach of Article 3 of the Convention.[370] A noteworthy fact in both cases is that the government authorities did not even attempt to use the emergency situation they were facing or the information they had obtained through the measures in question in their defence arguments.[371]

With regard to national security, Article 3 is also considered in extradition cases. As a principle developed by the ECtHR in *Söering v. the United Kingdom*, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country, the extradition would engage the responsibility of the requested state under the Convention.[372] While in *Söering*, the Court tried to a certain extent to balance the risk of ill-treatment against the interest of bringing the fugitive to justice,[373] it changed course in later cases. The focus has been on the non-derogable status of the prohibition of torture or other ill-treatment, which has to be assessed

[365] See *Ireland v. the United Kingdom*, 18 January 1978, § 98, Series A no. 25.
[366] More on the public emergency in Northern Ireland, see Jan-Peter Loof, 'Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights. A Threat Analysis', in Antoine Buyse (ed.), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict*, Intersentia, 2010, 35-56, pp. 43 & 53.
[367] See *Ireland v. the United Kingdom*, 18 January 1978, § 168, Series A no. 25. In a revision of the case in 2018, the ECtHR maintained its judgment that the use of the five techniques constituted a practice of inhuman and degrading treatment, instead of torture. See *Ireland v. the United Kingdom* [revision], no. 5310/71, ECHR 2018. More discussions on whether the five techniques amounted to torture, see Michelle Farrell, 'The Marks of Civilisation: The Special Stigma of Torture', *Human Rights Law Review 22(1)*, 2022, 1-26. Kathleen Cavanaugh, 'On Torture: The Case of the "Hooded Men"', *Human Rights Quarterly 42(3)*, 2020, 519-544.
[368] See Huw Bennett, 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan', *The British Journal of Politics and International Relations 16(2)*, 2014, 211-229.
[369] See *Aksoy v. Turkey*, 18 December 1996, § 14, Reports of Judgments and Decisions 1996-VI.
[370] See *Aksoy v. Turkey*, 18 December 1996, § 64, Reports of Judgments and Decisions 1996-VI.
[371] See *Ireland v. the United Kingdom*, 18 January 1978, §§ 152-159, Series A no. 25. *Aksoy v. Turkey*, 18 December 1996, § 59, Reports of Judgments and Decisions 1996-VI.
[372] *Söering v. the United Kingdom*, 7 July 1989, § 91, Series A no. 161.
[373] See *Söering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161.

independently.[374] There are views that non-extradition of torture is becoming the *jus cogens*.[375] In *Harkins and Edwards v. the United Kingdom*, for example, the Court held that 'indeed in the twenty-two years since the *Soering* judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State.' [376] To assess the element independently, the Court only needs to evaluate whether the risk of torture or other ill-treatment is real, without reference to factors such as the danger the extradited person posed or the interest of criminal justice.

Article 2 – Right to life

Although Article 2 is categorised as an absolute right, it accommodates certain occasions that might result in the deprivation of life, which are prescribed in the second paragraph. Such exceptional circumstances include action in defence of any person from unlawful violence; in order to arrest suspects or to prevent the escape of detainees; and in action to quell a riot or insurrection against a state institution. Several conditions apply to such exceptional circumstances. Firstly, as prescribed in the second paragraph, the use of lethal force should be 'no more than absolutely necessary'. This implies a stricter requirement than the necessity test accommodating qualified rights (Articles 8-11). Secondly, what is allowed is the use of lethal force that may result in death, not the act of intentionally killing a person.[377] Lastly, Article 2 imposes both negative and positive obligations on the state. The positive obligations require the state to take preventive measures to avoid death.[378] In this respect, the Court demands, for instance, any use of lethal force to be carefully planned.

Counterterrorism operations are a popular connection point between the right to life and national security. In this context, questions can be raised about a perpetrator or suspected perpetrator's right to life, as well as other individuals' right to life, as state authorities are obliged to refrain from arbitrary deprivation of life and to protect an individual from harm by a third party.[379] In

[374] See *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, § 124, ECHR 2012.
[375] See Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, 2010, p. 65.
[376] *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, § 125, ECHR 2012.
[377] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, para. 73, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.
[378] See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 130, ECHR 2014; *Branko Tomašic and Others v. Croatia*, no. 46598/06, § 50, ECHR 2009; and *Osman v. the United Kingdom*, 28 October 1998, § 115, Reports of Judgments and Decisions 1998-VIII.
[379] See Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart, 2004, p. 15.

its case law, the ECtHR has developed a set of obligations applying to states before a terrorist attack and also both during and after the counterterrorism operations.[380]

First, state authorities have preventive obligations to protect 'an individual whose life is at risk from the criminal acts of another individual'.[381] If a government knows of an incoming attack, it is required to take appropriate measures in advance to prevent it or, at least, to minimise the loss of life caused by the attack.[382] A practical question is how to evaluate whether the government knew or should have known about such an attack. On the one hand, the ECtHR recognises that government authorities have to set priorities and allocate their policing resources and intelligence capabilities, and that human conduct can be difficult to predict.[383] On the other hand, terrorism remains a major concern for many European countries.[384] In *Tagayeva and Others v. Russia*, the Court took account of information available at the time to the Ministry of the Interior and Federal Security Service, and found that the authorities had relatively specific information on the location, date and nature of an attack.[385] Based on these observations, the Court concluded that the government had failed to take adequate preventive measures against the potential risk.[386]

Second, during counterterrorism operations, the state's obligations concern the right of the civilians involved and also the right of the perpetrators. Although the second paragraph of Article 2 demands the deprivation of life in this circumstance to be 'absolutely necessary', the Court does not conduct a careful scrutiny of all elements of the operation in question. In the case of phases of the operation that are not subject to serious time constraints and that are within the authorities' control, the Court makes efforts to check whether the authorities took reasonable precautions in their operation plan and employed

[380] See Linos-Alexander Sicilianos, 'Preventing Violations of the Right to Life: Positive Obligations under Article 2 of the ECHR', *Cyprus Human Rights Law Review 3(2)*, 2014, 117-129, p. 122. Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?', *The European Journal of International Law 21(3)*, 2010, 701-721, p. 702.
[381] See *Tagayeva and Others v. Russia*, no. 26562/07, § 482, ECHR 2017.
[382] See *Mastromatteo v. Italy* [GC], no. 37703/97, § 68, ECHR 2002-VIII. *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, 2002-II.
[383] See *Osman v. the United Kingdom*, 28 October 1998, § 116, Reports of Judgments and Decisions 1998-VIII.
[384] See Christophe Paulussen and Martin Scheinin, 'Introduction', in Christophe Paulussen and Martin Scheinin (eds.), *Human Dignity and Human Security in Times of Terrorism*, Springer, 2020, 3-11, p. 4.
[385] See *Tagayeva and Others v. Russia*, no. 26562/07, § 484, ECHR 2017.
[386] See *Tagayeva and Others v. Russia*, no. 26562/07, § 491, ECHR 2017.

means to minimise the use of force.[387] In, for instance, *Finogenov and Others v. Russia*, relating to Russian security forces' hostage-rescue operations, the Court closely reviewed the authorities' decision to use gas, and their planning of medical assistance and evacuation and how these plans were implemented.[388] Nevertheless, when it comes to elements mainly involving strategic political choices, the Court tends to defer to state authorities' decisions. This was the stance taken by the Court in the *Finogenov* case when deciding whether the authorities should have negotiated and tried to compromise with the terrorists. The Court held that it was up to the government authorities to decide on such matters of policy.[389]

Third, after the operations have concluded, the state must investigate the loss of life resulting from its use of force. Although the ECtHR requires such an investigation to be effective,[390] it is an obligation of means, not result.[391] The focus of the Court's review is mainly, therefore, on the features and procedures of the investigation, including its independence, its capability of leading to the establishment of the facts, its accessibility to the public scrutiny and its promptness.[392] In the *Finogenov* case, the Court found the investigative team not to have been independent and not to have made sufficient enquiries into the authorities' alleged negligence; the Court thus considered the investigation conducted by Russian government not to have been effective.[393]

3.2.3 Region Impacted and the Duration of the Impact

3.2.3.1 Which region may be subject to the impact

The Convention's jurisdiction means the scope of national security's impact on human rights is normally limited to the territory of a state. The government has authorities within its territory to take action against national security threats. At the same time, the government is obligated to protect the human rights of those under its jurisdiction. Whether the government's interference is legitimate does not necessarily depend on which region is targeted, or on how

[387] See *McCann and Others v. the United Kingdom* [GC], 27 September 1995, § 194, Series A no. 324. See also Juliet Chevalier-Watts, 'A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in their Scrutiny of Right to Life Cases?', *The International Journal of Human Rights 14(2)*, 2010, 300-318, p. 307.
[388] See *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, §§ 227-262, ECHR 2011.
[389] See *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, §§ 217-223, ECHR 2011. Regarding non-negotiation policy in general, see Guy Olivier Faur, 'Negotiating Hostages with Terrorists: Paradoxes and Dilemmas', *International Negotiation 20(1)*, 2015, 129-145.
[390] See *McKerr v. the United Kingdom*, no. 28883/95, § 111, ECHR 2001-III. See also Christine Bell and Johanna Keenan, 'Lost on the Way Home? The Right to Life in Northern Ireland', *Journal of Law and Society 32(1)*, 2005, 68-89, p. 71.
[391] See *Jaloud v. the Netherlands*, no. 47708/08, § 186, ECHR 2014.
[392] See *Armani Da Silva v. the United Kingdom*, no. 5878/08, §§ 229-240, ECHR 2016.
[393] See *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, §§ 277-282, ECHR 2011.

large this region is. However, certain places are closely connected with national security due to military and political considerations, such as their functions, strategic importance and symbolic meaning. In *Leander v. Sweden*, for instance, the applicant contested the practice of running a background check on personnel hired by a museum at the Naval Base and alleged a breach of Article 8. The Court found there to be no breach because the job would give the applicant access to a restricted military security zone, including access to secret installations and information.[394]

Disturbance in a region may constitute a determining factor for the Court to decide whether national security is in danger. This is often seen in cases related to derogations under Article 15. A recent case concerns the derogation by Ukraine due to the disturbance in its eastern territory, with the Ukrainian government defining the Autonomous Republic of Crimea and the city of Sevastopol as parts of its territory in which Russia is responsible for human rights protection. Ukraine also identified certain areas of the Donetsk and Luhansk oblasts as a region to be subject to derogations from several human rights obligations.[395] Other examples in the context of Article 15 include the declaration by Armenia of a state of emergency in only its capital in 2008, by Georgia in its Khelvachauri district in 2006, and by Turkey on various occasions.[396]

In other cases, delimiting the area that the government's measure applies to can be critical. In *Engel and Others v. the Netherlands* and *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, which were about contested publications, the limitation on publishing the journal was to be confined to certain barracks rather than extending to all the military premises within the national territory.[397] Narrowing the scope of the contested measure complies with the requirement that the restriction on human rights should be necessary. Otherwise, governing authorities may abuse their power.

---

[394] See *Leander v. Sweden*, 26 March 1987, Series A no. 116.

[395] See the derogations declared by Ukraine, at Council of Europe, "Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms", retrieved 29 January 2022, from https://www.coe.int/en/web/conventions/concerning-a-given-treaty?module=declarations-by-treaty&territoires=&codeNature=0&codePays=&numSte=005&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=01-29-2022.

[396] See Council of Europe, "Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms", retrieved 29 January 2022, from https://www.coe.int/en/web/conventions/concerning-a-given-treaty?module=declarations-by-treaty&territoires=&codeNature=0&codePays=&numSte=005&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=01-29-2022. See also Stuart Wallace, 'Derogations from the European Convention on Human Rights: The Case for Reform', *Human Rights Law Review 20(4)*, 769-796.

[397] *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, § 39, Series A no. 302. *Engel and Others v. the Netherlands*, 8 June 1976, § 43, Series A no. 22.

While governments usually interfere with the human rights of those who are resident in the country, the rights of people overseas may also be subject to a government's interference. In other words, the scope of impact may extend beyond a state's borders. In cases related to secret surveillance, the state may gather intelligence by intercepting cross-border communications. To avoid abuses of power, the Court has developed minimum requirements commonly applied in cases concerning the interception of communications.[398]

3.2.3.2 What is the duration of the impact

How long may the impact of national security on human rights last? The temporal factor is not necessarily decisive, although the Court often takes it into account when assessing the nature and proportionality of contested measure. As any limitations on human rights must be exceptional, the duration of a government's interference must not be indefinite. In case law, the contested measure may cease to be deemed legitimate in two circumstances. The first of these circumstances is when the situation changes radically and the measure is consequently no longer proportionate. The essence of the question here is not the duration itself, but when the government should stop or alleviate the interference. Second, as time goes by, either the necessity of the interference will gradually decrease, or the adverse effect will increase. Therefore, the Court has to take the 'time' factor into account to evaluate the nature and proportionality of the contested measure.

In the first circumstance, a substantial change in a situation can be a decisive factor. In the *Observer and Guardian v. the United Kingdom* case, the contested measures were the temporary injunctions on the publication of a book allegedly containing confidential information. Two periods of time were distinguished because the book in question went on to be published in another country. This change in the circumstances meant the injunctions were no longer necessary since confidentiality had already been lost.[399] In some derogation cases, a regular assessment of the situation is appreciated by the Court. As a procedural requirement, states must withdraw derogations they have made if the relevant exigencies alleviate or disappear.[400] Current practice has shown that some derogations can last for years. For example, the derogations made by the UK government in 2001 in response to terrorist threats after 9/11 lasted for nearly four years. In the case of *A. and Others v. the United Kingdom*, the Court did not find this four-year long derogation to have lost its temporary nature because

[398] See, for instance, *Centrum För Rättvisa v. Sweden*, no. 35252/08, § 103, ECHR 2018.
[399] See *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 66, Series A no. 216.
[400] Article 15(3) reads: '… It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.'

the UK Parliament reviewed the case annually to see whether the situation had changed.[401]

The second circumstance relates mainly to the accumulation of time, although it is inevitably accompanied by a change of situation. In *Öcalan v. Turkey*, the Court ruled that over thirteen years of detention in relative social isolation breached the threshold of inhuman treatment under Article 3.[402] At the beginning of the state's interference, the strict security measures applying to the applicant's detention were justified by the legitimate aim of preventing him from continuing his leadership of the terrorist group. At that time, the Court did not find the impugned measures to breach the threshold of inhuman treatment.[403] As time went by, however, it held that the threshold had been breached, given the effect of such a long period of social isolation on the applicant's psychology.[404]

On some occasions, the Court has introduced a particular length of time as the benchmark for its decision. For instance, case law under Article 5(3) refers to the temporal element of the contested measure, prescribing that the detainee must be brought before a judge 'promptly'. In *Brogan and Others v. the United Kingdom* and subsequent cases,[405] the Court developed the principle that taking more than four days to bring an arrested person before a judge is *prima facie* incompatible with the meaning of 'promptly'. One of the applicants in the *Brogan and Others* case was arrested for suspected terrorist offences and detained for four days and six hours before being taken to a judge.[406] Compared with the seriousness of terrorism in *Brogan and Others*, the Court confirmed in *Oral & Atabay v. Turkey* (*Oral et Atabay c. Turquie*; judgment available only in French) that the period of four days was a *prima facie* benchmark.[407] In this regard, it should be pointed out that the four-day standard is not a one-size-fits-all norm. Instead, it is a standard of reference that can be applied to cases related to terrorism and other national security threats with a similar degree of seriousness.

3.2.4 Summary

[401] See *A. and Others v. the United Kingdom*, no. 3455/05, § 178, ECHR 2009.
[402] See *Öcalan v. Turkey* (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, §§ 137-145, ECHR 2014.
[403] See *Öcalan v. Turkey* [GC], no. 46221/99, § 196, ECHR 2005-IV.
[404] See *Öcalan v. Turkey* (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, § 146, ECHR 2014.
[405] See *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B, followed by cases including *Oral et Atabay c. Turquie*, no. 39686/02, CEDH 2009; *McKay v. the United Kingdom*, no. 543/03, ECHR 2006-X; and *Năstase-Silivestru c. Roumanie*, no. 74785/01, CEDH 2008.
[406] *Brogan and Others v. the United Kingdom*, 29 November 1988, § 62, Series A no. 145-B.
[407] See *Oral et Atabay c. Turquie*, no. 39686/02, § 43, CEDH 2009.

In this section, I have examined categories of people whose rights are often interfered with on the grounds of protecting national security, the rights involved in national security protection measures, and regional and temporal elements of governmental interference. The analysis delimits the impact that national security can have on human rights in practice.

We have seen that four groups of individuals often have their cases reviewed by the ECtHR in relation to a government's national security measures. These four groups are (1) persons under surveillance; (2) persons suspected or convicted of terrorist crimes; (3) personnel from army and intelligence agencies; and (4) non-citizens. Specific national security concerns may result in various rights of such individuals being interfered with.

It is not only qualified rights that may be limited due to national security concerns, but also limited rights and, on some occasions, even absolute rights can also be restricted on these grounds. Five qualified rights that explicitly accommodate national security in their limitation clauses are the right to respect for privacy and family life (Article 8), the right to freedom of expression (Article 10), the right to freedom of assembly and association (Article 11), the right to freedom of movement (Article 2 of Protocol No. 4) and the procedural safeguards relating to the expulsion of aliens (Article 1 of Protocol No. 7). The case law pertaining to these rights displays a clear connection between the rights and various national security concerns. Although the limited rights do not accommodate national security in 'clawback' clauses, their restrictions may be introduced on the grounds of national security. Articles 5 and 6 contain several aspects of rights, with my focus being on those closely related to national security cases. In the case of Article 5, the following aspects of the right to liberty and security can be reconciled with national security concerns through the requirement for detention to be based on reasonable suspicion, for reasons for the arrest to be given promptly, for the right to a trial within a reasonable time or to release pending trial, and the right to *habeas corpus*. Under Article 6, national security considerations may justify excluding the press and public from all or part of the trial. Concerns about the adversarial nature of the trial, equality of arms and the right to access to a court may arise in cases involving national security cases.

The right to life (Article 2) and prohibition of torture and ill-treatment (Article 3) appear to be less 'absolute' in some cases involving national security considerations. Case law under Article 3 in this field pertains to three main aspects: conditions of detention, interrogation methods and extradition. While with regard to cases involving the latter two aspects, the Court did not evaluate the government's measures against the need to protect national security, it did so when reviewing some cases concerning conditions of detention. The second

paragraph of Article 2 accommodates certain occasions that could result in the deprivation of life. In the context of counterterrorism operations, the Court has developed a set of positive obligations applying to states before a terrorist attack and during and after the counterterrorism operations.

We have also seen regional and temporal elements in government interference. Whether a government's interference is legitimate does not necessarily depend on which region is targeted, or on how large it is. In some cases, it was nevertheless critical to delimit the area that the government's measure applied to because the areal extent of the measure was an element to be considered by the Court when deciding whether the measure was necessary. In other cases, the places involved could be closely connected to national security from a military or political perspective on the grounds, for example, of their function, strategic importance or symbolic meaning. In terms of the temporal factor, the Court often takes account of it when assessing the nature and proportionality of the contested measure. In case law, there are two circumstances in which a contested measure may no longer be deemed legitimate: (1) if the situation changes radically and the measure is no longer proportionate; or (2) as time goes by, either the necessity of the interference gradually decreases or the adverse effect increases. On some occasions, the Court also introduced a particular length of time as the benchmark for its decision.

3.3 PATHWAYS OF THE IMPACT

Legislation, policies and case law are the instruments used by national authorities to resolve their national security concerns. As Friedrich Hayek states, the rule of law demands that 'government in its all actions is bound by rules fixed and announced beforehand'.[408] The legislation on national security matters not only provides the legal basis for the government to wield power, but also to regulate how power is used. National policies on security are usually made by the government to achieve certain goals and include the approach the government plans to adopt. The contents of these policies range from abstract to specific, depending on the subject matter.[409] Review by the judiciary is there to ensure that the government implements the law within the latter's meaning and, if not, to correct it on a case-by-case basis. The judiciary may also check whether the legislation complies with the constitution.

[408] Friedrich Hayek, *The Road to Serfdom*, G. Routledge & Sons, 1946, p. 54.
[409] See Michael Howlett and Ben Cashore, 'Conceptualizing Public Policy', in Isabelle Engeli and Christine Rothmayr Allison (eds.), *Comparative Policy Studies: Conceptual and Methodological Challenges*, Palgrave Macmillan, 2014, 17-33, pp. 20-21.

3.3.1 The Law and its Quality

The principle of the rule of law requires not only that the law exists and has been announced beforehand, but also implies requirements as to its quality. Many famous jurists have given their views on the quality of the law, such as that the law should be general, public, clear and stable, as argued by Lon Fuller.[410] In its case law, the Court develops standards for the quality of law. In this section I will explore these standards in connection with features of national security law.

3.3.1.1 Accessibility and foreseeability

Accessibility

A secret law is not law. Public promulgation has been commonly regarded as a necessary element of the law.[411] Individuals must have access to the legal rules that bind them. In practice, the Court usually finds this element of quality to be satisfied as long as the respondent government provides the legal basis for the contested measures in domestic law. It is extremely rare to see a democratic government take action without any legal authority. To put it in another way, the government usually are able to find some legal provisions to invoke.

Many laws can be categorised as national security laws. There may be a comprehensive law, dealing with basic legal issues such as the definition, aim, mechanisms and institutions of national security. More commonly, however, national security issues are regulated by various sections of the law. Human rights are regularly interfered with by two kinds of national security laws: first, by laws that regulate and restrict people's conduct in order to protect national security, such as criminal law, and, second, by laws that provide powers to governing authorities to protect national security, such as national intelligence laws. The national security law is usually the *lex specialis*.

Foreseeability

Deriving from the principle of the rule of law, this qualitative requirement specifies that the provisions should be precise to the extent that a person is able to foresee the consequences of his or her conduct and to regulate that conduct. In terms, for instance, of a criminal offence, a person should be able to perceive

[410] Theo J. Angelis and Jonathan H. Harrison, 'History and Importance of the Rule of Law', *World Justice Project*, 2003, p. 20, retrieved 10 February 2018, from https://worldjusticeproject.org/our-work/publications/working-papers/history-and-importance-rule-law.

[411] See Elizabeth Goitein, *The New Era of Secret Law*, Brennan Center for Justice, 2016, p. 16, retrieved 13 August 2021, from https://www.brennancenter.org/our-work/research-reports/new-era-secret-law.

'what acts and omissions will make him or her criminally liable'[412] and, in that sense, what adverse consequences would flow from these actions. The person may obtain this understanding from the provisions of the criminal code, as well as from judicial interpretations and laws at lower levels in the legal hierarchy.

The wording of the law inevitably contains some vagueness because the law has to be applied in various concrete circumstances and to keep pace with changes. To evaluate the foreseeability of the law, the Court will take into account laws at low levels of the legal hierarchy. The respondent government may invoke ordinances,[413] ministerial decrees[414] and laws at lower levels in the legal hierarchy to elaborate the meaning of the legal basis in question. Judicial interpretations may also contribute to the clarification of certain enactments. The 'rigorous and consistent' explanation or application of laws can make up for laws' vagueness.[415] When it comes to a novel legal issue where no domestic judicial review has taken place, the Court can choose to assume that the provision in question is foreseeable.[416]

In some cases, the Court evaluates the foreseeability of the law in question from the perspective of the person concerned, rather than as an 'objective observer'. In *Karapetyan and Others v. Armenia*, the Diplomatic Service Act of Armenia prohibited diplomats from using their official capacity and work facilities to 'carry out other political or religious activity'.[417] Considering that the applicants had been professional diplomats for years, the Court assumed that they should have been aware, at least to a certain degree, of whether their conduct would fall under the scope of 'other political activity'.[418] It is also interesting to note here that a catch-all provision, regardless of its vagueness, does not necessarily make the law unpredictable in the Court's eyes. In *Asan v. Turkey* (*Asan c. Turquie*; judgment available only in French), the Court held that the applicant, the author of an academic research book, was not able to predict that the contents of his book would constitute propaganda against the territorial integrity of the state, according to Article 28 of the Constitution and Additional Article 1(2) to Press Law No. 5680.[419]

---

[412] See, for instance, *Novikova and Others v. Russia*, nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, § 125, ECHR 2016; *Protopapa v. Turkey*, no. 16084/90, § 97, ECHR 2009.
[413] See, for instance, *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116.
[414] See, for instance, *Pasko v. Russia*, no. 69519/01, § 73, ECHR 2009.
[415] See *Dmitriyevskiy v. Russia*, no. 42168/06, § 79, ECHR 2017.
[416] See, for instance, *Dmitriyevskiy v. Russia*, no. 42168/06, § 83, ECHR 2017.
[417] *Karapetyan and Others v. Armenia*, no. 59001/08, § 41, ECHR 2016.
[418] Section 44, subsection 1, point (c) of Armenia's Diplomatic Service Act prescribed that a diplomat has no right to use his official capacity and work facilities for the benefit of parties and non-governmental organisations (including religious ones), or in order to carry out other political or religious activities.
[419] *Asan c. Turquie*, no. 28582/02, §§ 17, 19 & 37, CEDH 2008.

3.3.1.2 Safeguards against abuse

Generally speaking, one category of national security laws aims mainly to regulate and restrict people's conduct in order to protect national security, while the other category serves to provide power to governing authorities. For practical reasons, laws under the latter category have to grant discretion to governing authorities. In order to avoid abuse of power, these laws provide both substantive and procedural arrangements.

Substantive safeguards are required by the principle of foreseeability of law,[420] meaning that the law has to clarify the discretion available to the government so that the latter cannot apply it in an arbitrary way. In case law of the Court, the laws concerned are required to indicate the scope of discretion and the manner in which it is to be exercised.[421] This is of particular importance when power is exercised secretly by a government, as in the case of intelligence measures. For instance, intelligence interception regimes are consequently required to incorporate at least the following minimum safeguards:[422]

- a description of the nature of offences which may give rise to an interception order;
- the definition of the categories of people liable to have their communications intercepted;
- a limit on the duration of the measures;
- the procedure to be followed for examining, using, and storing the data obtained;
- the precautions to be taken when communicating the data to other parties; and,
- the circumstances in which recordings may or must be erased or destroyed.

The procedural safeguards refer to requirements concerning decision-making supervision and judicial remedies. In general, procedural arrangements should be in place to prevent a decision from being made arbitrarily, and judicial remedies available to the persons concerned. In national security case law, procedural arrangements play an especially important role wherever government authorities exercise power in secret. In, for instance, secret surveillance cases, the Court reviews the external supervision of the decision-

[420] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018, p. 313.
[421] See, for instance, *Roman Zakharov v. Russia*, no. 47143/06, § 230, ECHR 2015; *Malone v. the United Kingdom,* 2 August 1984, § 68, Series A no. 82; *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116; *Huvig v. France*, 24 April 1990, § 29, Series A no. 176-B; *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 94, ECHR 2006-XI.
[422] See, for instance, *Centrum För Rättvisa v. Sweden*, no. 35252/08, § 103, ECHR 2018.

making process and the judicial remedies available to the person concerned, and then decides whether the law provides sufficient safeguards against abuse of power.[423]

Secret measures have great potential to be abused by governments as the secret measure will be effective only if the person concerned is not aware as to whether and when government authorities impose it. Therefore, substantive and procedural safeguards are essential for keeping the authorities in check.

3.3.2 Policies

National security policies provide a framework that indicates a state's approach to protecting security. These policies are usually laid down in official documents such as plans, strategies, concepts and white papers. The framework may consist of a leading comprehensive policy, subordinated by policies on specific subject matters. In 2018, for instance, the Dutch government issued the 'Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022', which included adjacent policies on national defence, economic security, intelligence and security services, and cyber security.[424] A comprehensive national security policy generally consists of three main aspects: (a) defining the state's role in geo-politics or the world, and its relationship with allies; (b) identifying its core interests and most urgent threats, and; (c) integrating the contributions of national security actors.[425]

These policies set out a state's specific understanding and evaluation of major threats to its security. In its counterterrorism strategy (2016-2020), for instance, the Dutch government defined 'extremism' and 'terrorism', analysed their roots in the context of the state and devised a strategic framework to tackle these threats.[426] This divided the Dutch strategy into five categories:

---

[423] See *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, §§ 375-383, ECHR 2018.

[424] See Ministry of Foreign Affairs, "Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022", *Ministry of Foreign Affairs*, 2019, p. 7, retrieved 13 March 2018, from https://www.government.nl/binaries/government/documents/reports/2018/05/14/integrated-international-security-strategy-2018-2022/NL_International_Integrated_Security_Strategy_2018_2022.pdf.

[425] See Geneva Centre for the Democratic Control of Armed Forces (DCAF), 'DCAF Background Paper on National Security Policy', *DCAF*, 2005, pp. 1-2, retrieved 16 March 2018, from https://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/DCAF-Background-Paper-on-National-Security-Policy.

[426] See National Coordinator for Security and Counterterrorism (NCTV), 'National Counterterrorism Strategy for 2016-2020', *NCTV*, 2016, retrieved 14 March 2018, from https://english.nctv.nl/binaries/LR_100495_rapportage_EN_V3_tcm32-251878.pdf.

procure, prevent, protect, prepare and prosecute.[427] More importantly, the strategy contributes to clarifying the causal relationship between means and ends by offering rational explanations on how the government's interventions are related to the purpose of counterterrorism, while also indicating that the focus is on preventive measures, and implying that interventions will be at the earliest possible stage.

National security policies may also help to convey a government's understanding of emerging national security threats, such as when the Dutch government introduced its cyber security policies in 'Cyber Security Assessment Netherlands 2018'. This document is devoted specifically to 'threats, interests and resilience in the field of cyber security in relation to national security'.[428] Among other things, it indicates the features of digital threats, and makes detailed assessments of the vital national interests under threat, with the primary concern here being to establish the link between cyber security and national security in the context of the Netherlands.

Although policy documents relating to national security may not adequately address human rights concerns, they clarify the threats to the security of the state in light of its particular circumstances. By publishing their understanding of national security issues, governments can expect some consensus on when interfering with human rights is justified for the protection of national security.

3.3.3 Judiciary

The judiciary is traditionally the last resort with regard to the protecting of human rights as it provides a review on the lawfulness and reasonableness of the balance between national security and human rights. In addition, several human rights are focused on judicial proceedings, with an aim to obtain either procedural or substantive justice. On many occasions, secret evidence is used in judicial proceedings, thus raising concerns over procedural and substantive justice.

Secret evidence is usually evidence provided by the government but not disclosed to suspects or defendants.[429] In ECtHR case law, it is often used in

[427] See National Coordinator for Security and Counterterrorism (NCTV), 'National Counterterrorism Strategy for 2016-2020', *NCTV*, 2016, pp. 4 & 9-20, retrieved 14 March 2018, from https://english.nctv.nl/binaries/LR_100495_rapportage_EN_V3_tcm32-251878.pdf.
[428] National Coordinator for Security and Counterterrorism (NCTV), 'Cyber Security Assessment Netherlands 2018', *NCTV*, 2018, retrieved 14 March 2018, from https://www.ncsc.nl/english/current-topics/Cyber+Security+Assessment+Netherlands/cyber-security-assessment-netherlands-2018.html.
[429] See Daniel Alati, Ronnie Dennis, Ryan Goss, Alecia Johns, Esther Kuforiji, Paul Troop, and Keiran Hardy, 'The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey', *Oxford Pro Bono Publico*, 2011, p. 1, retrieved 16 March 2018, from http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2011/10/2011-Secret-Evidence.pdf.

criminal prosecutions and proceedings regarding entry, stay, deportation and exclusion of aliens and resident aliens. The Court admits that the use of secret evidence may be inevitable in some national security cases.[430] The question then becomes whether the secrecy is employed excessively or unjustifiably.

The use of secret evidence may raise concerns over the right to a fair trial by not satisfying the principle of equality of arms.[431] The general principle applied by the Court is that the use of secret evidence 'must be sufficiently counterbalanced by the procedures followed by the judicial authorities'.[432] An example of such procedures is the UK's 'special advocate procedure', whereby a special advocate may challenge the legitimacy of confidential materials on behalf of the accused. If the materials are found to have been classified unnecessarily, special advocates can apply for additional disclosure. This mechanism prevents sensitive information from being disclosed to the public. In *A. and Others v. the United Kingdom*, the Court held that the special advocate procedure of the Special Immigration Appeals Commission provided a sufficient counterbalance.[433]

The domestic court's judgment should also not be made 'solely or to a decisive extent' on the basis of secret evidence.[434] In other words, secret evidence should not play a determinative role in the conviction. Otherwise, it may extinguish the very essence of an applicant's defence rights. Under the rule of law, governing authorities cannot be allowed to enjoy unfettered power whenever confidentiality is referred to.[435]

3.3.4 Summary

We have seen that by undertaking their responsibility to protect national security, state authorities may interfere with human rights, directly or indirectly, through legislation, policies and judicial proceedings. In the case law, the ECtHR considers the domestic legislation related to national security and, on some occasions, judicial proceedings. In terms of legislation, I have

[430] See Natalia Brady, 'Evidence, Special Investigative Techniques and the Right to a Fair Hearing', *ERA Forum 15*, 2014, 37–49, p. 46.
[431] See Daniel Alati, Ronnie Dennis, Ryan Goss, Alecia Johns, Esther Kuforiji, Paul Troop, and Keiran Hardy, 'The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey', *Oxford Pro Bono Publico*, 2011, p. 4, retrieved 16 March 2018, from http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2011/10/2011-Secret-Evidence.pdf.
[432] *Jasper v. United Kingdom*, no. 27052/95, § 52, 16 February 2000.
[433] See *A. and Others v. the United Kingdom*, no. 3455/05, § 219, ECHR 2009.
[434] *Doorson v. the Netherlands*, 26 March 1996, § 76, Reports of Judgments and Decisions 1996-II.
[435] See Didier Bigo, Sergio Carrera, Nicholas Hernanz, and Amandine Scherrer, 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', *European Parliament*, 2014, p. 51, retrieved 23 January 2020, from https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU%282014%2950 9991_EN.pdf.

categorised national security laws into two groups that often involve questions of human rights: first, laws that regulate people's conduct in order to protect national security and, second, laws that provide powers to governing authorities to protect national security. The ECtHR requires the domestic laws concerned to be accessible and foreseeable. While the government may have little trouble finding legal provisions in domestic laws to meet the requirement of accessibility, it is the foreseeability of these provisions that often attracts the ECtHR's attention. Especially when it comes to laws providing power to authorities, the foreseeability can be undermined by discretionary arrangements. In this regard, the ECtHR requires some substantive and procedural safeguards to be in place to prevent abuse of power.

Judicial proceedings are subject to several articles in the Convention. I have found that the use of secret evidence in domestic judicial proceedings directly links a government's national security needs to concerns by the ECtHR about human rights, including the right to a fair trial and the principle of equality of arms. In its case law, the ECtHR contends that the use of secret evidence may be inevitable in some cases, but has to be sufficiently counterbalanced by the procedures followed by the judicial authorities. The national security policies of a government, which can convey its understanding of national security threats and indicate its domestic approach to protecting security in the upcoming period, are not normally scrutinised by the ECtHR.

3.4 Extent of the Impact

As discussed in Chapter 2, its subsidiary role in implementing the Convention means that the Court applies the 'margin of appreciation' doctrine to allow for its possible ignorance of local circumstances. However, the Court undertakes the duty to monitor implementation of the Convention. In other words, a government's interference with human rights cannot be justified simply by having a legal basis in domestic laws. Additionally, the government must take action insofar as necessary.

Proportionality is assessed from two perspectives: the interests at stake in a conflict, and the rationale for impugned measures in relation to the aim sought. The balance that the Court seeks to establish between different interests usually concerns public interests on the one hand and individual freedoms on the other. The assessment of the second aspect focuses on the relationship between means and ends. In each circumstance, national security is regarded as a relatively paramount public interest. In this section, I will explore how the Court weighs national security against individual freedoms, and how it examines the justification in case law.

3.4.1 Balancing Public Interests and Individual Interests

On the one hand, the government has an interest to eliminate threats and to improve the operational effectiveness of security agencies. On the other hand, it also has to safeguard human rights.[436] Disputes can arise when a government's national security actions come into conflict with the state's human rights obligations. In general, the Court has drawn a bottom line, stating that a government's interference must not damage the very essence of the rights in question, no matter how important public interests are.[437] However, the Court has not clarified how it weighs one sort of interest against another. In this section, I will first provide an overview of the interests at stake in the case law on representative subject matters and then conclude how the Court manages to balance conflicting interests.

3.4.1.1 Political speech and promotion of violence

Speech that amounts to the inciting of violence is a specific form of 'hate speech',[438] of which various forms have been identified,[439] including speech conveying racial hatred, xenophobia and anti-Semitism, or speech that undermines the equality and non-discrimination of members of society.[440] The Court usually deems violence-inciting speech to be related to national security, with the public interests at stake here involving curbing separatist tendencies and terrorism, maintaining constitutional order and ensuring the survival of the democratic regime.[441]

In its case law, the Court does not devote itself to finding a balance between national security and freedom of speech. Instead, its primary concern is to decide whether the contested expressions promote violence as,[442] by inciting violence, the expressions hold little value to be protected in the eyes of the Court because they go far beyond what is required of a 'democratic society' in

[436] See *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 144, 29 November 2007.
[437] See Fan Jizeng, 'Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights', *The Journal of Human Rights 15(1)*, 2016, 46-87, p. 73.
[438] See Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech', *International & Comparative Law Quarterly 63(2)*, 2014, 491-503, p. 493.
[439] A definition of 'hate speech' was given by Committee of Ministers. It was provided that hate speech includes all forms of expressions which not only incite but also promote, justify or spread 'racial hatred, xenophobia, anti-Semitism and other forms of hatred based on intolerance'. See Council of Europe, Committee of Ministers, Recommendation No. R(97)20 on "Hate Speech", Rec(97)20 30/10/1997(1997).
[440] See Antonis Pesinis, 'The Regulation of "Hate Speech": The Meaning of "Incitement" under the Case-law of the European Court of Human Rights and the Jurisdictions of the European Union, the United Kingdom and Greece', *LL.M Thesis of Human Rights of Central European University*, 2015, p. 7.
[441] See *Stomakhin v. Russia*, no. 52273/07, § 96, ECHR 2018.
[442] For instance, there is a series of cases concerning Turkey, including *Zana v. Turkey*, 25 November 1997, Reports of Judgments and Decisions 1997-VII; *Sürek v. Turkey* (no. 1), no. 26682/95, ECHR 1999-IV; and *Gül and Others v. Turkey*, no. 4870/02, ECHR 2010.

fostering pluralism, tolerance and broadmindedness towards the unfavourable information.[443] In its assessment, the Court normally takes a consequentialist approach by evaluating the potential or actual violence the speech incites,[444] based on the content, context and intention.[445]

3.4.1.2 Political party

Freedom of association is regarded as a particular form of exercising the freedom of speech.[446] This is also reflected in practice by the Court, which applies the same decision-making pattern to cases under freedom of speech and to those under freedom of association. When it comes to national security issues, the Court's case law relates to bans on political parties that oppose the current governing authorities and that are accused of attempting to overthrow the regime, or of wanting to separate part of the territory and people from the country.

In the Court's opinion, the interests to be weighed on one side are an individual's freedom to form or join a lawful entity in order to collectively protect mutual interests.[447] The entity is then entitled to establish a political programme and agenda in order to bring some changes to a society without recourse to violence. In this regard, a political party plays an essential role in ensuring pluralism, which is one of the principal characteristics of democracy and promotes its proper functioning.[448] On the other side, national security concerns often refer specifically to confronting separatism and maintaining territorial integrity. Various governments have brought cases to the Court in which they accuse applicant political parties of encouraging minorities to be conscious of their differences from the rest of the population, thereby posing a threat to the unity of the nation.[449]

Freedom of association generally outweighs the interest of protecting national security because this freedom entails features that are essential to a

[443] See *Zana v. Turkey*, 25 November 1997, § 51, Reports 1997-VII.
[444] See Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech', *International & Comparative Law Quarterly 63(2)*, 2014, 491-503, p. 492.
[445] See Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech', *International & Comparative Law Quarterly 63(2)*, 2014, 491-503, pp. 497-498.
[446] See Dragan Golubovic, 'Freedom of Association in the Case Law of the European Court of Human Rights', *The International Journal of Human Rights 17(7-8),* 2013, 758-771, p. 763.
[447] See *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, Reports of Judgments and Decisions 1998-IV. See also *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 89, ECHR 2001-IX.
[448] See *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 43, Reports of Judgments and Decisions 1998-I.
[449] For instance, *Union Nationale Turque et Kungyun c. Bulgarie*, no. 4776/08, § 45, CEDH 2017; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 56, Reports of Judgments and Decisions 1998-I; *Sidiropoulos and Others v. Greece*, 10 July 1998, § 39, Reports of Judgments and Decisions 1998-IV.

democratic society.[450] When, however, the freedom is exercised in a manner that works against democracy, the Court will find in favour of the government's interference.

3.4.1.3 Disclosing classified information

The Court has reviewed the issue of state secrets being circulated in print or other media in several cases, including *Gîrleanu v. Romania*,[451] *Vereniging Weekblad Bluf! v. the Netherlands*,[452] *The Sunday Times v. the United Kingdom*[453] and *Observer and Guardian v. the United Kingdom*.[454] A decisive factor in the Court's reasoning has been whether the confidential information in question has already been made public, with the Court then providing its assessment on the interests at stake.

In the case law of the Court, governments generally classify information as state secrets in order to protect sensitive information of the military, or to ensure the operational effectiveness of intelligence services. When defining individual interests, the Court attaches more importance to the interest of society as a whole than to the freedom of expression of the individual concerned.[455] In the Court's opinion, the public has an interest in receiving information on a government's abuse of power.[456] As a result, the interests to be reconciled are national security on one hand, and the interests of individuals, as well as the public, on the other hand. Therefore, individual interests combined with the characteristic of public interest frequently prevail over the government's interests in protecting official secrets out of concern for national security.

3.4.1.4 Homosexual personnel in the military

As discussed above in Section 3.2, the public interests identified by the Court in the case of homosexuality in the military are the interests in maintaining

[450] For example, before it takes any actions, the political party in question should enjoy 'benefit of doubt' to a certain degree as to its political programme, assuming it does not attempt to achieve other objectives under cover of the one it proclaims. See Dragan Golubovic, 'Freedom of Association in the Case Law of the European Court of Human Rights', *The International Journal of Human Rights 17(7-8),* 2013, 758-771, p. 764. See *Zhechev v. Bulgaria*, no. 57045/00, §§ 49-51 & 59, 21 June 2007. See also *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 58, Reports of Judgments and Decisions 1998-I; *Sidiropoulos and Others v. Greece*, 10 July 1998, § 46, Reports of Judgments and Decisions 1998-IV.

[451] *Gîrleanu v. Romania,* no. 50376/09, ECHR 2018.

[452] *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, Series A no. 306-A.

[453] *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, Series A no. 30.

[454] *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216.

[455] See *Stoll v. Switzerland*, no. 69698/01, §§ 101-124, Reports of Judgments and Decisions 2007-V.

[456] See *Sürek v. Turkey* (no. 2) [GC], no. 24122/94, §§ 35 & 39, 8 July 1999; *Görmüş et autres c. Turquie*, no. 49085/07, § 48, CEDH 2016; and *Stoll v. Switzerland* [GC], no. 69698/01, § 110, Reports of Judgments and Decisions 2007-V.

'fighting power' and 'operational effectiveness' of the armed forces,[457] which are important for protecting national security. When it comes, however, to a person's sexual orientation and sexual life, the individual interests outweigh the interests of national security in the Court's eyes as sexual orientation is stated to be 'a most intimate part of an individual's private life,'[458] whereby 'pluralism, tolerance, and broadmindedness' should support individuals' freedom to choose how they live their lives.[459] In a landmark case, the ECtHR found that the discharge of military personnel from the Royal Navy on the basis that they were gay was a breach of their right to a private life.[460]

3.4.1.5 Secret surveillance

Surveillance programmes, and especially the trend of applying intelligence measures on a larger scale, have invoked both academic and social concerns. Nevertheless, the Court's case law indicates that it is not in a hurry to lead revolutionary changes on this topic, despite increasing public concern. Firstly, the Court has not found secret surveillance to extinguish the very essence of an individual's privacy and confidentiality of correspondence. Secondly, it has identified public interests as including the countering of unknown threats to national security in advance. Its decades of case law demonstrate that the public interests of a state's security are often seen as outweighing the interests of individual's privacy.

The Court's case law can be divided into three specific categories regarding secret surveillance, according to the objects being intercepted:

- Intercepting the contents of communication;
- Intercepting communication data;
- Intelligence sharing.

I will now examine each of these categories in further detail.

Intercepting the contents of communication

It is no surprise that technology is being used to pry into citizens' private lives. There are techniques to open envelopes without any trace, equipment to wiretap phone calls and, more recently, technologies able to perform mass surveillance. When it comes to analysing the interests at stake in these interceptions, the Strasbourg authorities have not found there to be an essential

[457] *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 67, 27 September 1999.
[458] *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 83, 27 September 1999.
[459] *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria,* 19 December 1994, § 36, Series A no. 302.
[460] *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI.

difference between targeted and bulk interceptions. Most cases recently reviewed by the Court have related to mass surveillance, such as *Big Brother Watch and Others v. the United Kingdom,*[461] *Liberty and Others v. the United Kingdom*[462] and *Weber and Saravia v. Germany.*[463] The targeted interception cases date back to as early as 1978 and the *Klass and Others v. Germany* case.[464] The basic judgment on how the Court weighs public and individual interests has not radically changed since then.

Surveillance measures that register the contents of communications, both targeted and bulk, interfere with the interests protected in Article 8 of the Convention, but do not necessarily damage the very essence of such interests. Even though interception invades the confidentiality of communications, thereby impacting on people's private lives, the Court reviews these cases in the context of a democratic state rather than a police state. As a democratic state is usually required to set a clear duration and scope for any interception, correspondence and private life are not completely deterred. On the government's side, the public interest at stake here is the need to try to foresee unknown threats to national security.[465] The difficulties the government faces are amplified by the fact that advanced technologies mean that national security threats have become highly sophisticated and difficult to detect.[466] The Court accepts that, in the context of terrorism, espionage or other subversive threats to the security of a state, it is of significant importance to take pre-emptive measures to prevent such incidents from happening.

Intercepting communication data

With the development of the concept of 'big data', the sensitivity of metadata has increased fundamentally. However, the Court has continued to adopt a relatively conservative position. As early as 1984, in *Malone v. the United Kingdom*,[467] the Court gave its views on intercepting data from phone calls – the numbers dialled on the telephone, and the time and duration of each call, are integral elements in the communications and using them by government may interfere with Article 8. Its basic assessment of metadata has not fundamentally changed since then. The Court differentiates metadata from the contents of

[461] *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, ECHR 2018.
[462] *Liberty and Others v. the United Kingdom*, no. 58243/00, 1 July 2008.
[463] *Weber and Saravia v. Germany*, no. 54934/00, ECHR 2006-XI.
[464] *Klass and Others v. Germany*, 6 September 1978, Series A no. 28.
[465] *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, §314, ECHR 2018.
[466] *Klass and Others v. Germany*, 6 September 1978, § 48, Series A no. 28.
[467] *Malone v. the United Kingdom,* 2 August 1984, Series A no. 82.

communications. Metadata must be accessible to communications service providers, so that services can be delivered,[468] meaning that the real question is not whether or not metadata is gathered, but who has access to it and how is it being used. It is the governing authorities' acquisition of metadata from communications service providers that constitutes the interference. The public interests to be weighed are similar to those weighed in the context of intercepting the contents of communications.

More recently, the Court has addressed one particular type of metadata – real-time geolocation tracking. According to the Court, governing authorities' acquisition of this kind of data represents a rather severe interference with an individual's private life. Nevertheless, the public and individual interests to be balanced here are still the same.[469]

Intelligence sharing

In the context of surveillance, intelligence sharing between countries is a normal practice. A state may ask a foreign intelligence agency to intercept communications, or to share information it stores. Since the interception itself is not conducted by the requesting state, it is the receiving, storing, examining and use of the intelligence in question that interfere with the interests protected in Article 8.[470] As such, the Court holds that intelligence sharing is not fundamentally different from the other two categories of surveillance mentioned above, both of which involve the same kind of individual and public interests. It also considers that intelligence sharing does not necessarily damage the very essence of the rights to privacy.

Regarding public interests, apart from the considerations mentioned in the previous two categories, information sharing plays an essential role in efforts to combat global terrorism networks. This interest has to be balanced by safeguards to prevent governing authorities from circumventing domestic surveillance procedures through intelligence-sharing practices.

3.4.1.6 Personal information stored in secret registers

Out of concern for national security, intelligence services compile information on certain individuals in registers that are not accessible to the public. In the case law of the Court, the personal files in registers included not only

[468] See *Malone v. the United Kingdom,* 2 August 1984, § 84, Series A no. 82. *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 42, Reports of Judgments and Decisions 2001-IX.
[469] See *Uzun v. Germany*, no. 35623/05, § 78, ECHR 2010.
[470] *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, § 421, ECHR 2018.

information on applicants' private lives, but also public information 'systematically collected by the authorities'.[471]

With regard to individual interests, individuals can have a reasonable expectation that their activities will remain private, even in public places.[472] On some occasions, despite being aware that their conduct outside private premises could be observed by others, they are still entitled to expect that behaviour in public will not be systematically or permanently recorded by government authorities.[473] Ensuring this sort of expectation contributes to reducing the chilling effect that anything a person does might be used against him or herself in the future.

The Court seeks to reconcile the interest of protecting national security with the seriousness of the interference with privacy.[474] Compiling personal information does not necessarily frustrate the essence of the right to privacy. In general, the Court has found that public interests should prevail out of concerns for national security. To be specific, offences such as terrorism, espionage and incitement of violence by persons may attract the attention of intelligence services, whose main task is to protect a state's security and who therefore may compile such information for future reference.[475] To protect the working methods and patterns of the intelligence agencies from being exposed, the government may also restrict an individual's right to access his or her personal information compiled by intelligence services.[476]

3.4.1.7 Secret evidence for criminal proceedings

When dealing with national security offences, a state may sometimes need sensitive information in order to apprehend and prosecute suspects. The use of secret evidence means that the person concerned, and his or her lawyer, will not be allowed to check the evidence against them, let alone to challenge it accordingly. Regarding the apprehension of terrorist suspects, the public interests involve protecting the population from the threats of terrorism.[477] In case law, even while admitting to the need to use secret evidence in some cases,

[471] *Segerstedt-Wiberg v. Sweden*, no. 62332/00, § 72, ECHR 2006-VII.
[472] See Lilian Edwards and Lachlan Urquhart, 'Privacy in Public Spaces: What Expectations of Privacy do We Have in Social Media Intelligence?', *International Journal of Law and Information Technology 24(3)*, 2016, 279-310, pp. 299-300.
[473] See *Benedik v. Slovenia*, no. 62357/14, § 101, ECHR 2018.
[474] *Leander v. Sweden*, 26 March 1987, § 59, Series A no. 116.
[475] *Segerstedt-Wiberg v. Sweden*, no. 62332/00, § 72, ECHR 2006-VII.
[476] See *Segerstedt-Wiberg v. Sweden*, no. 62332/00, § 102, ECHR 2006-VII. See also *Leander v. Sweden*, 26 March 1987, § 66, Series A no. 116; *Klass and Others v. Germany*, 6 September 1978, § 58, Series A no. 28.
[477] *Fox, Campbell and Hartley v. the United Kingdom*, § 32, 30 August 1990, Series A no. 182, p. 12.

the Court has required the government to provide relevant information to prove there were genuine grounds for the suspicion.[478]

The use of secret evidence may raise questions concerning the due process of the law, with the equality of arms and the right to adversarial proceedings in particular being essential elements for a fair trial.[479] However, those rights may be counterbalanced by competing interests, such as preserving the anonymity of information sources and the secrecy of police investigation methods.[480] The Court finds no violation of the right to a fair trial if procedural arrangements are in place to prevent the government from abusing the non-disclosure of materials.

3.4.1.8 Balancing national security and human rights

Speaking of 'balancing' brings a picture of scales to mind; to some of us, these are the scales held by *Justitia* (Lady Justice). Within the framework of this thesis, human rights are on one side of the scales, while on the other side is national security. Lady Justice then provides us with a precise and objective assessment of the objects she holds, ensuring a balance between the two. However, as Stavros Tsakyrakis points out, the real story of creating such a balance in the adjudication process is hardly that simple or objective.[481]

Comparing two objects requires a common metric. The Court attempts to use 'interests' as that common metric in its assessment. Cases of national security often involve two kinds of interests: the first group relates to preventing threats from occurring or tensions from exacerbating, and the second to ensuring the operational effectiveness or efficiency of law enforcement agencies. Regarding human rights, the interests relate to the entitlement an individual may have in a specific case. For instance, the right to privacy may include an individual's demand that his or her correspondence should be secret, or the interests of choosing the way of life the individual wants to live. The right to a fair trial includes the interests of having the opportunity to challenge evidence against oneself.

---

[478] See *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 34, Series A no. 182, p. 13; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X.

[479] Although these are the guarantees for a fair trial in criminal cases as to Article 6, the *habeas corpus* provided by Article 5(4) requires same guarantees, as it is also supposed to be of judicial characters. See Daniel Alati, Ronnie Dennis, Ryan Goss, Alecia Johns, Esther Kuforiji, Paul Troop, and Keiran Hardy, 'The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey', *Oxford Pro Bono Publico*, 2011, pp. 4 & 17, retrieved 16 March 2018, from http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2011/10/2011-Secret-Evidence.pdf. See also *Jasper v. the United Kingdom*, no. 27052/95, § 50, 16 February 2000.

[480] *Jasper v. the United Kingdom*, no. 27052/95, § 52, 16 February 2000.

[481] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *International Journal of Constitutional Law 7(3)*, 2009, 468-493, pp. 469-472.

However, the interests of national security can hardly be judged by the same standards as the interests of human rights. Neither of these interests can be measured quantitatively or, as Tsakyrakis puts it, they are not 'amenable to any meaningful form of quantification'.[482] That is to say, the proportionality-focused test is not viable in the quantitatively comparable sense. When measuring the interest of protecting personal communications from interception versus the interest of detecting a terrorist plot, for example, we cannot be so sure which one should prevail. The specific nature of the public interest in protecting national security means we cannot reach a conclusion simply by aggregating each individual's interest; in other words, the Court cannot weigh the two 'interests' by simply measuring the number of people whose phone calls are intercepted against the number of people whose life would be saved thanks to the information discovered by the surveillance. Instead, the public interest should be those interests that, objectively speaking, have overriding benefits for people, or those interests that all members of society have in common.[483] In addition, in the example above, while the interests of individual privacy will surely have been compromised, the interests of security will not automatically be guaranteed. This is mainly due to the strong tendency towards proactive strategies when it comes to protecting national security. The uncertainty of the effectiveness of pre-emptive measures taken by the government contributes to the difficulties of quantifying their significance and effect in practice.

How, then, have the Strasbourg institutions proceeded with their 'balancing' analysis when adjudicating on human rights? Some scholars argue that a more convincing balance can be reached through another approach. Jeremy Waldron, for example, states that weighing or balancing 'is not necessarily Benthamite quantification but any form of reasoning or argumentation about values in question'.[484] To be specific, balancing underlies the Court's reasoning when assigning priority to one party over the other.[485] The question then is what value does the Court anchor its reasoning to? Democracy is a shared value in Europe and a governance system that is broadly accepted as contributing to the

[482] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *International Journal of Constitutional Law 7(3)*, 2009, 468-493, p. 472.
[483] See the three general categories about the theories of the public interests – preponderance theories, unitary theories, and common interest theories, concluded by Virginia Held, in Virginia Held, *The Public Interest and Individual Interests*, Basic Books, 1970.
[484] Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer', *Hastings Law Journal 45(4)*, 1994, 813-824, p. 817.
[485] See Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *International Journal of Constitutional Law 7(3)*, 2009, 468-493, p. 473.

maintenance of fundamental freedoms.[486] The governance tradition in many European countries is that uncompromising importance is attached to democracy and a democratic society.[487] In a legal sense, interferences with human rights are required to be necessary 'in a democratic society', as stipulated in Articles 8, 10 and 11 and in Article 2 of Protocol No. 4.[488]

Accommodating essential features of a democratic society is a rather strong consideration for the Court to prioritise human rights protection over national security protection. In its case law on national security, the Court has repeatedly identified those essential features to be 'pluralism, tolerance, and broadmindedness'.[489] The list of rights underlying core democratic values is exhaustive and includes the freedom of speech, the freedom of assembly and association, and the right to respect for private life. If those key values were to be set aside, a democratic society would be more nominal than substantive, according to the Court. Given that the Court has enumerated those rights closely related to the essential features of a democratic society, the remaining rights are the rights outweighed by national security. The underlying reasoning is that the state is the entity in which democracy is vested, and democracy will only survive when national authorities preserve the security of the state.

3.4.2 Suitability and Less Intrusive Means[490]

In this section I will deal with how the Court makes proportionality analyses in national security case law. The Court normally examines whether or not the contested measure is justified on the basis of the principle of proportionality.[491] However, it has often been accused of inconsistency in its judgments, especially due to the introduction of doctrines such as 'evolutive interpretation' and the

[486] See the third paragraph of preamble of the ECHR.
[487] See Joseph Zand, 'The Concept of Democracy and the European Convention on Human Rights', *University of Baltimore Journal of International Law 5(2),* 2017, 195-227.
[488] See Iain Cameron, *National Security and the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2000, p. 35. David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, p. 945.
[489] Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case Law of the European Court of Human Rights', *European Constitutional Law Review 3(3)*, 2007, 367-384, p. 370.
[490] Part of this section, together with Section 3.4.1.8 has been published by the *Leiden Journal of International Law*. See Jing Chao, 'The ECtHR's Suitability Test in National Security Cases: Two Models for Balancing Human Rights and National Security', *Leiden Journal of International Law 36(2)*, 2023, 295-312.
[491] See Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, pp. 467-468. David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, pp. 12-14. Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, paras. 27-38, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

'autonomous meaning of Convention terms'.[492] I will therefore provide a paradigm through which the Court's reviews on the suitability and necessity (i.e. a less-intrusive-means test) in national security cases can be assessed in a relatively coherent manner.

The doctrine of the margin of appreciation is often quoted by scholars seeking to explain why the Court conducts reviews of the proportionality principle in different ways and hoping to illustrate the underlying consistency of the Court's decisions.[493] The margin of appreciation refers to 'the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties'.[494] The Court applies the doctrine in a way that justifies its scrutiny as being either close or deferential, reflecting the discretion enjoyed by the government.[495] In a general sense, a right embedded with essential elements for a democratic society often induces the Court to proceed with close scrutiny,[496] while a case concerning national security matters is subject to deferential scrutiny.[497]

Two major problems stem from attempts that adopt solely the margin of appreciation doctrine when seeking to make sense of the decision-making pattern in the Court's reviewing of proportionality in national security cases.

---

[492] See Fan Jizeng, 'Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights', *The Journal of Human Rights 15(1)*, 2016, 46-87, p. 65. Jeffrey A. Bauch, 'The Margin of Appreciation and Jurisprudence of the European Court of Human Rights', *Columbia Journal of European Law (11),* 2004, 113-150, p. 125. See David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, pp. 8-9 & 20-22.

[493] Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law*, Brill, 2015. Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490. Richard Smith, 'The Margin of Appreciation and Human Rights Protection in the War on Terror, have the Rules Changed before the ECtHR', *Essex Human Rights Review 8(1)*, 2011, 124-153. Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009. Jeffrey A. Bauch, 'The Margin of Appreciation and Jurisprudence of the European Court of Human Rights', *Columbia Journal of European Law (11),* 2004, 113-150. Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002.

[494] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002, p. 2.

[495] See Johan Callewaert, 'Quel Avenir pour la Marge D'appréciation?' in Paul Mahoney and others (eds.), *Protection des Droits de L'homme: La Perspective Européenne: Mélanges à la Mémoire de Rolv Ryssdal*, Carl Heymanns, 2000, p. 149.

[496] See Toby Mendel, 'A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights', pp. 5-6, retrieved 10 March 2018, from https://rm.coe.int/16806f5bb3. See also Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality,* Oxford University Press, 2012, p. 90.

[497] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, para. 40, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf. See David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, p. 16.

The first problem results from a contradiction in the doctrine itself, i.e. the nature of the rights involved and the subject matter of the case. The doctrine does not stipulate whether the review applied when a national security case involves a government's interference with a right accommodating a characteristic of democracy should be deferential or close. Instead, the answer to this question can be found only by turning to the Court's adjudications.

The second problem, which is more critical, concerns the doctrine's practicality. As a norm for clarifying patterns in the Court's reasoning, it indicates merely a breadth of the margin of appreciation, which is roughly measured as 'wide' or 'narrow', but is not accurate enough to indicate how the suitability test and the necessity test are to be conducted in a given case. Does a wide margin of appreciation mean that the Court should accept the government's allegations about the effectiveness of its measures, without question? Or, if a narrow margin means a strict review by the Court, how should a 'strict review' be carried out in a specific case? While the doctrine is helpful for classifying different types of scrutiny, it fails to state what exactly differentiates strict scrutiny from scrutiny of a less strict nature.

This section unfolds in two parts. The first part adopts a broad categorical approach to identifying the patterns depicted by the Court in examining the suitability and necessity of selected cases. Depending on the nature of the right being interfered with in national security cases, two basic models can be distinguished. For each model, a few representative test considerations can be identified. In the meantime, the norms and thresholds applying under each model demonstrate a tendency either to prioritise national security over human rights, or the other way around. Accordingly, I refer to the two models as the 'National Security Priority Model' and the 'Human Rights Priority Model', respectively. The second part of the analysis takes a case-specific approach. Applying the National Security Priority Model does not mean that all cases under this model survive the tests, while the Human Rights Priority Model does not guarantee that the applicant wins the case. In this part, I focus on how the Court mitigates a tendency in favour of either human rights or national security. The concrete circumstances of the case have a role to play in the approach. I summarise the features of selected cases that the Court considers. This part also identifies circumstances under which interference does not survive the tests. Lastly, as a supplement, I briefly analyse the role played by proportionality *stricto sensu*.

3.4.2.1 Decision-making pattern under each model

Suitability test

The suitability test addresses whether the government actions that restrict the enjoyment of human rights are suitable for achieving the intended goals.[498] The rationale is apparent: if the interference cannot achieve the alleged purposes, it does not contribute to national security, but only to the restricting of human rights. Depending on the nature of the rights concerned, the Court has developed two models for its reasoning on suitability in national security case law. These two models vary in two aspects: the first is a normative one, concerning the desirability of the effectiveness of the government measure in question; the second is a factual one, relating to the Court's evaluation of evidence and other materials that substantiate the government's allegations.[499] These variations between the models have a substantive impact on the Court's decision as each has an identifiable tendency to prioritise either the protection of national security or the protection of human rights. As mentioned above, I refer to the one with the tendency to protect human rights as the 'Human Rights Priority Model', and to the one tending to protect national security as the 'National Security Priority Model'.

To start with, the suitability test concerns the causal link between the means and ends of the government action under scrutiny.[500] The Human Rights Priority Model requires the causality to be relatively strong from the normative perspective. To establish its strength, the Court requires national security, firstly, to be in real danger. This raises the question of how the Court can recognise a danger as real? Imagine a 'defence perimeter', within the scope of which any danger may be real enough for a government to take action. Political controversy ranging, for instance, from dissenting opinions or criticisms of the government to separatist statements can hit the nerves of a government, which might then be prone to claim that national security is at stake. If such a case is brought to the Court, the latter will rule in favour of the government only if the statements comprise incitement to violence.[501] Therefore, the state is in fact

[498] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *International Journal of Constitutional Law 7(3)*, 2009, 468-493, p. 474.

[499] Such a classification was inspired by Jonas Christofferson's abstract analysis on the complex interaction between fact and norms inherent in the proportionality assessment. See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, pp. 163-167.

[500] See Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 473.

[501] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, para. 19, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf. See Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech', *International & Comparative Law Quarterly 63(2)*, 2014, 491-503, pp. 496-502. A recent case, for example, see *Stomakhin v. Russia*, no. 52273/07, § 92, ECHR 2018.

asked to take the risk that political opposition may contribute indirectly, partially or in the long run to violence.

Secondly, a relatively strong causality requires the interference to have a high level of effectiveness in achieving the alleged purpose of the state. It then becomes a matter of measuring the efficacy of the contested interference. In the *Vereniging Weekblad Bluf!* case, a journal containing a confidential report from the Dutch security services was circulated before the government took action. In the Court's opinion, prohibiting the circulation might be able to reduce damage by limiting the spread of the information, but such a prohibition would not be sufficient due to its limited effectiveness.[502] Withdrawing the copies of the journal could also narrow the scope and reduce the speed at which the confidential information was being spread, but this, too, would no longer fulfil the aim of protecting the state secret, given that the confidential information had already been disseminated.[503]

It is worth noting that government authorities have to submit evidence to substantiate a sufficient link between the interference and its purpose.[504] In terms of the factual aspects of the Human Rights Priority Model, the Court carries out a detailed review of the persuasiveness of the evidence available to it. In most cases, it examines the evidence to see whether there is a real danger to national security, rather than focusing on evaluating the degree of effectiveness of the government measures. This is probably because as long as a concrete danger to national security can be established, the question as to whether and to what extent the contested measure is effective at tackling that danger can be answered by appealing to common sense. To demonstrate the danger to be real, the government sometimes puts forward expert conclusions[505] or internal assessment reports.[506] In some cases, where the evidence submitted appeared to be specific, well-organised and impartial, the Court was not automatically ready to agree with government authorities' claims.

[502] See *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, § 45, Series A no. 306-A. *Observer and Guardian v. the United Kingdom*, 26 November 1991, §§ 66-70, Series A no. 216. *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, §§ 52-56, Series A no. 30.
[503] See *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, §§ 44-45, Series A no. 306-A.
[504] See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights,* Brill, 2009, p. 191.
[505] For instance, in *Dmitriyevskiy v. Russia* case, the government provided linguistic expert's conclusions on the nature of the articles in question. See *Dmitriyevskiy v. Russia,* no. 42168/06, § 13, ECHR 2017.
[506] For instance, in *Lustig-Prean and Beckett v. the United Kingdom* case, the government brough forward a report prepared by the Minister of Defence, to assess the armed forces' policy on homosexuality. See *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 44, 27 September 1999.

Sometimes, for instance, the Court scrutinised the method of the assessment,[507] while on other occasions it re-evaluated the wording, form and nature of articles published[508] or reviewed the activities or programmes of a political party,[509] as well as taking into account the wider and immediate context in which the government actions were adopted.[510]

Under the National Security Priority Model, by contrast, the intensity of the Court's scrutiny is considerably lower. Firstly, the Court has found that a danger to national security does not need to be imminent, such as when it accepted the usefulness of a government's secret surveillance in terrorist cases without requesting it first to be established that a terrorist attack was 'just around the corner'.[511] Secondly, the suitability requirement is satisfied as long as no major defects are identified in the efficacy of the means. Means may also be accepted as justifiable if they contribute to achieving the ends in the long run or in a step-by-step manner.[512]

As for the factual pillar of this model, the Court is generally ready to accept the government's arguments. In particular, a danger of a potential or cumulative nature has often been acknowledged by the Court in cases concerning one or more of the following issues: counterterrorism, confidentiality of critical information [513] or the operations of security services,[514] as well as where the due effectiveness of their operations or the secrecy of their working methods are concerned,[515] or because of the outcomes they have produced.[516] With regard to the effectiveness of the means, it may not always be the case that the state has to demonstrate the actual effect of the government's measure, or that the applicant has to specifically prove the

[507] For example, in *Smith and Grady v. the United Kingdom* case, the Court raised questions over the study methods used by the authorities on the issue concerning accepting homosexuals in the army would affect the servicemen's morale. See *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 95, ECHR 1999-VI.

[508] For example, see *Stomakhin v. Russia*, no. 52273/07, §§ 98-123, ECHR 2018. *Karataş v. Turkey* [GC], no. 23168/94, §§ 51-51, ECHR 1999-IV.

[509] For example, see *Affaire Union Nationale Turque et Kungyun c. Bulgarie*, no. 4776/08, §§ 45-46, CEDH 2017.

[510] See *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 205-206, ECHR 2015.

[511] See *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, §§ 303-310 & 385, ECHR 2018. See also Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France*, Intersentia, 2009, p. 312.

[512] Oliver Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Duncker & Humblot, 2003.

[513] See *Gîrleanu v. Romania,* no. 50376/09, § 89, ECHR 2018.

[514] See *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, § 40, Series A no. 306-A. See also *Rotaru v. Romania* [GC], no. 28341/95, § 47, ECHR 2000-V.

[515] See, for example, *Leas v. Estonia,* no. 59577/08, § 78, ECHR 2012.

[516] See, for example, *Leander v. Sweden*, 26 March 1987, § 59, Series A no. 116.

existence of a major defect in the government measure.[517] Instead, based on the information at hand, the Court more or less resorts to presumptions and inferences to evaluate the effectiveness of the contested measure.[518]

Less-intrusive-means test (necessity test)

After ensuring that a government's actions are suitable for achieving its objectives, the Court considers whether any alternatives which might impose fewer restrictions on human rights are available. This factual analysis corresponds to the necessity test under the principle of proportionality, as developed in German administrative and constitutional law.[519] Ideally, where multiple 'equally effective' alternatives are available, the government is required to choose the one that proposes the least intrusive means. In judicial practice, the Court does not have to find the one 'silver bullet' that overrides the government's option. Instead, it only has to propose *less* intrusive means, instead of the *least* intrusive means, for it to conclude that the impugned measure is disproportionate to the legitimate aims invoked.[520] Although the analysis may serve as a rather clear, objective and fact-based test, in a technical sense, of the Court's reasoning on proportionality,[521] scholars have observed many inconsistencies in how the less-intrusive-means test is applied in case law.[522] What are these inconsistencies? More importantly, how do they show up in national security case law? Furthermore, does the Court review the necessity of government's actions by applying different standards in light of the two

[517] For example, in *Bartik v. Russia* case, Russian government did not specify the effect of the travel ban on the applicant, who used to have access to classified information. And in the meantime, the applicant did not attempt to prove that travel ban would be only marginally effective, if not entirely ineffective. See *Bartik v. Russia*, no. 55565/00, § 49, ECHR 2006-XV.

[518] See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, pp. 173-174 & 176-178.

[519] Three sub-tests can be concluded under the proportionality principle: suitability, necessity, and proportionality in the strict sense. See Robert Alexy, *A Theory of Constitutional Rights*, Julian Rivers trans., Oxford University Press, 2010, p. 68.

[520] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, p. 142.

[521] See Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 484.

[522] For example, Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, p. 113. See also Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 483. And a recent observation, Laurens Lavrysen, 'On Sledgehammers and Nutcrackers: Recent Developments in the Court's Less Restrictive Means Doctrine', *Strasbourg Observers*, 20 June 2018, retrieved 21 December 2019, from https://strasbourgobservers.com/2018/06/20/on-sledgehammers-and-nutcrackers-recent-developments-in-the-courts-less-restrictive-means-doctrine/.

models? In this section, I will first look at how the Court deals with the test in general and then move on to examining national security cases.

The inconsistencies in the Court's application of the test are reflected in various ways. The first and probably most problematic inconsistency is the Court's contradictory attitude towards the test. In several cases, the Court has explicitly rejected the application of a less-intrusive-means test.[523] Based on its subsidiary nature and judicial deference,[524] the Court held that it was not in a position to determine whether the measure in question was the best solution, or whether the purpose should have been achieved in another way.[525] Instead, the contracting state was assumed to be in a better position to assess the alternatives at hand and thus its choice was considered to be plausible. Interestingly, the Court did adopt the test on several other occasions. In *Glor v. Switzerland*, for example, it ruled against the government, which had introduced an exemption tax for those unable to do military service. The Court saw this as a failure to provide civilian service as an alternative measure.[526] In several subsequent cases, the Court also addressed the question of whether any less intrusive ways of interfering with an individual's human rights existed.[527] In the face of such completely opposing positions of the Court, scholarly debates, too, are divided. Jonas Christoffersen is strongly against generally applying the less-intrusive-means test in assessing a measure's proportionality[528] because he regards those cases that did apply the test as deviating from the Court's normal practice and as not adding up to a general practice.[529] Some scholars, such as Eva Brems, Laurens Lavrysen and Janneke Gerards, acknowledge the

[523] Such cases include, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (merits),* 23 July 1968, § 13, Series A no. 6; *James and Others v. the United Kingdom*, 21 February 1986, § 51, Series A no. 98; *Mellacher and Others v. Austria*, 19 December 1989, § 53, Series A no. 169; *Bäck v. Finland*, no. 37598/97, § 54, ECHR 2004-VIII; *Blecic v. Croatia*, no. 59532/00, § 67, 29 July 2004, (and the Grand Chamber later declared the application inadmissible *ratione temporis*); and *Becvár and Becvárová v. the Czech Republic*, no. 58358/00, § 66, 14 December 2004.

[524] See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, p. 130. See also Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, p. 148.

[525] See *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (merits),* 23 July 1968, § 13, Series A no. 6. See also *James and Others v. the United Kingdom*, 21 February 1986, § 51, Series A no. 98.

[526] See *Glor v Switzerland*, no. 13444/04, § 95, ECHR 2009.

[527] For instance, *Association Rhino and Others v. Switzerland*, no. 48848/07, § 65, ECHR 2011; *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 61, ECHR 2012; *Saint-Paul Luxembourg S.A. v. Luxembourg,* no. 26419/10, § 44, ECHR 2013.

[528] See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, p. 129.

[529] See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, p. 114.

test in an affirmative way despite recognising the Court's reluctance to accept it. By comparing case samples, Brems and Lavrysen found that the test had more often been applied than not.[530] Gerards argues for the advantages that the test offers and outlines practice under other jurisdictions. She also proposes a consistent way in which to apply the test.[531] These authors take a wider approach to understanding the less-intrusive-means test[532] and propose certain improvements and structural applications[533] rather than defending the *status quo*.[534]

As for national security case law, none of the cases selected for this study reject the less-intrusive-means test. Instead, it has been explicitly applied in some cases. In, for example, *Big Brother Watch and Others v. the United Kingdom*, the Court agreed with the government that there was 'no alternative for the bulk interception power'.[535] Meanwhile in *Lustig-Prean and Beckett v. the United Kingdom*, the Court analysed whether a strict conduct code, as an alternative to discharging homosexual officers from the army, could address the problems caused by negative attitudes towards them.[536] Other cases included *Irfan Güzel v. Turkey* (*İrfan Güzel c. Turquie*; judgment available only in French) concerning Article 8,[537] *Dilipak v. Turkey* concerning Article 10[538] and *National Turkish Union and Kungyun v. Bulgaria* (*Union nationale turque et Kungyun c.*

[530] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, pp. 153-154. See also Laurens Lavrysen, 'On Sledgehammers and Nutcrackers: Recent Developments in the Court's Less Restrictive Means Doctrine', *Strasbourg Observers,* 20 June 2018, retrieved 21 December 2019, from https://strasbourgobservers.com/2018/06/20/on-sledgehammers-and-nutcrackers-recent-developments-in-the-courts-less-restrictive-means-doctrine/.

[531] See Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, pp. 482-483.

[532] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, pp. 152-166. Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 486.

[533] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, pp. 150-152. Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, pp. 486-488.

[534] Christoffersen is one of those who took the approach to explaining the reasonableness of the current practice. See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, p. 135.

[535] *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, § 384, ECHR 2018.

[536] *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 95, 27 September 1999.

[537] *İrfan Güzel c. Turquie*, no. 35285/08, § 87, CEDH 2017.

[538] *Dilipak v. Turkey*, no. 29680/05, § 72, ECHR 2015.

Bulgarie; judgment available only in French) concerning Article 11.[539] While national security case law does not reject the less-intrusive-means analysis, the Court more often than not applies it in a rather implicit manner.

These inconsistencies are also reflected in the kind of means proposed by the Court. Seeking a less drastic measure normally indicates seeking a solution of a different kind rather than a lighter version of the same kind. Fines, for example, would be less drastic than imprisonment, temporary bans less drastic than permanent ones, and targeted measures less drastic than indiscriminate one. When the Court bases its reasoning on seeking a solution of a different kind, it usually mentions certain keywords, such as 'alternative measure', 'by other means' and 'less intrusive means'.[540] By doing so, it applies the test in an explicit way. Many scholars, including Christoffersen and Gerards, have defined only such an explicit review as a less-intrusive-means test.[541] A focus on where the review is explicit, however, contributes to the sense of inconsistency in the Court's case law as the Court does not often apply the necessity test explicitly.

In fact, the Court more frequently applies the test implicitly. The primary purpose of applying the less-intrusive-means test is to demonstrate that the contested measure has imposed excessive restraints on human rights; the question of whether or not a specific substitute has been proposed is subsequently never decisive.[542] Bearing this in mind, analyses that concentrate on tailoring the scope of the impugned measure can also be viewed as applying the less-intrusive-means test, but only implicitly. Such implicit applications could include, for instance, shortening the duration of surveillance, [543] specifying the items a search warrant is authorised to seizure[544] or modifying the severity of the conviction.[545] In most of the cases selected, the Court focused on whether the contested measure could be tailored to impose less of a restriction on human rights rather than on proposing a substitute for it.

There is also a difference depending on whether the Court takes a substantive or a procedural approach to the test. Under the procedural

[539] *Union nationale turque et Kungyun c. Bulgarie*, no. 4776/08. § 46, CEDH 2017.
[540] Eva Brems and Laurens Lavrysen made a summary of such key terms that explicitly indicate the application of the less-intrusive means test. Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, p. 153 footnote 79.
[541] See Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Brill, 2009, pp. 114-129. See also Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 483.
[542] See Fan Jizeng, 'Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights', *The Journal of Human Rights 15(1)*, 2016, 47-86, p. 83.
[543] For instance, see *Centrum För Rättvisa v. Sweden*, no. 35252/08, §§ 94 & 127-130, ECHR 2018.
[544] See *Sher and Others v. the United Kingdom*, no. 5201/11, § 174, ECHR 2015.
[545] See *Stomakhin v. Russia*, no. 52273/07, § 129, ECHR 2018.

approach, the Court defers to the state and checks whether the government has made any efforts to consider a less restrictive measure or to tailor the impugned one. [546] The Court takes a substantive approach when it makes its own assessment on whether a measure is unduly restrictive or, sometimes, by proposing a conceivable alternative.[547] Under the substantive approach, the Court does not always suggest how exactly to improve the contested measure by tailoring or changing it. The Court holds a measure to be disproportional if it finds it to be excessively intrusive. In terms of their approach, a general distinction can be seen between the Human Rights Priority Model and the National Security Priority Model. Under the former, the Court usually makes decisions on the severity of sanctions (i.e. the substantive approach), [548] whereas under the latter it reviews the necessity of the measure either by evaluating the intrusiveness of the measure for itself or by checking the efforts made by the government to evaluate it (i.e. the substantive or the procedural approach). In certain types of cases, however, mainly related to their subject matter, the Court has shown itself more likely to adopt one approach than the other. There have been a considerable number of cases filed under Article 8, for example, that were based on allegations *in abstracto* that domestic legislation on secret surveillance violated the Convention. Since no concrete interception measures were brought before the Court for review, the procedural approach was the only option left for the Court to rule on the necessity of measures by reviewing the procedural arrangements provided by the domestic law for tailoring the scope and duration of the surveillance.[549]

In conclusion, at least in national security cases, the Court has not refused to check the necessity of a government's measures. Firstly, the Court often evaluates the intrusiveness of government actions implicitly rather than explicitly. Secondly, while the Court reviews the substantive merits of the measure under the Human Rights Priority Model, it has not established a similarly consistent pattern under the National Security Priority Model on whether to defer that sort of review to the government. In those cases in which it did not apply the test, the Court held that the contested measure was

[546] See Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 487.
[547] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, p. 150.
[548] For example, *Stomakhin v. Russia*, no. 52273/07, § 129, ECHR 2018.
[549] For example, *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24960/15, § 315, ECHR 2018.

disproportional due to its lack of suitability, and thus there was no need to proceed with the necessity test.[550]

From my in-depth analysis of the Court's case law, different major concerns, in line with the two models, underlie the decision-making patterns depicted by the Court when examining the necessity of measures. Under the Human Rights Priority Model, the Court focuses on whether the impugned measure would have potentially negative impacts on the rights in question, including a short-term effect, a chilling effect and even any negative effect for an entire profession or society. In other words, it takes into account the 'collateral damage' to human rights, which demonstrates this model's tendency towards protecting human rights. Under the National Security Priority Model, by contrast, the Court usually focuses on whether the government's powers have been adequately circumscribed in implementing measures. If the Court affirms the effectiveness of the contested measure, it no longer sets out to seek any substitutes but only to suggest a tailored version. As such, any less restrictive measures suggested by the Court are usually for the purposes of clarifying authorisations by, for example, delineating the precise scope of targeted subjects and limiting measures' duration.

3.4.2.2 Case law scenarios for each model

Scenarios for the Human Rights Priority Model

Once the Court finds that the right interfered with accommodates features of a democratic society, it will closely scrutinise government actions. Considerations in favour of 'pluralism, tolerance, and broadmindedness' normally outweigh the need to remove potential threats.[551] According to the Court, these values are vital to the functioning of liberal democracies. As far as the Human Rights Priority Model is concerned, a pragmatic question to be asked is whether a list of rights underlying core democratic values is ever exhaustive in national security case law? If so, what rights should be on that list?

From the Court's case law, three rights have been identified as qualifying to be on that list: the freedom of speech, the freedom of assembly and association, and the right to respect for private life. Each of these rights has multiple aspects,[552] but not all aspects carry these key democratic values. Circumstances

[550] For instance, *Ivanovski v. the Former Yugoslav Republic of Macedonia*, no. 29908/11, ECHR 2016; and *Fatih Taş v. Turkey* (no. 2), no. 6813/09, ECHR 2017.

[551] Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case Law of the European Court of Human Rights', *European Constitutional Law Review 3(3)*, 2007, 367-384, p. 370.

[552] See European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf. European Court of Human Rights, 'Guide sur L'article 10 de la Convention Européenne des Droits de L'homme: Liberté D'expression', *ECtHR*, 2020, retrieved 7 October 2020, from

in which these rights may be interfered with by the government in the interest of national security are limited.[553] There are generally four circumstances in which states come under close scrutiny by the Court, namely when they:

(a) Ban or sanction political speech (in conflict with the freedom of speech, and freedom of assembly);

(b) Dissolve a political organisation (in conflict with the freedom of association);

(c) Ban imparting classified information on public interests (in conflict with the freedom of speech);

(d) Discharge individuals from the army on the ground of homosexuality (in conflict with the right to respect for private life).

The Court has repeatedly confirmed in its reasoning that the preceding circumstances of government interference raise concerns over essential features of a democratic society, i.e. 'pluralism, tolerance, and broadmindedness'.[554] To be specific, statements and interviews of a political nature and the organisation of political parties are regarded as providing the public with different political arguments, choices, approaches and goals.[555] Tolerating and discussing different opinions, however disturbing or shocking they might appear to some people, are essential for sustaining democracy. Apart from political issues, the Court has also attached importance to exchanging opinions on matters of public interest[556] and has thus recognised the essential role played by the press in a democratic society.[557] A free flow of information concerning public interests can attract people's attention to a given topic and contribute to the public debate. As to the issue of discharging

www.echr.coe.int/Documents/Guide_Art_10_FRA.pdf. European Court of Human Rights, 'Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf. See also Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018, pp. 770-776, 814-819, 822-829 & 668-669. David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, pp. 503-510, 593-596 & 684.

[553] See Research Division of European Court of Human Rights, 'National Security and European Case-Law', *ECtHR*, 2013, para. 5, retrieved 23 May 2017, from www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

[554] Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case Law of the European Court of Human Rights', *European Constitutional Law Review 3(3)*, 2007, 367-384, p. 370.

[555] In regard to the political speech, see, for example, *Stomakhin v. Russia*, no. 52273/07, § 88, ECHR 2018. As for the political party issue, see, for example, *Zhechev v. Bulgaria*, no. 57045/00, §§ 35 & 59, 21 June 2007.

[556] See *Thorgeir Thorgeirson v. Iceland,* 25 June 1992, § 64, Series A no. 239. *Dichand and Others v. Austria,* no. 29271/95, § 38, 26 February 2002.

[557] See, for example, *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216.

personnel from the army on the basis of sexual orientation, the values of 'pluralism, tolerance, and broadmindedness' support people's freedom to choose how they live their lives, even though their choices may cause discomfort to other people's moral standards.[558]

Scenarios for the National Security Priority Model

The Court reviews most of the remaining case law under the National Security Priority Model. In these circumstances, it often attaches importance to eliminating threats and ensuring the efficacy of executive branch agencies. Although the circumstances that would fall under this model vary, some typical scenarios can be summarised as far as the Court's case law is concerned:

(a) Secret surveillance, including intercepting the contents of communication, intercepting communication data and intelligence sharing (in conflict with the right to private life);

(b) Personal information stored in secret registers (in conflict with the right to private life);

(c) International travel bans on retired personnel who used to have access to classified information (in conflict with the freedom of movement);

(d) *In camera* trials (in conflict with the right to a public hearing);

(e) Non-disclosure of sensitive material and information supporting the reasonableness of apprehending the suspect (in conflict with the right against arbitrary arrest and detention);

(f) The use of secret evidence in a trial (in conflict with the equality of arms, the right to an adversarial hearing, the right to a fair trial and the right to prepare the defence);

(g) Prolonged pre-trial detention of terrorist suspects (in conflict with the right to trial within a reasonable time or to be released pending trial);

(h) Delayed access to a lawyer in terrorist cases (in conflict with the right of access to a lawyer).

Some factors, such as the nature of a terrorist crime and the operational effectiveness of intelligence services, contribute substantially to the government interference surviving the Court's review. By resorting to common sense when any of these circumstances occur, the Court has shown itself ready to recognise that the security of a state is at stake.[559]

3.4.2.3 Redressing the tendency of each model

[558] See, for example, *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, §§ 80 & 82, 27 September 1999.

[559] See Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford University Press, 2012, pp. 200-201.

Reading through the case law, it is clear that, the Court does not always decide that the contested measures are proportionate to protecting national security under the National Security Priority Model. Likewise, reviewing the government's interference under the Human Rights Priority Model does not guarantee that the Court's decision will be in favour of the applicant. It must be emphasised that, when the Court is reviewing a specific case, it takes concrete circumstances into account to examine the suitability and necessity of challenged government interference. In this way, it mitigates the identifiable tendency to favour either protecting human rights or preserving national security by applying the norms and thresholds of each model. This may be one of the reasons why the Court's reasoning appears to be inconsistent. In this part of the thesis, therefore, I summarise the features of cases that lead the Court to come to a conclusion that overrides the model's priority.

- Redressing the tendency towards protecting human rights

Under the Human Rights Priority Model, the Court generally scrutinises the government's actions closely. On a case-by-case basis, however, the Court has to take into account the special features of a case submitted to it and recognise the difficulties the government authorities in question are facing in protecting security. My in-depth analysis of the Court's case law shows that the mitigating of the model's tendency is attributed more to the suitability test than to the less-intrusive-means test.

Suitability test

A. Cases involving political speeches. Government interference that amounts to banning or restricting political speech will not be viewed as suitable by the Court unless the speech constitutes an incitement to violence. Such a high threshold will generally result in more expressions being spared than being curtailed due to national security concerns. The question for the Court to answer in a specific case is whether or not a statement can be identified as constituting an incitement to violence. It is then a matter of predicting the danger of the contested expressions. In this regard, the Court adopts a proactive strategy to address national security threats,[560] with states not generally being expected to stay their hand until negative consequences have materialised.

A simple scenario is when the impugned statement directly and explicitly calls for armed resistance against the government, violent uprising against

[560] See Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech', *International & Comparative Law Quarterly 63(2)*, 2014, 491-503, p. 491. *Bayar et Gürbüz c. Turquie,* no. 37569/06, § 34, CEDH 2012. *Stomakhin v. Russia*, no. 52273/07, §§ 93 & 107, ECHR 2018.

government authorities or terrorist attacks.[561] In various complaints brought against Turkey, the Court decided that statements containing such a call were a *prima facie* incitement of violence.[562] Furthermore, in these cases, the Court confirmed the state's belief that national security was in danger in view of the serious disturbances that had occurred in the south-east of the nation.[563]

A comparable scenario is when the contents of a statement are not as extreme as in the simple scenario, yet express political opposition to state authorities. In cases involving this type of political speech, the Court has normally taken two factors into account: whether there is a tense climate in the country's politics or society, and the identity of the person concerned. A statement propagating an 'us-versus-them' mentality is an illustrative example.[564] As a general principle, speech promoting hatred or intolerance does not necessarily amount to incitement to violence.[565] Specifically, such speech may involve remarks attempting to antagonise and dichotomise social groups, such as non-Muslims versus Muslims, nationals versus immigrants, one ethnic group versus another, or minorities versus the central government. This sort of speech may be subject to legitimate restrictions, but not necessarily on the grounds of safeguarding national security,[566] given that its contents neither advocate recourse to violence nor justify terrorist attacks.[567] Where, however, violence and conflicts are ongoing or have recently ceased, the applicable legal grounds for restrictions may be rather different because the above-mentioned statements now run the risk of rendering harmful consequences imminent and pressing.[568]

In, for instance, the *Stomakhin* case, the Court noted that the impugned publications' labelling of the Russian army and security forces as 'maniacs',

[561] See *Dmitriyevskiy v. Russia*, no. 42168/06, § 100, ECHR 2017.
[562] See *Halis Doğan c. Turquie* (no. 3), no. 4119/02, § 34, 10 octobre 2006. *Hocaoğulları c. Turquie*, no. 77109/01, § 39, 7 mars 2006. *Sürek v. Turkey* (no. 3), no. 24735/94, § 40, 8 July 1999.
[563] See *Halis Doğan c. Turquie* (no. 3), no. 4119/02, § 35, 10 octobre 2006. *Hocaoğulları c. Turquie*, no. 77109/01, § 39, 7 mars 2006. *Sürek v. Turkey* (no. 3), no. 24735/94, § 40, 8 July 1999.
[564] For example, *Stomakhin v. Russia*, no. 52273/07, ECHR 2018.
[565] See *Dmitriyevskiy v. Russia*, no. 42168/06, § 99, ECHR 2017. *Sürek v. Turkey* (no. 4), no. 24762/94, § 60, 8 July 1999. *Fatullayev v. Azerbaijan,* no. 40984/07, § 116, ECHR 2010. *Gözel et Özer c. Turquie,* nos. 43453/04 and 31098/05, § 56, CEDH 2010. *Nedim Şener c. Turquie*, no. 38270/11, § 116, CEDH 2014. *Şık v. Turkey*, no. 53413/11, § 105, CEDH 2014. *Dilipak c. Turquie*, no. 29680/05, § 62, CEDH 2015.
[566] For instance, in the *Féret v. Belgium* case, leaflets had discrimination content based on race, colour, and national or ethnic origin. The legitimate aim reviewed by the Court was 'prevention of disorder', and 'protection of the reputation or rights of others', instead of 'national security'. In addition, the context of the case was Belgium's election campaign. See *Féret c. Belgique,* no. 15615/07, §§ 59 & 76, CEDH 2009.
[567] See *Dmitriyevskiy v. Russia*, no. 42168/06, § 100, ECHR 2017.
[568] Such cases include, *Gürbüz et Bayar c. Turquie*, no. 8860/13, CEDH 2019; *Karatepe c. Turquie,* no. 41551/98, 31 juillet 2007; and *Sürek v. Turkey* (no. 1), no. 26682/95, ECHR 1999-IV.

'murderers' and otherwise criminally-minded personnel incited the Chechen people's hatred towards the Russian government.[569] In light of the disturbances and terrorist attacks following the Second Chechen War, [570] the negative emotional assessments made in the statements under scrutiny were no longer just an issue of discrimination or the encouraging of sporadic hatred crimes, but would justify and stir up violence against the Russian army and security forces. [571] In other words, they could incite violent resistance based on a separatism discourse.

As to the second factor, the Court took into account the occupation or capacity of the applicant or author in order to measure the impact of the impugned statement. In both the *Gürbüz and Bayar* and the *Karatepe* case, the Court looked into the personality of the author and speaker. One was the leader of a terrorist organisation[572] and the other a politician – the mayor of a big city.[573] According to the Court, their roles meant their remarks would have a profound influence on people. In other cases, including *Halis Doğan*, *Hocaoğulları* and *Sürek* (No. 1), the applicants were the editors or the owner of a journal or newspaper that provided a platform for the contested statements to be widely accessible to the public.[574]

B. Cases involving political organisations. The freedom of association grants an individual the right to found or join a political party, the aims of which include competing with the current ruling party and putting forward a political agenda different from or even opposite to that of the ruling party. On the one hand, and from a broad categorical perspective, such a political party enjoys some benefit of the doubt: calling for a radical change in its political agenda does not necessarily comprise a real danger to national security. In light of this, the Court considers dissolving such an organisation before it has ever engaged in any activities to be an unsuitable measure. On the other hand, when reviewing a specific case, the Court may identify some concrete circumstances that signal that the danger that a party's political programme presents to national security is real, even though the political party has not put it into practice.

In practice, the Court adopts a proactive strategy to evaluate danger, meaning that government interference does not have to be put on hold until a political party seizes power and implements policies that go against

[569] See *Stomakhin v. Russia*, no. 52273/07, § 105, ECHR 2018.
[570] See *Stomakhin v. Russia*, no. 52273/07, § 96, ECHR 2018.
[571] See *Stomakhin v. Russia*, no. 52273/07, § 107, ECHR 2018.
[572] See *Gürbüz et Bayar c. Turquie*, no. 8860/13, § 43, CEDH 2019.
[573] See *Karatepe c. Turquie,* no. 41551/98, § 30, 31 juillet 2007.
[574] See *Halis Doğan c. Turquie* (no. 3), no. 4119/02, § 36, 10 octobre 2006. *Hocaoğulları c. Turquie*, no. 77109/01, § 41, 7 mars 2006. *Sürek v. Turkey* (no. 1), no. 26682/95, § 63, ECHR 1999-IV.

democracy.[575] A state's preventive intervention can be legitimate. As a general principle, a danger to national security can be established if the change that a political party is seeking to bring about goes against fundamental principles of a democratic society, or the means that it uses (or plans to use) to achieve its aims are illegal or otherwise undemocratic.[576]

A party's purpose and the approach it takes are reflected in its constitution and political programmes. However, the Court also agrees that it is neither unthinkable nor unknown that an ambitious party might conceal its political agenda until it comes to power.[577] In this regard, 'the acts and positions of the members and leaders' of the party in question should be taken into account[578] in order to examine whether a potential danger can be identified. In, for instance, *Refah Partisi and Others v. Turkey*, the Court concluded that the party's real intentions were contrary to democratic principles, based on the reading of relevant speeches given by its leaders and members.[579] Those speeches suggested that the party would introduce Sharia into the regime,[580] establish a legal system based on religious discrimination,[581] and resort to force to achieve these purposes.[582] In a more recent case, *Ignatencu and the Romanian Communist Party v. Romania* (*Ignatencu et le Parti communiste roumain c. Roumanie*; judgment available only in French), the Court issued a similar decision. In this case, the party's statute and political programmes stated that the party respected the constitutional order and the principle of democracy, and opposed totalitarianism.[583] Based, however, on an assessment of

[575] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 102, ECHR 2003-II.
[576] See *Ignatencu et le Parti communiste roumain c. Roumanie,* no. 78635/13, § 80, CEDH 2020. *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 49, ECHR 2002-II. *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 98, ECHR 2003-II.
[577] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 99 & 101, ECHR 2003-II.
[578] See Dragan Golubovic, 'Freedom of Association in the Case Law of the European Court of Human Rights', *The International Journal of Human Rights 17(7-8),* 2013, 758-771, p. 763. See also *Ignatencu et le Parti communiste roumain c. Roumanie,* no. 78635/13, § 96, CEDH 2020. *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 120, ECHR 2003-II.
[579] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 116-136, ECHR 2003-II.
[580] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 120-125, ECHR 2003-II.
[581] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 117-119, ECHR 2003-II.
[582] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 129-131, ECHR 2003-II.
[583] See *Ignatencu et le Parti communiste roumain c. Roumanie,* no. 78635/13, § 97, CEDH 2020.

publications from the party's chairman, the Court concluded that the party's real intentions were against democratic principles.[584]

C. Cases involving imparting state secrets concerning the public interest. If the press publishes 'a matter of public interest' that contains classified information, the Court normally holds in principle that the freedom of the press outweighs the preventing of state secrets from being leaked. Nevertheless, the real question in terms of specific cases is whether the classified information was published for the sake of public interest.[585] In the Court's case law, this means that the Court questions whether the published information contributes to an ongoing public debate[586] or whether it reveals government misconduct or the abuse of power.[587] In the absence of 'public interests', the case falls under the National Security Priority Model, meaning the Court performs scrutiny of a less intense nature.[588]

Another consideration is whether the contested disclosure would cause 'considerable damage' to national security.[589] The Court takes into account the age of impugned information, [590] as well as its nature and content. [591] Assessments of these elements have so far generally led the Court to conclude that disclosure would not cause considerable damage rather than the other way around.[592] Nevertheless, this consideration serves to prevent national security from suffering severe damage.

D. Cases involving the discharge of military personnel on the ground of homosexuality. A state may take the view that a person's sexual orientation may

[584] See *Ignatencu et le Parti communiste roumain c. Roumanie,* no. 78635/13, §§ 98 & 100, CEDH 2020.
[585] European Court of Human Rights, 'Guide sur L'article 10 de la Convention Européenne des Droits de L'homme: Liberté D'expression', *ECtHR*, 2020, paras. 344-345, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_10_FRA.pdf.
[586] For example, *Gîrleanu v. Romania*, no. 50376/09, § 87, ECHR 2018.
[587] For example, *Bucur et Toma c. Roumanie*, no. 40238/02, § 103, CEDH 2013. *Observer and Guardian v. the United Kingdom*, 26 November 1991, §§ 61 & 69, Series A no. 216.
[588] For example, in *Pasko v. Russia*, the applicant intended to disclose to Japanese media classified information concerning military exercises, which was not of any public interest. See *Pasko v. Russia,* no. 69519/01, §§ 86-87, ECHR 2009. In *Hadjianastassiou v. Greece*, the state secrets in question were 'general information concerning the guided missile', which did not contribute to any public debate or reveal official misconduct. See *Hadjianastassiou v. Greece,* 16 December 1992, §§ 9 & 45, Series A no. 252.
[589] See *Gîrleanu v. Romania*, no. 50376/09, § 89, ECHR 2018.
[590] See *Gîrleanu v. Romania*, no. 50376/09, §§ 8 & 89, ECHR 2018. *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, § 41, Series A no. 306-A.
[591] For example, in the *Vereniging Weekblad Bluf! v. the Netherlands* case, the information contained in the impugned report was deemed 'of a fairly general nature', because it was designed mainly to inform BVD (*de Binnenlandse Veiligheidsdienst*) staff and other officials who carried out work for the BVD about the organisation's activities. See *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, §§ 8-9 & 41, Series A no. 306-A.
[592] See *Gîrleanu v. Romania*, no. 50376/09, § 89, ECHR 2018. *Vereniging Weekblad Bluf! v. the Netherlands*, 9 February 1995, § 41, Series A no. 306-A.

collide with the country's security. Several cases involving the UK have been reviewed by the Court.[593] The Court concluded that neither the presence of homosexual personnel in the army, nor the negative attitudes of heterosexual personnel towards them, would necessarily cause serious damage to the army's fighting power and operational effectiveness,[594] although it admitted that this could lead to some relational difficulties among personnel.[595] With regard to the suitability test, the Court made only little effort to redress the Model's tendency to favour the right concerned. After all, such a scenario is quite exceptional in the sense that it involves an individual's right to choose their way of life on the one hand, and national security on the other.

Less-intrusive-means test

Under the less-intrusive-means test, the Court shows a tendency to favour the protecting of human rights by performing a substantive review of the contested measures' intrusiveness and by taking account of the chilling effect on the right concerned. Once it has established the existence of a danger to national security in a case, what concerns the Court is not the fact that the government responds to the danger, but the means it uses.

Most cases that survive the necessity test include those related to political speech and political organisation. Regarding cases of the latter, the Court usually holds drastic measures such as the dissolution of a political party[596] and the refusal to register a party even before it engages in any activities to be proportionate. [597] In the *Refah Partisi (the Welfare Party)* case, the Constitutional Court of Turkey, as an additional penalty, barred leaders of the party from engaging in certain types of political activity.[598] Because the ban was temporary in nature, and those leaders' speeches and stances were contrary to the fundamental principles of democracy, the Court found it not to be unduly intrusive.[599]

---

[593] See *Perkins and R. v. the United Kingdom*, nos. 43208/98 and 44875/98, 22 October 2002; *Beck, Copp and Bazeley v. the United Kingdom*, nos. 48535/99, 48536/99 and 48537/99, 22 October 2002; *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI.

[594] See *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, §§ 90-92, 27 September 1999.

[595] See *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 93, 27 September 1999.

[596] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 133, ECHR 2003-II.

[597] See *Ignatencu et le Parti communiste roumain c. Roumanie,* no. 78635/13, § 103, CEDH 2020.

[598] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 41-42, ECHR 2003-II.

[599] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 133-134, ECHR 2003-II.

In cases concerning political speeches that amount to incitement to violence, the Court does not consider dissuasive sanctions imposed by a state to be disproportionate.[600] This constitutes a departure from the Court's concerns over the chilling effect. In *Halis Doğan v. Turkey* (No. 3) (*Halis Doğan c. Turquie* (no. 3); judgment available only in French), the Court held in favour of the Turkish authorities imposing a temporary ban on publication of the newspaper concerned.[601] In its case law, the Court has held punishments such as imprisonment and fines to be proportionate.[602] Regarding imprisonment, the Court considers the deprivation of liberty to be an extremely harsh penalty for speech,[603] but also notes that this may prove necessary in cases amounting to incitement of violence, which goes against the founding principles of democracy.[604] The Court has not found many opportunities to clarify the limits within which a prison sentence would be deemed proportionate. Nevertheless, in two cases related to Turkey, it held that one year's imprisonment was proportionate; and, in both cases, the applicants did not serve their sentences in full (one served four and a half months, and the other two months and twelve days).[605] In *Stomakhin v. Russia*, by contrast, the applicant remained behind bars for five years and was also subjected to a three-year ban on working as a journalist.[606] In this case, the Court found the punishment not to be proportionate.

- Redressing the tendency towards national security

Under the National Security Priority Model, the Court's decision-making pattern favours protecting national security. On the case-specific level, in my observation, the Court often turns to the less-intrusive-means test to redress the tendency towards protecting national security.[607] In some cases, however, the Court has examined the suitability of an interference and found it to violate

[600] See *Karatepe c. Turquie,* no. 41551/98, § 31, 31 juillet 2007.
[601] See *Halis Doğan c. Turquie* (no. 3), no. 4119/02, § 37, 10 octobre 2006.
[602] For example, *Gürbüz et Bayar c. Turquie*, no. 8860/13, § 45, CEDH 2019; *Karatepe c. Turquie,* no. 41551/98, 31 juillet 2007; *Halis Doğan c. Turquie* (no. 3), no. 4119/02, § 37, 10 octobre 2006; *Hocaoğulları c. Turquie*, no. 77109/01, § 41, 7 mars 2006; *Sürek v. Turkey* (no. 1), no. 26682/95, § 64, ECHR 1999-IV; *Sürek v. Turkey* (no. 1), no. 26682/95, §§ 14 & 42, ECHR 1999-IV; and *Zana v. Turkey*, 25 November 1997, § 61, Reports 1997-VII.
[603] See *Stomakhin v. Russia*, no. 52273/07, § 129, ECHR 2018.
[604] See *Karatepe c. Turquie,* no. 41551/98, § 31, 31 juillet 2007.
[605] See *Karatepe c. Turquie,* no. 41551/98, § 31, 31 juillet 2007. *Zana v. Turkey*, 25 November 1997, §§ 26 & 61, Reports 1997-VII.
[606] See *Stomakhin v. Russia*, no. 52273/07, § 128, ECHR 2018.
[607] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, p. 142.

the Convention. In this part of the study, therefore, I will also investigate some situations in which a state's interference measures failed the suitability test.

Suitability test

A. The decreasing danger. While the Court normally respects a state's judgment on situations such as terrorist attacks and leaks of classified information, a danger to national security that has been established as real may decrease over time. Circumstantial changes can result in a new estimation of the severity of the danger. For instance, the severity may decrease simply because of later changes in the situation, or evidence revealed later may prove that the state previously overestimated the danger. Under the National Security Priority Model, however, the Court does not take account of a gradual shift in the severity of the danger until such shift becomes sufficiently substantial. This is mainly because the Court has accepted the danger to be potential and cumulative, and governments often describe danger in a general and abstract way. Nevertheless, I find that a change in situation could reach a point where the alleged danger becomes evidently too slight to satisfy the presumptive suitability.

In case law of the Court, such a point is sometimes reached as a result of decisive changes in conditions occurring either in a political context or through social transformation. In *Segerstedt-Wiberg and Others v. Sweden*, for example, two applicants had had their information collected and stored in the Swedish security police's register owing to their involvement in left-wing activities 30 years previously.[608] While such information could have been useful in helping the security police to fulfil its duty during the Cold War, being a left-wing sympathiser is currently no longer regarded as a potential danger to national security.[609] The Court consequently concluded that the continued storage of the applicants' information was unsuitable. Similarly, the Court may regard regime change, along with a different political ideology, as a decisive factor. In *Turek v. Slovakia*, for example, the Court ruled that disclosing documents that used to be classified as secrets by security services under former regimes – in this case, a communist regime – did not constitute an actual danger of divulging the functions or operating methods of security agencies under current regimes, which are liberal democracies.[610]

[608] The case was lodged with the ECtHR in 2000. See *Segerstedt-Wiberg v. Sweden*, no. 62332/00, §§ 15-22 & 33-37, ECHR 2006-VII.
[609] See *Segerstedt-Wiberg v. Sweden*, no. 62332/00, § 90, ECHR 2006-VII.
[610] See *Turek v. Slovakia*, no. 57986/00, § 115, ECHR 2006-II. See also *Bobek v. Poland,* no. 68761/01, § 57, 17 July 2007.

B. Lack of efficacy. If a government's impugned measure is deemed ineffective for fulfilling its alleged ends, the Court will conclude that the measure is not suitable. By dint of experience, common sense and precedent, the Court has *a priori* recognised a relationship between certain means and ends when governments interfere with human rights on the grounds of seeking to protect national security, without any explicit explanation of how it has established this relationship. In specific cases, however, serious defects have been found that result in failure to achieve the desired effects. In these circumstances, the Court does not consider it its task to figure out how such defects may have occurred or whether they can be justified. Instead, it has simply concluded that the contested interference was not able to achieve its aim.

In, for example, *Bartik v. Russia* concerning Article 2 of Protocol No. 4, a major defect in the government's measure was pointed out by the Court when it ruled there to be a lack of efficacy in an international travel ban intended to prevent the divulgence of state secrets.[611] In the Court's view, the retired personnel who had access to classified information and were subject to the travel ban could still reveal the classified information via other means of communication that were not monitored by the government.[612] That is to say, the classified information could still be disclosed to foreigners at home or abroad if the applicant wished to do so. Due to this serious lack of efficacy, the Court concluded that a link between the means and ends was missing.[613]

C. Claims lacking in substance about the danger. How specific should a government be when substantiating its claims about a danger to national security? In the case law of the Court, the answer seems to be contingent on which type of rights the government is interfering with, i.e. qualified rights or limited rights. The Court tends to accept the state's general arguments in relation to interference with qualified rights, while explicitly declining similar state submissions on interferences with certain limited rights, as seen in scenarios involving the prolonged pre-trial detention of terrorist suspects

[611] See *Bartik v. Russia*, no. 55565/00, § 49, ECHR 2006-XV.
[612] See *Bartik v. Russia*, no. 55565/00, § 49, ECHR 2006-XV.
[613] See *Soltysyak v. Russia*, no. 4663/05, ECHR 2011. *Berkovich and Others v. Russia*, nos. 5871/07, 61948/08, 25025/10, 19971/12, 46965/12, 75561/12, 73574/13, 504/14, 31941/14 and 45416/14, ECHR 2018.

(Article 5(3)),[614] a trial held *in camera* (Article 6(1))[615] and the delayed access to lawyers in terrorist cases (Article 6(1) and (3)).[616]

In certain specific cases, the state is expected to present grounds with a higher degree of specificity to support its allegation of a danger to national security. The Court expects the state to explain the alleged danger in more detail, through an individual and case-specific assessment. In, for instance, *Belashev v. Russia*, the state, in defending its action to exclude the public from the contested trial, simply claimed that the classified information was contained in the case file,[617] but did not further illuminate which materials were confidential or how they related to the applicant's offences.[618] In *Welke and Białek v. Poland*, by contrast, the state indicated that the classified materials included secret recordings and certain details about the police operations.[619] An open trial could have exposed the police's operational methods to the general public, which would have negatively affected future police operations.[620]

Under the National Security Priority Model, the Court does not perform rigorous scrutiny of governing authorities' assessment of a danger to national security. Nevertheless, by rejecting generally formulated claims, the Court tries to ensure that any interference is based on the government's elaborate contemplation of the likelihood of a danger to national security, instead of on a one-size-fits-all account.

Less-intrusive-means test

The Court has found cases to violate the Convention when governing authorities enjoy too much leeway in implementing impugned measures. While the Court recognises the difficulties in tackling national security threats, it does

[614] See *Grubnyk v. Ukraine,* no. 58444/15, §§ 110 & 113, ECHR 2020; *Debboub alias Husseini Ali c. France*, no. 37786/97, § 44, 9 novembre 1999; and *Demir and Others v. Turkey*, 23 September 1998, § 52, Reports of Judgments and Decisions 1998-VI. See also *Merabishvili v. Georgia*, no. 72508/13, § 222, ECHR 2017; *Boicenco v. Moldova*, no. 41088/05, § 142, 11 July 2006; *Khudoyorov v. Russia*, no. 6847/02, § 173, Report of Judgments and Decisions 2005-X.

[615] See *Welke and Białek v. Poland*, no. 15924/05, §§ 76-77, ECHR 2011; *Belashev v. Russia*, no. 28617/03, §§ 82-86, ECHR 2008; and *Engel and Others v. the Netherlands*, 8 June 1976, § 89, Series A no. 22. See also *Mraović v. Croatia*, no. 30373/13, § 45, ECHR 2020; and *Chaushev and Others v. Russia*, nos. 37037/03, 39053/03 and 2469/04, § 24, ECHR 2016.

[616] See *Atristain Gorosabel v. Spain*, no. 15508/15, §§ 58-63, ECHR 2022; *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, §§ 259 & 276-279, ECHR 2016; *Brennan v. the United Kingdom,* no. 39846/98, §§ 28 & 46, ECHR 2001-X; and *Salduz v. Turkey* [GC], no. 36391/02, §§ 55-56, ECHR 2008. See also *Rodionov c. Russie*, no. 9106/09, § 161, CEDH 2018.

[617] See *Belashev v. Russia*, no. 28617/03, § 22, ECHR 2008.

[618] See *Belashev v. Russia*, no. 28617/03, § 84, ECHR 2008.

[619] See *Welke and Białek v. Poland*, no. 15924/05, §§ 8, 32-33 & 76, ECHR 2011.

[620] See *Welke and Białek v. Poland*, no. 15924/05, §§ 76-77, ECHR 2011.

not want governments to use national security as a pretext for building a police state or preserving autocracy.

In light of how governing authorities take action against threats, the Court commonly demands that states tailor the scope and limit the duration of any such measures. For instance, the less-intrusive-means test plays a conspicuous part in the Court's reasoning on cases linked to secret surveillance. In a cognate form of the less-intrusive-means test, the Court has developed the following norms to be set out in states' interception regimes: a description of the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; a limit on the duration of the measures; the procedure to be followed for examining, using, and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.[621] Based on these criteria, the Court expects the exercising of discretion by the government to be narrowly defined in the domestic law.

Cases related to holding trials *in camera* are another example. The Court requires the state to limit the closure of trials to only the extent necessary in order to protect national security.[622] In the *Belashev* case, the Court raised questions about the domestic court excluding the public from the entire criminal proceedings.[623] Here, the Court signalled that it wanted the domestic court to consider whether the features of the case allowed for only a single session or a specific number of sessions to be closed out of concern for state secrets.[624] In another case, *Welke and Białek v. Poland*, the Court found that closing the entire trial to the public was necessary for protecting the classified information contained in the case file.[625] An important reason for this was that the domestic court did not withhold classified evidence from the accused, thus guaranteeing his right to a fair trial,[626] albeit without public scrutiny. After all, the objective of holding public hearings is to protect litigants against the administration of justice;[627] this constitutes a guarantee that the individual will have a fair trial.

Proposing an alternative measure is another means through which the Court seeks to avert abuse of power by governing authorities. Such means have

[621] See, for instance, *Centrum För Rättvisa v. Sweden*, no. 35252/08, § 103, ECHR 2018.
[622] See *Welke and Białek v. Poland*, no. 15924/05, § 77, ECHR 2011; and *Belashev v. Russia*, no. 28617/03, § 83, ECHR 2008.
[623] See *Belashev v. Russia*, no. 28617/03, § 84, ECHR 2008.
[624] See *Belashev v. Russia*, no. 28617/03, § 84, ECHR 2008.
[625] See *Welke and Białek v. Poland*, no. 15924/05, § 77, ECHR 2011.
[626] See *Welke and Białek v. Poland*, no. 15924/05, § 77, ECHR 2011.
[627] See *Moser v. Austria*, no. 12643/02, § 93, 21 September 2006.

repeatedly been applied in a particular class of cases – namely, those relating to the use of classified intelligence information as evidence in judicial proceedings, often concerning, *inter alia*, Articles 5(2), 5(4), 6(1) and 6(3).[628] As discussed in the previous section, secret evidence invokes, on the one hand, concerns about adversarial proceedings and equality of arms. On the other hand, counterterrorism and protecting the secrecy of intelligence services' operations are also pressing needs. In its case law, the Court has put forward two solutions to this dilemma under the less-intrusive-means test. One solution is simply to ask the government to disclose more information. This information is required to be specific or relevant enough to allow the accused or arrested person to effectively challenge the allegations against him or her.[629] In this type of case, what matters is the content rather than the quantity of the disclosed information. [630] Here, under the scrutiny of the necessity test, the Court attempts to narrow down the scope of evidence that can be legitimately withheld from litigants.

As for the second solution, the Court offers a substitute to simply denying the defence's access to classified materials.[631] This solution proposes granting a special lawyer, with the appropriate security clearance, access to the undisclosed evidence. In this way, a lawyer can question the truthfulness and reliability of the classified information and also challenge the legitimacy of its being classified as secret.[632] A leading example of this solution is the 'special advocate procedure' introduced by the United Kingdom. In *Chahal v. the United Kingdom*, national security concerns meant the applicant and his lawyer were

[628] See Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?', *The Modern Law Review 78(6)*, 2015, 913-944, pp. 921-922.
[629] See *A. and Others v. the United Kingdom*, no. 3455/05, § 220, ECHR 2009; *Selahattin Demirtaş v. Turkey* (no. 2), no. 14305/17, § 201, ECHR 2018; *Mustafa Avci c. Turquie*, no. 39322/12, § 90, CEDH 2017; and *Ceviz c. Turquie*, no. 8140/08, § 41, CEDH 2012. Out of the context of national security, this requirement was put forward rather early by the Court, for instance, *Lamy v. Belgium*, 30 March 1989, § 29, Series A no. 151. See also Didier Bigo, Sergio Carrera, Nicholas Hernanz, and Amandine Scherrer, 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', *European Parliament*, 2014, p. 49, retrieved 23 January 2020, from https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU%282014%2950 9991_EN.pdf.
[630] See *A. and Others v. the United Kingdom*, no. 3455/05, § 220, ECHR 2009.
[631] See *Botmeh and Alami v. the United Kingdom*, no. 15187/03, § 37, 7 June 2007; *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51-53, 16 February 2000; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, §§ 54 & 58, Reports of Judgments and Decisions 1997-III; *Doorson v. the Netherlands*, 26 March 1996, § 72, Reports of Judgments and Decisions 1996-II; and *Kostovski v. the Netherlands*, 20 November 1989, § 43, Series A no. 166.
[632] See Didier Bigo, Sergio Carrera, Nicholas Hernanz, and Amandine Scherrer, 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', *European Parliament*, 2014, pp. 48-49, retrieved 23 January 2020, from https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU%282014%2950 9991_EN.pdf. See, for example, *Toma c. Roumanie*, no. 40238/02, § 131, CEDH 2013.

denied access to evidence supporting the government's decision to deport him.[633] With regard to Article 5(4), the Court specifically took as an example of an alternative measure the role played by Canada's security-cleared counsel in examining classified evidence.[634] Proposing this practical alternative, the Court held that the government had violated Article 5(4). Following the *Chahal* case, the UK first introduced a special advocate procedure to the deportation proceedings under the Special Immigration Appeals Commission Act[635] and then extended its application to include other types of proceedings and other types of courts.[636] The special advocate procedure has been used by the Court as an example of less restrictive means in other cases, such as *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*,[637] *Al-Nashif v. Bulgaria*[638] and *A. and Others v. the United Kingdom*.[639]

However, although the UK's special advocate procedure is an improvement on total non-disclosure of the evidence, it remains a 'half empty, half full' scenario. Indeed, some scholars and human rights organisations have questioned its compliance with human rights law.[640] It was not until the case of *A. and Others v. the United Kingdom* that the Court expressed an opinion on this issue, holding that the country's special advocate procedure did not necessarily comply with the Convention, unless the arrested or accused person was given essential information that would allow him to gain knowledge of the precise

[633] See *Chahal v. the United Kingdom*, 15 November 1996, § 41, Reports of Judgments and Decisions 1996-V.
[634] See *Chahal v. the United Kingdom*, 15 November 1996, § 131, Reports of Judgments and Decisions 1996-V.
[635] See Amnesty International, 'Left in the Dark: The Use of Secret Evidence in the United Kingdom', *Amnesty International*, 2012, p. 40, footnote 8, retrieved 24 January 2020, from https://www.amnesty.org/en/documents/EUR45/014/2012/en/.
[636] In the UK, the closed materials procedure can be applied in certain terrorism-related cases, and all civil cases. As for the types of the courts that have recourse to it, both specialised tribunals and ordinary courts are included. See Didier Bigo, Sergio Carrera, Nicholas Hernanz, and Amandine Scherrer, 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', *European Parliament*, 2014, pp. 21-22, retrieved 24 January 2020, from https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU%282014%2950 9991_EN.pdf. See also Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?', *The Modern Law Review 78(6)*, 2015, 913-944, pp. 918-919.
[637] See *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 10 July 1998, § 78, Reports 1998-IV.
[638] See *Al-Nashif v. Bulgaria*, no. 50963/99, §§ 93-97, 20 June 2002.
[639] See *A. and Others v. the United Kingdom*, no. 3455/05, § 210, ECHR 2009.
[640] For instance, Amnesty International, 'Left in the Dark: The Use of Secret Evidence in the United Kingdom', *Amnesty International,* 2012, retrieved 24 January 2020, from https://www.amnesty.org/en/documents/EUR45/014/2012/en/. See also Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial', *The Modern Law Review 73(5),* 2010, 836-857. Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?', *The Modern Law Review 78(6)*, 2015, 913-944.

nature of the allegations against him, and thereby give effective instructions to the special advocate.[641] In this sense, therefore, the Court endorsed the UK's scheme. Under the less-intrusive-means test, the special advocate procedure is proposed as an alternative measure for counterbalancing the detrimental effect that withholding evidence from the defence has on the equality of arms.

3.4.2.4 Proportionality in the narrow sense (stricto sensu)

Those familiar with the principle of proportionality probably find that there is a test missing from my preceding discussions. Apart from suitability and necessity, the classic proportionality analysis also runs the test of proportionality in the narrow sense (*stricto sensu*) as the final step.[642] This test requires that government measures imposed for public interests should not impose an excessive burden on the individuals concerned. In national security case law, the Court normally gives succinct reasoning on this test, mainly because most of the aspects of the test have already been included in the assessment of suitability and necessity. [643] The Court's reasoning on proportionality *stricto sensu* is consequently of less interest for the purposes of this research.

Proportionality *stricto sensu* is an excessive burden test, and the analysis is always on a case-by-case basis. It focuses mainly on avoiding two kinds of extreme circumstances. The first of these is when a government seriously interferes in human rights for an objective of only low importance. To evaluate the objective, i.e. the national security interests at stake, the Court must assess the threat identified in the case, including its nature, urgency and likelihood of producing an unfavourable outcome. However, this analysis has already been done under the suitability test. The seriousness of the government's interference, which is discussed when the Court assesses its necessity, depends on the impugned measure's duration, scope and rigour, as well as on whether the right accommodates essential features of a democratic society. In addition, extinguishing the very essence of rights undoubtedly constitutes serious interference. The second kind of circumstances the Court seeks to deter through the *stricto sensu* test is when the serious interference has an important objective, but lacks effectiveness in achieving that objective. We may recall that the effectiveness of the government measure is already a key element of the suitability test. By referring back to the analyses from the other two tests, the Court thus gives a succinct analysis of the proportionality *stricto sensu*.

---

641 See *A. and Others v. the United Kingdom*, no. 3455/05, § 220, ECHR 2009.
642 See Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 469.
643 See Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law*, Brill, 2015, pp. 79-80.

The process could be compared to a cost-benefit analysis, where the combination of low benefit and high cost is not acceptable. The *stricto sensu* test acts as a safety valve in case governing authorities use a remote national security threat to justify a severe restriction on human rights.

3.4.3 Conclusion

How should the human rights enshrined in the ECHR be reconciled with national security? Each has a good reason to be prioritised: while the security of the state constitutes a precondition for safeguarding human rights, the protection of human rights constitutes the legitimate basis of the state. This long-existing dilemma might explain why the Court's reasoning and decisions may seem to be inconsistent from one case to another. In the meantime, scholars have also often criticised the Strasbourg authorities for lacking clarity and consistency in their reasoning when balancing human rights against conflicting public interests.

Nevertheless, the findings presented above suggest that the Court reviews the proportionality of government interference with human rights in a consistent and predictable way if we view its decision-making process from two distinct but closely related perspectives: the broad categorical perspective and the case-specific perspective. Seeing this process from the broad categorical perspective, we can see how the Court follows a relatively consistent analytical structure for scrutiny by reviewing the same elements, i.e. suitability and necessity. Under this structure, we can read the Court's scrutiny of national security cases into two models of norms, distinguished by their stringency or focus. Due to the different intensity of their scrutiny and their major concerns, each model shows an identifiable tendency in which the Court leans either towards protecting human rights or towards preserving national security. But the tendency embedded in each model does not necessarily determine the outcome of each case. By viewing the case law from the case-specific perspective, we can see that the Court also considers the specific facts and nature of a case, and thereby mitigates the identifiable tendency, arising from the model, to protect human rights or to preserve national security.

From the broad categorical perspective, the two models are summarised in accordance with the nature of the rights under question. The first model, the Human Right Priority Model, can be found in cases concerning rights underlying the democratic values of 'pluralism, tolerance, and broadmindedness'. In the selected case law, concerns are frequently raised about the freedom of speech, the freedom of assembly and association, and the right to respect for private life. The chief reason for prioritising these rights over national security is that once such essential features are set aside, a democratic society would be more

nominal than substantial. In such cases, the Court is consequently required to perform intense scrutiny of the contested government interference. The other model is the National Security Priority Model, which is visible in cases concerning rights not seen as being closely linked with democratic values. In these cases, protecting national security prevails over some human rights obligations as the state is the entity in which democracy is vested, and democracy will survive only if the authorities can preserve the security of the state to some extent. The scrutiny of the suitability and necessity of the contested government action is less intense in these cases than for cases in the first model.

To assess whether government interference is suitable (i.e. the suitability test), the Court examines three main elements: the danger to national security, the effectiveness of the impugned measure, and the evidence or argument to substantiate the previous two elements. Under the less-intrusive-means test (i.e. the necessity test), the Court may seek a practical substitute or tailor the contested measure. It may review the substantive merits of the measure or scrutinise the national decision-making process. More importantly, the Court also places focus on either 'collateral damage' to human rights, or efforts made to avert abuse of power by the government. When proceeding with strict review standards, the Court is more likely to find a violation of human rights than to find that an interference is compatible with the Convention. It is in this sense that the approach is referred to as the 'Human Rights Priority Model': it offers quite strong protection of rights and freedoms. By contrast, under the 'National Security Priority Model', the Court is less intense in its scrutiny of government actions and may therefore conclude more easily that the government is justified in taking the impugned measure.

From the case-specific perspective, the Court tries to redress each model's embedded tendency to prioritise either human rights or national security by weighing the concrete facts and specific circumstances of each case. For the Human Rights Priority Model, apart from confining its application to several given types of cases, the Court also adopts a proactive strategy to evaluate whether the alleged danger is real by taking into account the context and specific circumstances of the case. After all, the Court does not expect or require a state to wait until it is too late to take action against national security threats. The Court has also found that deterrent penalties may be necessary in light of the special features of a case. When it comes to the National Security Priority Model, government interference can still be found to be unsuitable if the Court identifies major defects such as *ex post* disappearance of the danger, a lack of efficacy of the impugned measure or, in cases relating to certain limited rights, a lack of specific description of the danger. In addition, the specific

circumstances of a case may prove that government authorities enjoyed too much leeway in imposing the contested measure.

CHAPTER 4

IMPACT OF NATIONAL SECURITY ON HUMAN RIGHTS IN CHINA

4.1 NATIONAL SECURITY, HUMAN RIGHTS: REINTERPRETATION WITH CHINESE CHARACTERISTICS?

Chinese authorities have attached considerable, or sometimes even overriding, importance to the country's unique circumstances. These circumstances are used to defend China's 'deviations' from international norms. In this section, I analyse how China interprets national security and human rights. How much are 'Chinese characteristics' involved in these interpretations? Does the lens of 'Chinese characteristics' mean that, in China, human rights and national security have a radically different meaning from their European counterparts?

4.1.1 National Security in the Context of China

A new National Security Law was passed in 2015, designated by Chinese authorities as the fundamental legislation in the field of national security,[644] yet criticised by international observers as being 'too broad, too vague'.[645] To define the term 'national security' in the legal sense, Article 2 reads:

> 'National security' means a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the State are relatively not faced

[644] See Li Shishi, "Introduction of the 'National Security Law of the People's Republic of China' (draft) at the 12th Session of the Standing Committee of the Twelfth National People's Congress, 22 December 2014", *The Website of the National People's Congress of the People's Republic of China*, retrieved 8 February 2020, from http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content_1945964.htm.（参见李适时："关于《中华人民共和国国家安全法（草案）》的说明——2014 年 12 月 22 日在第十二届全国人民代表大会常务委员会第十二次会议上"，全国人大网，http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content_1945964.htm，最后访问日期 2020 年 2 月 8 日。）

[645] See, for instance, Office of High Commissioner for Human Rights, "UN Human Rights Chief Says China's New Security Law is Too Broad, Too Vague", *OHCHR,* 7 July 2015, retrieved 8 February 2020, from https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16210&LangID=E.

> with any danger and not threatened internally or externally and the capability to maintain a sustained security status.[646]

Comparing this definition with the definition given in Chapter 1, we can see that it contains the two basic elements of national security: first, no internal or external threats, and, second, if threats appear, the state has the ability to tackle them. At least in terms of the dimensions of national security, China's definition shows no significant deviation from the ordinary meaning, and nor does it bear any 'Chinese characteristics'. The inclusion of these two elementary dimensions determines that China's starting point when delimiting national security concerns is the same as that of European countries. From this starting point, national security is divided into two major concerns: (a) eliminating threats, and (b) maintaining both the capacity of national security institutions and the effectiveness of their mechanisms.

Nevertheless, the definition is ambiguous. It is long on policy exhortations,[647] and the law does not provide any further explanation of the terms. The definition lists the subjects of national security as 'the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development' and 'other major interests'. As the lawmakers indicate, these aspects constitute China's core interests and were borrowed from a 2011 policy document entitled 'The White Paper on China's Peaceful Development'.[648] However, the legislation does not define these core interests,

---

[646] The English version of the National Security Law is available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.

[647] See Timothy P. Stratford and Yan Luo, 'China's New National Security Law', *The National Law Review 5,* 2015, retrieved 10 February 2020, from https://www.natlawreview.com/article/china-s-new-national-security-law.

[648] See National Law Office of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, *Decoding the National Security Law of the People's Republic of China,* China Legal Publishing House, 2016, p. 10.（全国人大常委会法制工作委员会国家法室：《中国人民共和国国家安全法解读》，中国法制出版社 2016 年，第 10 页。） See also, The State Council Information Office of China, "China's Peaceful Development", *the State Council Information Office of China,* September 2011, retrieved 11 February 2020, from https://www.scio.gov.cn/zxbd/nd/2011/Document/1006416/1006416.htm.

The Legislative Affairs Commission is a professional support body under the NPC Standing Committee. It plays a crucial role throughout the legislative process: it is responsible for drafting the Standing Committee's legislative plans, drafting important bills, conducting public consultations on draft laws, proposing amendments to pending bills, and acting as the Standing Committee's spokesperson's office, among other duties. See National People's Congress of People's Republic of China, "Legislative Affairs Commission", NPC, retrieved 15 July 2023 from http://www.npc.gov.cn/englishnpc/c2852/201903/939762af24ce48c886e9d175502a878b.shtml. See also Zhu Chenge, 'Debate on the Functions of the Legislative Affairs Commission of the Standing Committee of the National People's Congress', *China Law Review (1)*, 2017, 191-198.（参见褚宸舸："全国人大常委会法工委职能之商榷"，载《中国法律评论》2017 年 1 期。）

such as 'welfare of the people', 'sustainable economic development' and 'social development'. These terms thus remain mostly as imports from a political context and fail to become legal terms. As to the 'other major interests', there is no standard on how to identify them. Moreover, China's policy is made even more ambiguous by the fact that the new National Security Law extends its scope to at least eleven fields, ranging from traditional concerns like politics, territory and the military to non-traditional ones involving the economy, culture, society, technology, information, ecology, natural resources and nuclear power.[649] Although this extension reflects China's acceptance of the development of national security, the legislation fails to interpret these emerging concerns in the legal sense, but merely provides simple descriptions or policy extracts.

In Chapter 1, concerning the definition of national security, I briefly addressed the question: Why do we need a clear-cut definition of national security? Or, in other words, what functions should such a definition provide? I argued that a definition is more for clarifying the government's purpose than for preventing the term from being abused by the state. National security, as a paramount public interest, was accepted as a legitimate reason to restrict human rights long before the recent extension of its contents. The government powers that come along with it, especially with regard to discretion and secrecy, have already raised concerns among international commentators about potential abuse.[650] The extending of the concept means state authorities are now able to define more issues as national security concerns than before, including threats that would not appear to be imminent, such as threats to culture and ecology. In this context, I find the concern over this 'inflation' of the definition to be that because the existing legal framework was designed for 'traditional' national security, these new concerns of national security should not be allowed to enjoy the same legal consequences unless they are of similar seriousness. Ideally, therefore, the updated definition of national security should identify false claims by governing authorities, particularly those based on non-traditional threats. The assumption in this approach is that, in the absence of a clear-cut definition, authorities would abuse the notion of national security to delimit human rights prematurely.

[649] The 11 fields of China's national security concerns are prescribed under Articles 15-31 of the law. The English version of the National Security Law is available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.

[650] See Cai Congyan, 'Enforcing a New National Security – China's National Security Law and International Law', *Journal of East Asia and International* Law *10(1)*, 2017, 65-90, p. 72.

However, giving a clear-cut definition supposed to prevent abuse of power is neither viable nor necessary in practice. I have not observed national security claims concerning human rights restrictions in China being startling or 'creative'.[651] Neither have I observed such claims in ECtHR cases. To some extent, this can be attributed to the public's readiness to accept the situation as it is. The public are hesitant about changes and need repeated explanations to be persuaded. From the assessment of European countries' experience, we can see that preventing abuse of power does not necessarily require a detailed assessment of whether state authorities' claims fit the definition of national security. Conversely, a considerable number of countries do not even have a legal definition of it. Instead, they focus on implementing measures and shedding light on their proportionality, and on the actual utility of procedural safeguards against abuse.

Although the definition cannot be used as an available 'filter', examining its meaning in the country-specific context is still required in order to illuminate the rationale behind national security law and its implementation in China. I will therefore proceed by discussing two aspects: the national security threats and the protection mechanisms.

4.1.1.1 Threats to China's national security

Although the contents of national security have been expanded, maintaining the CCP's regime remains at the core of China's national security concerns. Since the 1980s, the programme of reform and opening-up has shifted China's focus towards economic development on the premise of retaining leadership by the CCP.[652] As I summarised in Chapter 1, economic growth is currently the empirical solution for the moral legitimacy of the CCP's ruling power. In turn, political stability with strong and efficient governance is seen by the governing authorities as insurance of economic development.[653] This very 'Chinese

[651] Most of such claims are still under the headings of political security and territory security, as well as terrorism. For example, see Kenneth Roth, "World Report 2020: China's Global Threat to Human Rights", *Human Rights Watch*, retrieved 12 February 2020, from https://www.hrw.org/world-report/2020/china-global-threat-to-human-rights. See also Congressional-Executive Commission on China, '2019 Annual Report', *Congressional-Executive Commission on China,* 2019, retrieved 12 February 2020, from https://www.cecc.gov/publications/annual-reports/2019-annual-report.
[652] Tony Saich, 'The Fourteenth Party Congress: A Programme for Authoritarian Rule', *The China Quarterly (132)*, 1992, 1136-1160, pp. 1158-1159. See also Elizabeth J. Perry, 'Studying Chinese Politics: Farewell to Revolution?', *China Journal (57)*, 2007, 1-22, p. 7. Andrew J. Nathan, 'China's Changing of the Guard: Authoritarian Resilience', *Journal of Democracy 14(1)*, 2003, 6-17.
[653] See Zeng Shuiying and Yin Dongshui, 'Overseas Political Study on Models of Authoritarianism of Modern China: Review and Rethink', *Dynamics of Social Sciences (1)*, 2017, 25-32, pp. 27-28.（参见曾水英、殷冬水："海外当代中国政治研究的威权主义范式：回顾与反思"，载《社会科学动态》2017 年 1 期，第 27-28 页。）Mark P. Petracca and Mong Xiong, 'The Concept of Chinese Neo-Authoritarianism: An Exploration and Democratic Critique', *Asian Survey 30(11)*, 1990, 1099-1117, p. 1106. Elizabeth J. Perry, 'Is the Chinese Communist Regime Legitimate?', in Jennifer Rudolph and

characteristic' is reflected in how China defines several kinds of national security threats. Firstly, an attack on the CCP's power is seen as constituting an attack on the security of the state. The CCP assumed power in 1949 and intends to remain the ruling party into the longer-term future.[654] In light of the country's Constitution, 'leadership of the CCP' is directly linked with the state's political system – socialism. As a result, the CCP has integrated its monopoly on power into the basic features of the People's Republic of China in the legal sense.[655] Consequently, undermining the CCP's ruling position constitutes a serious threat to the political security of the state. This is also reflected in the National Security Law, where, in elaborating the term 'regime' in the definition of national security under the law, Article 15 provides a further description of major concerns from a perspective of political security. It starts, for example, by

Michael Szonyi (eds.), *The China Questions: Critical Insights into a Rising Power*, Harvard University Press, 2018, 1-4, p. 2. Bruce Gilley and Heike Holbig, 'The Debate on Party Legitimacy in China: A Mixed Quantitative/Qualitative Analysis', *Journal of Contemporary China 18(59)*, 2009, 339-358, p. 343.

[654] Paragraph 7 of the preface of the Constitution reads:

> 'The victory in China's New-Democratic Revolution and the successes in its socialist cause have been achieved by the Chinese people of all nationalities, under the leadership of the Communist Party of China … Under the leadership of the Communist Party of China …, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road …'

See Mo Jihong, 'On the Evolution of the Constitutional Status of the Ruling Party', *Legal Forum (4)*, 2011. See also Liu Songshan, 'A Historical Review and New Expectation on the Party's Leadership in the 1982 Constitution', *Journal of Henan University of Economics and Law (3)*, 2014, 1-20, pp. 6-10.

[655] Article 1 of the Constitution reads:

> 'The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.
>
> The socialist system is the basic system of the People's Republic of China. *The leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics*. Disruption of the socialist system by any organization or individual is prohibited.' [emphasis added]

See Jiao Hongchang and Jiang Su, 'The Normative Meaning Concerning the Article 36 of the Constitutional Amendment of China', *Study & Exploration (1)*, 2019, 50-57, p. 53.

And in a brief explanation of the draft amendment to China's Constitution when submitted to the national legislature for deliberation, it elaborated on the proposed inclusion of 'the leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics'. Among others, it indicated that:

> 'Adding the constitutional provision on upholding and strengthening overall Party leadership, from the perspective of the very nature of China's socialist system, is conducive to boosting the awareness of the Party's leadership among all the Chinese people, effectively integrating the Party's leadership with the entire process and all aspects of the country's work, and ensuring the Party and the country's undertakings always forge ahead in the correct direction.'

See Wang Chen, "A Brief Explanation of the Draft Amendment to China's Constitution", *The Website of the National People's Congress of the People's Republic of China*, 20 March 2018, retrieved 20 February 2020, from https://web.archive.org/web/20180411025710/http://www.npc.gov.cn/npc/xinwen/2018-03/20/content_2052202.htm.

confirming the CCP's leadership of the country and correspondingly outlaws any conduct that 'subverts or incites the subversion' of this.[656]

European countries, by contrast, do not share China's concern for ensuring a specific party's long-term rule to ensure political stability. Rather, their democratic political systems determine that the ruling party is not protected from being replaced by another as long as any such replacement is elected democratically and legally. The CCP has long been on highly sensitive alert to any signs of advocacy of two-party or multi-party systems, not least because the Soviet Union ended up being dissolved after repealing the Communist Party's dominant position.[657] 'Chinese characteristics' regard leadership by the CCP as the only reliable guarantee for the continuance of the country's socialist political system. From the perspective of national security, the CCP has turned its rule into a matter of state security by embedding itself in the basic features of the political system. This raises practical questions about how to perceive the nature of some threats. Would, for instance, opposition or disobedience to a party member be a threat to the rule of the CCP? What if it were the party's policies, strategies and decisions that individuals or groups were opposing? Should the rule of the CCP in this context be interpreted only in an abstract way?[658]

Secondly, the Chinese authorities are preoccupied with retaining the dominance of CCP's political ideologies. The CCP regards these political ideologies – and two in particular: Marxism with Chinese-style adaptations, and nationalism – as key means for upholding its legitimacy. To ensure these ideologies remain dominant, the government has demonstrated less tolerance to political pluralism than democratic states, mainly because detrimental

---

[656] Article 15 of the National Security Law reads:

'The state shall *adhere to the leadership of the Communist Party of China*, maintain the socialist system with Chinese characteristics, develop socialist democratic politics, improve the socialist rule of law, reinforce the mechanism for checks and oversight of power, and protect the people's rights as the master of the country.

The state shall prevent, frustrate, and legally punish any conduct that betrays the country, splits the country, incites rebellion, *subverts or incites the subversion of the people's democratic dictatorship*; prevent, frustrate, and legally punish any conduct that compromises national security such as stealing and divulging state secrets; and prevent, frustrate, and legally punish any penetration, destruction, subversion, and secession activities of overseas forces.' [emphasis added]

[657] See Wu Yajie, 'The Inspiration of Gorbachev's Failure of Political Pluralism for Contemporary China', *Journal of Qiqihar University (Philosophy & Social Science Edition) (7),* 2016, 26-28.（参见吴亚杰："戈尔巴乔夫政治多元论失败对当代中国的启示"，载《齐齐哈尔大学学报（哲学社会科学版）》 2016 年 7 期。）

[658] See Liu Songshan, 'Several Issues of Constitutional Supervision after the 2018 Constitutional Amendment', *Local Legislation Journal (2)*, 2019, 1-13.（参见刘松山："修宪后宪法监督若干问题探讨"，载《地方立法研究》2019 年 2 期。）

effects of ideologies undermining rule by the CCP would only gradually become visible.

'Peaceful evolution', for example, is still regarded as a serious threat to China's national security. Chinese authorities regard 'peaceful evolution' as a strategy developed by Western countries with the aim of ending the communist regime by peaceful means,[659] and political ideology as one of their 'battlefields'. The government's fear is that undermining the ideology of socialism would, by itself, end the regime of the Communist Party and the country's socialist system.[660] Contrary to its importance in the eyes of the governing authorities, the National Security Law does not explicitly refer to the ideology issue until Article 23 on cultural security.[661] Nevertheless, encroachment amounting to inciting the subversion of the regime is indeed the danger the state authorities worry about.[662] The dilemma faced by China is that, on the one hand, it needs to continue the market economy and open policy in order to ensure economic performance, but, on the other hand, it also has to confront some of the accompanying values of liberal ideology.[663] The basic strategy adopted by the governing authorities is, therefore, to reject some values and re-interpret others to suit Chinese conditions, thus reconstructing universal values with 'Chinese characteristics'.

It would be excessively and unduly cautious for the Chinese government to assume any advocacy of liberal values to be a plot raising questions of national security. Advocacy may be based on real needs of the country. Nevertheless, it

---

[659] See Russell Ong, '"Peaceful Evolution", "Regime Change" and China's Political Security', *Journal of Contemporary China 16(53)*, 2007, 717-727, pp. 717-721.

[660] See Russell Ong, '"Peaceful Evolution", "Regime Change" and China's Political Security', *Journal of Contemporary China 16(53)*, 2007, 717-727, pp. 717-718.

[661] Article 23 of the National Security Law reads:

> 'The state shall adhere to developing an advanced socialist culture, inherit and carry forward the fine traditional culture of the Chinese nation, cultivate and practice the core values of socialism, prevent and resist the impact of harmful culture, *maintain its ideological domination*, and enhance the overall cultural strength and competitiveness.' [emphasis added]

The English version of the National Security Law is available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.

[662] Take the case of Jiang Tianyong. Jiang was convicted of 'inciting subversion of state power' in 2017. Among others, he was found taking courses and training programmes in the US, getting funding support overseas, and inciting the discontent of the public at the CCP and China's political system. See the video records of the first instance trial on case of Jiang Tianyong, retrieved 27 February 2020, from https://www.weibo.com/hncszy?profile_ftype=1&is_all=1&is_search=1&key_word=%E6%B1%9F%E5%A4%A9%E5%8B%87&sudaref=passport.weibo.com#_rnd1582790597922.

[663] See Tang Aijun, 'Ideological Security in the Framework of the Overall National Security Outlook', *Socialism Studies (5)*, 2019, 49-55, p. 53. Jennifer Pan and Xu Yiqing, 'China's Ideological Spectrum', *The Journal of Politics 80(1)*, 2018, 254-273, pp. 255 & 271. Russell Ong, '"Peaceful Evolution", "Regime Change" and China's Political Security', *Journal of Contemporary China 16(53)*, 2007, 717-727, p. 727.

is not practical to clearly distinguish such cases from the agenda of 'peaceful evolution'. By the time governing authorities are certain of what they are facing, it might be too late. Neither is this distinction imperative in practice. From the governing authorities' perspective, situations advocating political reform have the potential to be taken advantage of.[664] In this regard, low tolerance is often shown by Chinese authorities towards symbols and core values of liberalism, such as constitutionalism, democracy and human rights.[665] In other words, when 'defending' the dominance of the CCP's political ideologies, governing authorities are not satisfied with merely reinforcing their propaganda efforts, but also endeavour to eliminate their ideological opponents' messages, as witnessed both in legislation and in practice. Article 12(2) of the Cybersecurity Law, for instance, specifically excludes the free flow of online information that 'incites to subvert State power or overthrow the socialist system'.[666] In practice, the famous Great Firewall blocks access to selected foreign websites,[667] ranging from websites with a government background and political agenda, like Radio Free Asia (RFA) and Voice of America (VOA),[668] to websites with no propaganda missions, such as Google and Wikipedia.

Separatism is seen as another major threat to China's national security in the form, *inter alia*, of ethnic issues in Xinjiang and Tibet, and sovereignty challenges from Hong Kong and Taiwan.[669] Apart from undermining the state's

---

[664] See Russell Ong, '"Peaceful Evolution", "Regime Change" and China's Political Security', *Journal of Contemporary China 16(53)*, 2007, 717-727, p. 724.

[665] See Zhao Suisheng, 'The Ideological Campaign in Xi's China: Rebuilding Regime Legitimacy', *Asian Survey 56(6)*, 2016, 1168-1193, pp. 1171-1176. See also Kerry Brown and Una Aleksandra Bērziņa-Čerenkova, 'Ideology in the Era of Xi Jinping', *Journal of Chinese Political Science 23(3)*, 2018, 323-339, p. 329.

[666] Article 12(2) of the Cybersecurity Law reads:

> 'Any individual or organization using the network shall comply with the Constitution and laws, follow public order and respect social morality, shall not endanger cybersecurity, and shall not use the network to conduct any activity that endangers national security, honour and interest, i*ncites to subvert the state power or overthrow the socialist system*, incites to split the country or undermine national unity, advocates terrorism or extremism, propagates ethnic hatred or discrimination, spreads violent or pornographic information, fabricates or disseminates false information to disrupt the economic and social order, or infringes upon the reputation, privacy, intellectual property rights or other lawful rights and interests of any other person.' [emphasis added]

The English version of the law is available at http://en.pkulaw.cn/display.aspx?cgid=4dce14765f4265f1bdfb&lib=law, last visited 10 February 2021.

[667] See Global Times, "Great Firewall Father Speaks out", *Global Times*, 18 February 2011, retrieved 29 February 2020, from http://english.sina.com/china/p/2011/0217/360409.html.

[668] See Mark Magnier, "US Launches New Mandarin Network as Washington and Beijing Battle for Global Influence", *South China Morning Post*, 24 November 2019, retrieved 29 February 2020, from https://www.scmp.com/news/china/diplomacy/article/3039109/us-launches-new-mandarin-network-washington-and-beijing-battle.

[669] See Kingsley Edney, 'Building National Cohesion and Domestic Legitimacy: A Regime Security Approach to Soft Power in China', *Politics 35(3-4)*, 2015, 259-272, p. 263.

sovereignty, unity and territorial integrity,[670] separatist movements weaken the ideology of Chinese nationalism, which is one of the sources of legitimacy for the CCP's rule.[671] Despite being a multi-ethnic country, China uses the 'Chinese nation' as a political term to unify the many ethnic groups living within the territory of China under the CCP regime,[672] as well as to indicate those with historically shared traditions, culture and economic activities. The legitimacy of the CCP's rule derives partially from its history, when it succeeded in saving China from 'imperialism, feudalism, and bureaucrat-capitalism',[673] and from its intention to 'achieve the grand rejuvenation of the Chinese nation'.[674] In this context, the separatist movements in Xinjiang and Tibet strongly deny this identity and advocate their distinctive religious beliefs, languages and customs. Given the local circumstances in Xinjiang and Tibet, stopping the spread of separatist ideas is considered to be more pragmatic and effective than just selling nationalism. Therefore, the governing authorities have extended national security concerns to religious activities, cultural and daily life, and education,[675] thereby attempting to locate threats through any manifestation that may suggest separatism.

---

[670] The sovereignty, unity and territorial integrity of the state are mentioned in Article 15(2) of the National Security Law. The English version of the National Security Law is available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.

[671] See Zeng Shuiying and Yin Dongshui, 'Overseas Political Study on Models of Authoritarianism of Modern China: Review and Rethink', *Dynamics of Social Sciences (1)*, 2017, 25-32, p. 28. （参见曾水英、殷冬水："海外当代中国政治研究的威权主义范式：回顾与反思"，载《社会科学动态》2017 年 1 期，第 28 页。）

[672] See Fei Xiaotong, *The Pattern of Diversified Integration of Chinese Nation*, *China Min Zu University Press*, 1989.（参见费孝通：《中华民族多元一体格局》，中央民族学院出版社 1989 年。）

[673] The fifth paragraph of the preface of the Constitution. The English version of the Constitution of the People's Republic of China (2018 Amendment) is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[674] The seventh paragraph of the preface of the Constitution. The English version of the Constitution of the People's Republic of China (2018 Amendment) is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[675] For instance, Article 9 of the Uyghur Autonomous Region Regulation on De-extremification lists the following words and actions that are considered as 'extremification':

(1) …
(2) interfering with others' freedom of religion by forcing others to participate in religious activities, forcing others to supply properties or labour services to religious activity sites or religious professionals;
(3) …
(4) interfering with others from having communication, exchanges, mixing with, or living together, with persons of other ethnicities or other faiths; or driving persons of other ethnicities or faiths to leave their residences;
(5) interfering with cultural and recreational activities, rejecting or refusing public goods and services such as radio and television;

The main factors in the cases of Hong Kong and Taiwan are historical and political, [676] although this does not make it any easier for government authorities to tackle separatism and reinforce nationalism. Because of Hong Kong's high degree of autonomy, the central government suffered a setback when it attempted to add 'moral and national education' to the Hong Kong school curriculum in 2012.[677] While this intervention was supposed to increase identity recognition of the 'Chinese nation', the plan failed due to mass protests in Hong Kong. In the meantime, the central government has nevertheless made progress on frustrating the separatist movements in Hong Kong.[678] After their failure to introduce the National Security (Legislative Provisions) Bill 2003,[679] the Chinese authorities managed in 2020 to adopt, as an alternative, the Hong Kong National Security Law.[680] With regard to Taiwan, its *de facto* self-rule to a

(6) generalizing the concept of Halal, to make Halal expand into areas other beyond Halal foods, and using the idea of something being not-halal to reject or interfere with others secular lives;
(7) wearing, or compelling others to wear, gowns with face coverings, or to bear symbols of extremification;
(8) spreading religious fanaticism through irregular beards or name selection;
(9) failing to perform the legal formalities in marrying or divorcing by religious methods;
(10) not allowing children to receive public education, obstructing the implementation of the national education system;
…

The Regulation is available at https://www.guancha.cn/politics/2018_10_10_474949.shtml, last visited 10 February 2021.

[676] Zhu Jie and Zhang Xiaoshan, 'From "Taiwan Independence" to "Hong Kong Independence": How Hong Kong Followed the Steps of Taiwan on the Road of Separatism', in Zhu Jie and Zhang Xiaoshan, *Critique of Hong Kong Nativism: From a Legal Perspective*, Springer, 2019, pp. 64 & 69.

[677] See Liu Juliana, "Hong Kong Debates 'National Education' Classes", *BBC*, 1 September 2012, retrieved 25 February 2020, from https://www.bbc.com/news/world-asia-china-19407425.

[678] See Ming Pao, "Zhao Xiaoming: Failing to Enact Article 23 National Security Laws in Hong Kong would Lead to Hong Kong Independence – It is Urgent to Develop National Security Protection Mechanisms", *Ming Pao*, 11 December 2019, retrieved 29 February 2020, from https://news.mingpao.com/ins/%E6%B8%AF%E8%81%9E/article/20191211/s00001/1576039965673/%E5%BC%B5%E6%9B%89%E6%98%8E-23%E6%A2%9D%E6%9C%AA%E7%AB%8B%E6%B3%95%E5%8A%A0%E5%8A%87%E3%80%8C%E6%B8%AF%E7%8D%A8%E3%80%8D-%E5%BB%BA%E7%B6%AD%E8%AD%B7%E5%9C%8B%E5%AE%89%E5%88%B6%E5%BA%A6%E6%88%90%E7%B7%8A%E8%BF%AB%E4%BB%BB%E5%8B%99.

[679] See Legislative Council of the Hong Kong Special Administrative Region of the P.R. China, "Bills Committee on National Security (Legislative Provisions) Bill", *LegCo*, retrieved 25 February 2020, from https://www.legco.gov.hk/yr02-03/english/bc/bc55/papers/bc55_ppr.htm#c. See Rachel Cartland, "Enacting Article 23 National Security Laws in Hong Kong would be Better than the Current Legal Uncertainties", *South China Morning Post*, 4 September 2018, retrieved 25 February 2020, from https://www.scmp.com/comment/insight-opinion/hong-kong/article/2162654/enacting-article-23-national-security-laws-hong. See also South China Morning Post, "The Article 23 Argument", *South China Morning Post*, 1 July 2003, retrieved 25 February 2020, from https://www.scmp.com/article/420333/article-23-argument.

[680] See Jeffie Lam, Kimmy Chung, Gary Cheung, and Natalie Wong, "Hong Kong Government Unveils National Security Law Details", *South China Morning Post*, 1 July 2020, retrieved 10 February 2021, from https://www.scmp.com/news/hong-kong/politics/article/3091286/hong-kong-government-unveils-details-sweeping-national.

large extent precludes Chinese authorities from taking any legal measures directly targeting separatism there, even though China's adopting of the Anti-Secession Law was designed specifically for that purpose.[681]

I have summarised two kinds of national security threats in the Chinese authorities' eyes: the CCP's rule and political ideologies. The third kind of national security threat incorporates some possible causes of social unrest. On the one hand, governing authorities have long underlined that stability is paramount to economic development. Consensus on this idea has been reached among generations of leaders.[682] On the other hand, governing authorities assume that people's acceptance of the party's rule is reflected by Chinese society being free of instability.[683] In turn, the ability to maintain social order is becoming a 'selling point' of the governing authorities,[684] thus constituting another form of performance legitimacy other than continued economic growth.[685] In other words, stability not only contributes to the legitimacy of the CCP's rule, but is also an indicator measuring the consent of the ruled. This dual role adds weights to stability in the eyes of the authorities. Under Article 29 of the National Security Law, tackling social unrest is therefore an independent concern of national security.[686]

---

[681] The English version of the Anti-Secession Law is available at http://en.pkulaw.cn/display.aspx?cgid=d421901301d309f2bdfb&lib=law, last visited 12 February 2021.

[682] See Shang Xiaoqiang, 'The Lessons from the CCP's Maintaining Social Stability over the 40 Years of Reform and Opening Up', *Journal of the Party School of XPCC of CPC (5)*, 2018, 90-93. （参见尚小强：“改革开放 40 年中国共产党维护和保持社会稳定的基本经验”，载《兵团党校学报》2018 年 5 期。）

[683] See Yu Jianrong, 'Problems and Solutions of China's Current Pressure Stability Maintenance System: Reanalyse the Rigid Stability Type of the Society of China', *Exploration and Free Views (9)*, 2012, 3-6, p. 4.（参见于建嵘：“当前压力维稳的困境与出路——再论中国社会的刚性稳定”，载《探索与争鸣》2012 年 9 期，第 4 页。）

[684] For instance, regarding the criticism over the recent policies on Xinjiang, the authorities usually resort to the desirable outcome of social stability that has been achieved. See Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, "Address by Aiken Tuniyazi, Member of the Standing Committee of CPC Xinjiang Uygur Autonomous Regional Committee and Vice Governor of Xinjiang People's Government, at the 41st Session of UN Human Rights Council", *Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland,* 25 June 2019, retrieved 27 February 2020, from http://www.china-un.ch/eng/hom/t1675634.htm.

[685] See Sarah Biddulph, *The Stability Imperative Human Rights and Law in China*, UBC Press, 2015, p. 8.

[686] Article 29 reads:

> 'The state shall improve the system and mechanisms to effectively prevent and resolve social contradictions, improve the public security system, vigorously prevent, reduce, and resolve social contradictions, properly handle public health, social safety, and other emergencies that affect national security and social stability, promote social harmony, and maintain public security and social peace and stability.'

The English version of the National Security Law is available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.

While peace and stability across the society is a determinative factor in the CCP's ruling status, regional crises still arise from time to time. Whether an incident amounts to a national security threat depends on several factors, including its nature, timing, venue, scale and seriousness. The Chinese authorities see the disturbances in Xinjiang in recent years as threatening the party's rule and, therefore, national security: the state is under threat of the region's secession. Another example is the Tiananmen Square protests of 1989, which amounted to a national security threat because they happened in the capital and so were politically symbolic, while the government authorities also alleged that they involved political advocacy against the CCP and its leaders.[687]

These cases differ, in their nature, from mass incidents which occur due to economic interests or environmental concerns. The latter rarely challenge, or at least do not intend to challenge, rule by the CCP.[688] Nevertheless, local authorities have shown that they are equally ready to take action against such incidents. One of the mechanisms of the Chinese government, and probably a notorious one, is the Stability Maintenance (*Weiwen*) mechanism. The 'stability' it aims at is, as defined by Yu Jianrong, rigid and confined to maintaining absolute public order.[689] Any incident deviating from the normal routine will be regarded as a threat to the public order of the local governance. This low tolerance to irregularities in society – including social movements such as marching, protesting and striking – contributes to a reality where freedom of assembly has in practice been deterred to null,[690] despite being enshrined in the

[687] See People's Daily, "We must Take a Clear-cut Stand against Disturbances", *People's Daily,* 26 April 1989, retrieved 28 February 2020, from https://web.archive.org/web/20160304090319/http://news.xinhuanet.com/ziliao/2005-02/23/content_2609426.htm.（人民日报："必须旗帜鲜明地反对动乱"，《人民日报》1989 年 4 月 26 日社论，网址 https://web.archive.org/web/20160304090319/http://news.xinhuanet.com/ziliao/2005-02/23/content_2609426.htm，最后访问日期 2020 年 2 月 28 日。）See also Nicholas D. Kristof, "Beijing Hints at Crackdown on Students", *The New York Times*, 26 April 1989, retrieved 28 February 2020, from https://www.nytimes.com/1989/04/26/world/beijing-hints-at-crackdown-on-students.

[688] See Yu Jianrong, 'Major Types and Basic Characteristics of Group Event in Today's China', *Journal of CUPL (6)*, 2009, 114-120 & 160, p. 116.（参见于建嵘："当前我国群体性事件的主要类型及其基本特征"，载《中国政法大学学报》2009 年 6 期，第 116 页。）

[689] See Yu Jianrong, 'From Rigid Stability to Resilient Stability: An Analysis Framework for Chinese Social Order', *Study & Exploration (5)*, 2009, 113-118, p. 115.（参见于建嵘："刚性稳定到韧性稳定——关于中国社会秩序的一个分析框架"，载《学习与探索》2009 年 5 期，第 115 页。）

[690] See Zhao Juan, 'The Constitutionality of Cases of Administrative Permission on Assembly', *Jiangsu Social Sciences (6)*, 2017, 87-97, p. 97.（参见赵娟："集会类行政许可案件的宪法检视"，载《江苏社会科学》2017 年 6 期，第 97 页。）See also Hou Jian, 'The Legal Governance of Mass Incidents', *Studies in Law and Business (3)*, 2010, 16-22, p. 18.（参见侯健："群体性表达事件的法律治理"，载《法商研究》2010 年 3 期，第 18 页。）

Constitution, as well as in legislation such as the Law of the People's Republic of China on Assemblies, Processions and Demonstrations.[691]

4.1.1.2 Institutions and mechanisms for national security in China

Institutions and mechanisms need to be ready to tackle qualified threats to national security. The institutions specifically assigned to protect national security in China include the military, police and intelligence agencies.[692] Of these, the Central National Security Commission (CNSC) reinforces a 'Chinese characteristic' – leadership by the CCP is a national security issue. This is reflected in the fact that, being an organisation of the CCP, the CNSC serves as a policy maker, cross-department coordinator and crisis manager for national security issues.[693] Just like numerous other 'leading small groups',[694] the CCP manages to concentrate intelligence from various sources through the CNSC, as well as concentrate the powers allocated to multiple agencies.[695] More

[691] Article 35 of the Constitution reads: 'Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration'. The English version of the Constitution of the People's Republic of China (2018 Amendment) is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021. The English version of the Law of the People's Republic of China on Assemblies, Processions and Demonstrations is available at http://en.pkulaw.cn/display.aspx?id=fda00466531cf397bdfb&lib=law&SearchKeyword=&SearchCKeyword=%bc%af%bb%e1%d3%ce%d0%d0%ca%be%cd%fe%b7%a8, last visited 10 February 2021.

[692] The military refers to the *People's Liberation Army* (PLA), and the *People's Armed Police Force* (PAP). Once belonging to the police system, the PAP has now been defined as an armed force instead of the police force, under the leadership of the *Central Military Commission* (CMC). See Xinhua Net, "Armed Police to be Commanded by CPC Central Committee", *Xinhua*, 27 December 2017, retrieved 7 March 2020, from http://www.xinhuanet.com/english/2017-12/27/c_136855602.htm. The police refer to the *Ministry of State Security* (MSS), and the *Ministry of Public Security* (MPS).

The military institutions, the MSS and MPS, they all carry out intelligence-gathering functions.

As for the military institutions, see Article 38 of the National Security Law. As for the MSS and MPS, see the Article 42 of the National Security Law, and the Article 2(2) of the People's Police Law. As for the intelligence task assigned to the army, the MSS, and MPS, see the Article 42 of the National Security Law, and the Article 5(1) of the National Intelligence Law. The English versions of the three laws mentioned above are available at http://pkulaw.cn/.

[693] Zhao Kejing, "China's National Security Commission", *Window into China*, 14 July 2015, retrieved 16 July 2019, from https://carnegietsinghua.org/2015/07/14/china-s-national-security-commission-pub-60637.

[694] See Doing Xin, "Why are the Newly Established National Leading Groups Composed of these Eight Government Departments", *Sina News*, 28 June 2019, retrieved 16 February 2022, from https://news.sina.com.cn/c/2019-06-28/doc-ihytcerm0002544.shtml#:~:text=%E4%B8%AD%E5%A4%AE%E5%AE%A3%E4%BC%A0%E6%80%9D%E6%83%B3%E5%B7%A5%E4%BD%9C,%E5%88%B6%E6%94%B9%E9%9D%A9%E9%A2%86%E5%AF%BC%E5%B0%8F%E7%BB%84%E3%80%82. People's Daily, "A Picture to Display the Central Leading Groups", *Peoples.cn*, 30 June 2014, retrieved 16 February 2022, from http://politics.people.com.cn/n/2014/0630/c1001-25218379.html.

[695] See Zeng Shuiying and Yin Dongshui, 'Overseas Political Study on Models of Authoritarianism of Modern China: Review and Rethink', *Dynamics of Social Sciences (1)*, 2017, 25-32, p. 29. See also Susan V. Lawrence and Michael F. Martin, 'Understanding China's Political System', *Congress Report Service*, 2013, p. 14, retrieved 7 March 2020, from https://fas.org/sgp/crs/row/R41007.pdf.

importantly, this national security institution operates under the CCP instead of under the government, and thus contributes to reinforcing the CCP's rule. Similarly, the armed forces, mainly the People's Liberation Army and the People's Armed Police Force, are under the command of the CCP through the Central Military Commission. This relationship inevitably binds the life of the CCP with that of the state. In the context of national security, China's military system is relatively independent compared to other national security institutions; in this study, therefore, I will concentrate primarily on 'civil' aspects of national security, unless indicated otherwise.[696]

Mechanisms become distinctly exclusive to public supervision when national security concerns are involved, as demonstrated by the rather low foreseeability of, or even lack of accessibility to, the norms and procedures regarding national security. The state secrets system is a prime example: Article 11(3) of the Law on Guarding State Secrets (the State Secrets Law) requires the specific scope of secrets and their classification level to be published only 'within a certain range'.[697] In other words, not only is critical information classified, but the practical norms for defining what is critical information are also unavailable to the public. Take, for example, the Regulation on State Secrets and the Specific Scope of Each Level of Secrets in Public Security Work. This regulation is assumed to comprise a detailed list of which information on the work of the police is to be classified, in line with Article 11(1) of the State Secrets Law.[698] This, however, is problematic because the regulation itself is classified.[699] While its existence can be confirmed by the fact that it has been

[696] Needless to say, the military institutions may on some occasions be involved in the 'civil' aspect of the security issues, such as intelligence gathering and counter-terrorism tasks. See the Article 5 of the National Intelligence Law. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=eae461be038ae511bdfb&lib=law, last visited 10 February 2021. See also the Articles 8 and 57 of the Counterterrorism Law. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=0cf3fa54e1202bc8bdfb&lib=law, last visited 10 February 2021.

[697] Article 11(3) of the Law on Guarding State Secrets reads:

> 'Provisions on the specific scope of state secrets and scope of each classification level shall be published *within a certain range* and adjusted in light of changes of situations.' [emphasis added]

The English version of the legislation is available at http://en.pkulaw.cn/display.aspx?cgid=64aaf242e65550f4bdfb&lib=law, last visited 10 February 2021.

[698] Article 11(1) of the Law on Guarding State Secrets reads:

> '*The specific scope of state secrets and scope of each classification level* shall be determined by the state secrecy administrative department *respectively with* the foreign affairs department, *the public security department*, the national security department and other relevant central organs.' [emphasis added]

[699] The secrecy status of the regulation can only be confirmed in an indirect way. In the *Blue Book of Rule of Law (2019)*, it indicates that 'the Regulation on State Secrets and the Specific Scope of Each Level of Secrets in Public Security Work is a state secret'. Jiang Lin, "The National Think Tank Evaluated the Open Government on Police Affaires: The Transparency has been Significantly

invoked in some judgments by domestic courts,[700] its verified contents are not accessible to the public. In addition, although a regulation sharing the same heading has been disclosed online by a human rights NGO in its report,[701] the contents cannot be authenticated through an official channel.[702] As a result, by classifying both sensitive information and the standards requiring this information to be classified, the regime creates an enclosed system of state secrets.

This practice contributes to building a 'black box' of national security mechanisms, whose concrete functioning relies largely on rules that are state secrets and for internal circulation only. Few details can be observed from outside this box, except for the fact that certain measures are at the governing authorities' disposal for protecting the security of the state. The point is well reflected by the concept of 'technical reconnaissance', an intelligence-gathering method for matters concerning national security. Here, the term 'reconnaissance' is not necessarily linked to any military operations, but is mainly a habitual expression.[703] Although the term lacks any legal definition, it is regarded by lawmakers and scholars as technical surveillance and includes communication interceptions, the deployment of hidden cameras and GPS surveillance. [704] As an intrusive tool, technical reconnaissance is poorly

Increased", *Legal Daily*, 29 March 2019, retrieved 7 March 2020, from http://www.legaldaily.com.cn/zt/content/2019-03/29/content_7814895.htm.

[700] For instance, *Chen Jianwei v. Public Security Bureau of Qingfeng County and Public Security Bureau of Puyang City*, Judgment of the Second Instance, issued by the Intermediate People's Court of Puyang City, 2016, retrieved 7 March 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=897e331efdb341d08b13a74400ff6de0.

See also *Qiu Shuai v. Public Security Bureau of Runan County,* Judgment of the Second Instance, issued by the Intermediate People's Court of Zhumadian City, 2019, retrieved 7 March 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=9f84c672ad474fac82b7aaf60089cef6.

[701] The report reveals the source of the regulation, along with others, which is claimed to be extracted from a book designated as the 'highly secret'. Considering there is no official channel to verify the current secrecy of those regulations, though they have already been disclosed online, the name of the NGO, the report and the book will not be indicated in the footnote.

[702] In a general sense, the detailed list of classified information concerning the public security work is not beyond expectations nor unreasonable. It contains such information as certain specific emergency plans, the sources of intelligence, and the surveillance's equipment, methods, and performance.

[703] See Zhou Guojun, 'Study on "Investigations" and "Reconnaissance"', *The Political Science and Law Tribune (5),* 1993, p. 56.

[704] See Criminal Law Office of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, *The Interpretation and Practical Guide of Counterespionage Law of the People's Republic of China*, China Democracy Legal System Publishing House, 2015, the interpretation on the Article 12.（参见全国人大常委会法制工作委员会刑法室：《<中华人民共和国反间谍法>释义及实用指南》，中国民主法制出版社 2015 年，第 12 条释义。）See the Legislative Affairs Commission of the Standing Committee of the National People's Congress, *The Interpretation of Counterterrorism Law of the People's Republic of China*, Law Press, 2016, the interpretation on the

described in national security legislation such as the National Intelligence Law, the Counterespionage Law and the Counterterrorism Law. In these laws, the contents of the provisions regarding technical reconnaissance follow the same pattern: the governing authorities may carry out technical reconnaissance measures, provided that they are 'out of necessity', 'in accordance with the relevant provisions' and 'approved by strict formalities'.[705] There is no further information available to the public on the 'relevant provisions' or the approval procedures, or on what situations are considered to be 'out of necessity'. It is reasonable to assume the existence of such norms, but they exist only inside the 'black box' – in, for example, undisclosed policy papers issued by the Central Committee of the CCP, the Central Political and Legal Affairs Commission[706] or the Ministry of Public Security[707] – as the state authorities cannot afford such secret powers to be out of their control. Moreover, most of these papers are classified as 'top secret',[708] the highest level of secret prescribed by the State

Article 45.（参见全国人大常委会法制工作委员会：《中华人民共和国反恐怖主义法释义》，法律出版社 2016 年，第 45 条释义。）See also Wei Zhentuan, 'Application of Law in Technical Reconnaissance and Procurement of Evidence', *Journal of Guangxi Public Security Management Cadres Institute (3)*, 2001, 11-13, p. 11.（另见韦振团："论技术侦察及获取证据的法律适用"，载《广西公安管理干部学院学报》2001 年 3 期，第 11 页。）Shi Yafen, 'Analysis about the Necessity for Legal Regulations of Technical Reconnaissance Measures', *Law Science Magazine (7)*, 2009, 111-113.（施亚芬："技术侦察措施法律规制的必要性分析"，载《法学杂志》2009 年 7 期。）Zou Yi and Wang Mingqiang, 'The Legislative Improvement on Technical Reconnaissance Measures', *Political Science and Law (9)*, 2005.（邹懿、王明强："技术侦察措施的立法完善"，载《人民检察》2005 年 9 期。）

[705] Article 15 of the National Intelligence Law reads:

> 'A national intelligence department may, as required by the work, take technical reconnaissance and identity protection measures in accordance with the relevant provisions issued by the state, upon satisfaction of rigorous approval formalities.'

Article 37 of the Counterespionage Law reads:

> 'As needed for the counterespionage work, a national security department may take technical reconnaissance measures or identity protection measures after undergoing strict approval formalities in accordance with the relevant provisions of the state.'

Article 45(1) of the Counterterrorism Law reads:

> 'Public security authorities, national security authorities and military authorities may, within the scope of their powers and duties, take technical reconnaissance measures as required for counterterrorism intelligence information work after undergoing strict approval formalities according to the relevant provisions of the state.'

The English version of the preceding laws are available at http://en.pkulaw.cn/.

[706] The Central Political and Legal Affairs Commission is an organization under the Party's Central Committee responsible for political and legal affairs. The official website is http://www.chinapeace.gov.cn/.

[707] See Xie Fang and Cheng Lei, 'The Difference between Technical Investigation and Technical Reconnaissance: Viewed from the Reform of Due Process', *Journal of Sichuan University (Philosophy and Social Science Edition) (2)*, 2018, 184-192, p. 184.（参见解芳、程雷："技术侦查与技术侦察之辨析——基于程序改革的正当化视角"，载《四川大学学报（哲学社会科学版）》2018 年 2 期，第 184 页。）

[708] See Xie Fang and Cheng Lei, 'The Difference between Technical Investigation and Technical Reconnaissance: Viewed from the Reform of Due Process', *Journal of Sichuan University (Philosophy*

Secrets Law.[709] Technical reconnaissance is also regulated by manuals and codes of conduct, which are for internal circulation only.[710]

The exclusiveness of the state secrets system is also demonstrated by the fact that it is largely immune from external supervision. The State Secrets Law does not provide any remedies for individuals' complaints about certain matters being classified, nor for challenging the classification levels.[711] As indicated in case law, an Intermediate Court has held that the classification of information does not affect individuals' interests and, therefore, that its legitimacy should not be subject to judicial review.[712] At the same time, the Open Government Information Regulation does provide judicial remedies for individuals wanting to challenge the government's decisions on not disclosing classified information.[713] However, domestic courts have never assessed the

---

and Social Science Edition) (2), 2018, 184-192, p. 184 at footnote 2.（参见解芳、程雷："技术侦查与技术侦察之辨析——基于程序改革的正当化视角"，载《四川大学学报（哲学社会科学版）》2018 年 2 期，第 184 页注 2。）

[709] Article 10(2) of the State Secrets Law reads: 'State secrets at the top-secret level are the most important state secrets, the leakage of which would cause extraordinarily serious damage to the national security and interests…' The English version of the Law of the People's Republic of China on Guarding State Secrets is available at http://en.pkulaw.cn/display.aspx?cgid=64aaf242e65550f4bdfb&lib=law, last visited 19 February 2021.

[710] See Xie Fang and Cheng Lei, 'The Difference between Technical Investigation and Technical Reconnaissance: Viewed from the Reform of Due Process', *Journal of Sichuan University (Philosophy and Social Science Edition) (2)*, 2018, 184-192, p. 188.（参见解芳、程雷："技术侦查与技术侦察之辨析——基于程序改革的正当化视角"，载《四川大学学报（哲学社会科学版）》2018 年 2 期，第 188 页。）

[711] Article 20 of the State Secrets Law reads:

> 'Where any organ or entity is confused or raises any question about whether a matter is a state secret or at which classification level a state secret is, it shall be determined by the state secrecy administrative department or the secrecy administrative department of the relevant province, autonomous region or municipality directly under the Central Government.'

The English version of the Law of the People's Republic of China on Guarding State Secrets is available at http://en.pkulaw.cn/display.aspx?cgid=64aaf242e65550f4bdfb&lib=law, last visited 19 February 2021.

See also Wang Xinzi, 'Judicial Review on Determining State Secrets', *China Law Review (3)*, 2019, 186-192, p. 189.（另见王莘子："国家秘密确定行为司法审查问题研究"，载《中国法律评论》2019 年 3 期，第 189 页。）

[712] *Cao Jishan v. State Secrecy Bureau of Henan Province*, Judgment of the Second Instance, issued by the Zhengzhou Railway Transport Intermediate Court, 2016, retrieved 7 March 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=ac91934ec3474d07bc345d8afc641f26.（曹继山与河南省国家保密局二审行政判决书，郑州铁路运输中级法院（2016）豫 71 行终 138 号，网址 https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=ac91934ec3474d07bc345d8afc641f26，最后访问日期 2020 年 3 月 7 日。）

[713] Article 14 of the Open Government Information Regulation reads:

> 'Government information that is determined as state secrets according to the law, or whose public disclosure is prohibited by any law or administrative regulation, or may harm national security, public security, economic security, or social stability, shall not be disclosed to the public.'

Article 51 reads:

rationale behind how information is classified as state secrets in light of Article 9 of the State Secrets Law, i.e. is the information in question actually protecting any national security interests, and will its disclosure undermine those interests?[714] In judicial practice, as long as the government can provide an official document demonstrating the secrecy status, the domestic court is ready to hold in favour of the government without reviewing the substantial merits of the case.[715] As a result, the legitimacy of state secrets is free from effective external supervision.

In conclusion, by lowering accessibility and foreseeability, and denying effective external challenges, the state secrets system contributes substantially to excluding national security mechanisms from public supervision.

4.1.2 Human Rights in the Context of China

International human rights treaties do not automatically apply in China. A treaty first has to be transformed into domestic law. With regard to human rights, China does not have a specific 'human rights act', but instead incorporates these rights into scattered domestic laws, such as the Constitution and Criminal Procedure Law. The relevant legislation, regulations, provisions and judicial interpretations can be located through, *inter alia*, state reports to the UN human rights treaty bodies, national reports to the Universal Periodic Review (UPR) and scholars' research on human rights-related laws. As of 18 March 2020, China has ratified the Convention against Torture and Other Cruel

'Where citizens, legal persons, or other organizations find that administrative organs have violated their lawful rights and interests during open government information work, they may make a complaint or report to the administrative organ at the level above or the competent department for open government information work, and may also lawfully apply for an administrative reconsideration or initiate administrative litigation.'

The English version of the Open Government Information Regulation is available at http://en.pkulaw.cn/display.aspx?cgid=25167d137cfd5e55bdfb&lib=law, last visited 19 February 2021.

[714] See Zheng Chunyan, 'Open Government Information and State Secrets Protections', *China Legal Science (1)*, 2014, 144-157, pp. 152-153.（参见郑春燕：“政府信息公开与国家秘密保护”，载《中国法学》2014 年 1 期，第 152-153 页。）Wang Xinzi, 'Judicial Review on Determining State Secrets', *China Law Review (3)*, 2019, 186-192, p. 188.（另见王莘子：“国家秘密确定行为司法审查问题研究”，载《中国法律评论》2019 年 3 期，第 188 页。）See also *Ma Yafen v. Ministry of Natural Resources*, Judgment of the Second Instance, issued by the Beijing Municipal High People's Court, 2018, retrieved 7 March 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=b0950956446843e6ad68a9c800111c6b.（另见马亚芬与中华人民共和国自然资源部信息公开二审行政判决书，北京市高级人民法院（2018）京行终 6156 号，网址 https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=b0950956446843e6ad68a9c800111c6b，最后访问日期 2020 年 3 月 7 日。）

[715] See Zheng Chunyan, 'Open Government Information and State Secrets Protections', *China Legal Science (1)*, 2014, 144-157, pp. 152-154.（参见郑春燕：“政府信息公开与国家秘密保护”，载《中国法学》2014 年 1 期，第 152-154 页。）

Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Rights of the Child (CRC), the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OP-AC), the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OP-SC) and the Convention on the Rights of Persons with Disabilities (CRPD).[716] The rights established in these conventions should be accordingly protected by the domestic laws of China.[717]

Mainland China has yet to ratify the ICCPR,[718] but the rights it establishes have counterparts in China's domestic law. China's national reports to the UPR introduced legal protections of civil and political rights in the eyes of Chinese authorities.[719] Comparing the ICCPR rights with those in China's domestic law, nearly all the ICCPR rights have a counterpart in domestic law except the right to life, freedom of movement[720] and the right to have a judicial review of detention in connection with the right to liberty.[721] Whether the presumption of innocence and the right against self-incrimination are ensured by the Chinese Criminal Procedure Law also remains controversial.[722] However, as you will see

[716] The list of conventions that have been ratified by China is available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=CHN&Lang=EN, last visited 19 February 2021.

[717] This should exclude those rights on which China made reservations when ratifying the treaties, such as the right to strike under the ESCR. The declarations and reservations made by China is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec, last visited 19 February 2021.

[718] Upon resuming the exercising of sovereignty over Hong Kong and Macao, China notified the Secretary-General that the Covenant will apply to the two Special Administrative Regions. The notifications are available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#4, last visited 7 April 2020.

[719] See the Office of the High Commissioner for Human Rights, "Basic facts about the UPR", *OHCHR*, retrieved 7 April 2020, from https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx.

[720] See Liu Liantai, 'Comparation between International Bill of Human Rights and China's Constitution', *Journal of Zhejiang Provincial Party School (5)*, 1999, 84-88, pp. 85-87.（参见刘连泰："《国际人权宪章》与我国宪法的相关比较"，载《中共浙江省委党校学报》1999 年 5 期，第 85-87 页。）

[721] See Wang Minyuan, 'Judicial Control over China's Criminal Detention', *Global Law Review (4)*, 2003, 403-407, pp. 403-404.（参见王敏远："中国刑事羁押的司法控制"，载《环球法律评论》2003 年 4 期，第 403-404 页。）

[722] See Wu Qian, Jing Chunran, and Qiao Liang, "Confirming the Principle of Presumption of Innocence: Judicial Protection of Human Rights", *Henan Legal Newspaper*, 9 March 2015, p. 4, retrieved 7 April 2020, from http://www.humanrights.cn/html/2015/8_0311/4701.html.（参见吴倩、井春冉、乔良："明确无罪推定原则落实司法人权"，《河南法制报》2015 年 3 月 9 日 04 版报道，网址 http://www.humanrights.cn/html/2015/8_0311/4701.html，最后访问日期 2020 年

in the second half of this section, guaranteeing rights in legal provisions says very little about whether these rights are guaranteed in reality.

In China's human rights discourse, it is nearly impossible to ignore the primacy of the rights to subsistence and development, which government authorities relentlessly insist on. As such, this part of the study first sheds light on these rights and investigates what their primacy means for protecting civil and political rights in China. While the order of priority among human rights shows that civil and political rights may not come first in China, this is hardly a legal reason for restricting rights. Therefore, I then introduce and analyse the legal basis for restricting civil and political rights as provided for by the Chinese Constitution.

4.1.2.1 Top priority: the right to subsistence and the right to development

Rights to subsistence and development have overriding importance in China's human rights discourse. In the past three decades, the Chinese government has been constantly criticised for its human rights records by Western countries at the UN. The tactics adopted by China to respond to these criticisms can be summarised as, firstly, pointing to its achievements in comparison to the past; secondly, trading insults by criticising attackers' records; and, thirdly, taking another approach to human rights on the basis of a different philosophy.[723] As to the last point, the rights to subsistence and development play a central role in this approach with 'Chinese characteristics'. Although these two rights are already regarded as human rights by the UN human rights mechanisms, China endeavours to prioritise them. In this part of the study, I will explore these concepts, check whether there is any substance to them and examine their nature, i.e. whether they continue to be propaganda or whether they are rights that are practically enjoyed and enforceable. Finally, I will discuss the impact this prioritising approach has on civil and political rights.

While official rhetoric often combines the two rights, the right to subsistence and the right to development are conceptually different. The right to subsistence confirms that individuals are entitled to survive and live a life with a minimal degree of decency as a human being.[724] Decency implies not only the

---

4 月 7 日。）See also Chen Xuequan, 'Interpretation on the Right against Self-incrimination in China: From a Comparative Perspective', *Journal of Comparative Law (5)*, 2013, 29-40, pp. 35-36.（另见陈学权："比较法视野下我国不被强迫自证其罪之解释"，载《比较法研究》2013 年 5 期，第 35-36 页。）

[723] See Zhao Tingyang, '"Credit" Human Rights: A Non-Western Theory of Universal Human Rights', *Social Sciences in China (4)*, 2006, 17-30 & 205, p. 18.（参见赵汀阳："预付人权：一种非西方的普遍人权理论"，载《中国社会科学》2006 年 4 期，第 18 页。）

[724] See Ma Ling, 'The Broad and Narrow Contents of the Right to Subsistence', *Jin Ling Law Review (2)*, 2007, 72-85, pp. 72-73.（参见马岭："生存权的广义与狭义"，载《金陵法律评论》2007 年 2 期，第 72-73 页。）Gong Xianghe, 'Critique and Reconstruction of the Concept of the Right to

quality of life, but also says something about the means to attain it. A person should not have to earn a living by trading his or her dignity through, for instance, forced prostitution or servitude.[725] The meaning of the right to development is less clear. A commonly accepted definition is the one given in the Declaration on the Right to Development (DRD): 'Every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'[726] Within an inter-nations context, the right is used by developing countries to demand a radical change in the international economic order, which is dominated by Western countries, and to request foreign aid for development.[727]

These two rights have never been incorporated into China's domestic law. While the right to subsistence has counterparts in domestic law, the right to development is basically not a right in China. Although China is not a pioneer in initiating these rights,[728] it is among the countries that spare no effort to advocate for them in the human rights discourse. The Chinese government has consistently given top priority to the rights to subsistence and development in official rhetoric,[729] and it has won some credit by lifting millions of people out of poverty.[730] From reports to UN human rights mechanisms and academic research I have found that the right to subsistence, in a narrow sense, is normally divided into several specific rights: the right to an adequate standard

Subsistence', *Study & Exploration (1)*, 2011, 102-106 & 239, p. 105.（参见龚向和："生存权概念的批判与重建"，载《学习与探索》2011 年 1 期，第 105 页。）Xun Xianming, 'On the Right to Subsistence', *Social Sciences in China (5)*, 1992, 39-56, p. 45.（参见徐显明："生存权论"，载《中国社会科学》1992 年 5 期，第 45 页。）

[725] See Gong Xianghe, 'Critique and Reconstruction of the Concept of the Right to Subsistence', *Study & Exploration (1)*, 2011, 102-106 & 239, p. 105.（参见龚向和："生存权概念的批判与重建"，载《学习与探索》2011 年 1 期，第 105 页。）

[726] Article 1(1) of the Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 December 1986, available at https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx, last visited 19 February 2021.

[727] See Charles Jones, 'The Human Right to Subsistence', *Journal of Applied Philosophy 30(1)*, 2013, 57-72, pp. 90-91. Hao Mingjin, 'On the Right to Development', *Journal of Shandong University (1)*, 1995, 89-95, p. 92.（参见郝明金："论发展权"，载《山东大学学报（哲学社会科学版）》1995 年 1 期，第 92 页。）

[728] See Hao Mingjin, 'On the Right to Development', *Journal of Shandong University (1)*, 1995, 89-95, p. 91.（参见郝明金："论发展权"，载《山东大学学报（哲学社会科学版）》1995 年 1 期，第 91 页。）

[729] See Katrin Kinzelbach, 'Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000–2010)', *Netherlands Quarterly of Human Rights 30(3)*, 2012, 299-332.

[730] See the World Bank, "The World Bank in China", *World Bank*, 29 March 2021, retrieved 18 August 2021, from https://www.worldbank.org/en/country/china/overview.

of living, the right to social security and the right to health.[731] These rights are all included in the ICESCR, which China is obliged to implement. Apart from being a term used for communication purposes, the right to subsistence implies a top-down approach to implementation: i.e. the realising of each member's right relies on its being guaranteed and promoted at the collective level. It is a right more in the sense that the government has positive obligations rather than in the sense that an individual can make a personal appeal. Poverty eradication is a representative example under the heading of the right to subsistence in China's human rights discourse:[732] it is, in fact, government social policy and part of China's economic development plan, and, more recently, there has been a poverty alleviation campaign taking a 'targeted approach'.[733] As people with a low standard of living will benefit from this, their right to subsistence is protected. Such positive and progressive obligations also correspond to what is provided for in Article 2(1) of the ICESCR.[734] In this regard, Chinese authorities read the right to subsistence mainly in the context of economic and social rights,[735] and use the language of 'human rights' to describe economic and social development plans and policies.

Outside the context of inter-nation relations, scholars and government authorities advocating the right to development have failed to define it in concrete terms.[736] On the one hand, scholars and government authorities note

[731] See Gong Xianghe, 'Critique and Reconstruction of the Concept of the Right to Subsistence', *Study & Exploration (1)*, 2011, 102-106 & 239, p. 103.（参见龚向和："生存权概念的批判与重建"，载《学习与探索》2011 年 1 期，第 103 页。）See Li Buyun, "The Right to Subsistence and the Right to Development are the Priorities", *Beijing Daily*, 7 December 2015, p. 18.（李步云："坚持生存权、发展权是首要人权"，《北京日报》2015 年 12 月 7 日 18 版报道。）

[732] In numerous official reports on human rights of China, the poverty reduction progress was always categorised under 'the right(s) to subsistence (and development)'. See UN General Assembly, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China, A/HRC/WG.6/31/CHN/1 (2018), paras. 22-24. See also the State Council Information Office of China, "Seeking Happiness for People: 70 Years of Progress on Human Rights in China", 22 September 2019, retrieved 7 April 2020, from http://www.xinhuanet.com/english/2019-09/22/c_138412720.htm. The State Council Information Office of China, "Progress in Human Rights over the 40 Years of Reform and Opening Up in China", *Xinhuanet*, 12 December 2018, retrieved 7 April 2020, from http://www.xinhuanet.com/english/2018-12/12/c_137668699.htm.

[733] See the State Council Information Office of China, "China's Progress in Poverty Reduction and Human Rights", *State Council Information Office of China*, 17 October 2016, retrieved 7 April 2020, from http://www.china.org.cn/government/whitepaper/node_7242770.htm.

[734] See Manisuli Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', *The International Journal of Human Rights 15(6)*, 2011, 969-1012, pp. 974-983.

[735] See Wei Xiaoxu, 'The Chinese Expression of the Right to Subsistence: The Progressive Expansion of a Dual Orientation', *Human Rights (3)*, 2021, 38-56, pp. 55-56.（参见魏晓旭："生存权的中国表达：双重向度的递进展开"，载《人权》2021 年 3 期，第 55-56 页。）

[736] See Li Chunlin, 'Building a Community of Human Destiny and the Functional Positioning of the Right to Development', *Wuhan University International Law Review 2(5)*, 2018, 1-24, p. 8.（参见李春林："构建人类命运共同体与发展权的功能定位"，载《武大国际法评论》2018 年 5 期，第 8

the importance of people having equal opportunities and enjoying the benefits of development which are required by this right.[737] These elements correspond to ideals of equality which are valued by socialist ideology. On the other hand, the right is interpreted as demanding the improvements of all human rights, including civil, political, economic, social and cultural rights.[738] At best the right becomes an all-encompassing concept,[739] and at worst a mere aspiration. In addition to the merits of the right, scholars have discussed the relationship between its collective and individual dimensions.[740] They have indicated a top-down approach: an individual's development is determined by the economic, social, cultural and political progress of the local region or the whole nation. Through a shift in focus towards the process of development and a top-down approach, a convenience for Chinese authorities defending their human rights record is that addressing those prerequisites – material and institutional ones – for all the other human rights would now be regarded as part of this independent human right.

页。）Liang Hongxia, 'Constitutional interpretation of the Right to Development – From the Perspective of Constitutional Text', *Human Rights (4)*, 2015, 18-28, p. 18.（梁洪霞："发展权权利属性的宪法解读——以宪法文本为视角"，载《人权》2015 年 2 期，第 18 页。）Wang Xigen, 'The Definition of the Right to Development in Philosophy of Law', *Modern Law Science (6)*, 2004, 3-8, p. 3.（参见汪习根："发展权含义的法哲学分析"，载《现代法学》2004 年 6 期，第 3 页。）

[737] See Wei Xiaoxu, 'Redefining the Right to Development: Function, Fulfilment and Value', *Human Rights (2)*, 2020, 35-52, p. 42.（参见魏晓旭："发展权的再界定：功能、实现和价值"，载《人权》2020 年 2 期，第 42 页。）See also State Council Information Office of China, *The Right to Development: China's Philosophy, Practice and Contribution*, State Council Information Office, 2016. English version is available at http://www.xinhuanet.com/english/bilingual/2016-12/01/c_135873846.htm, last visited 26 July 2023.

[738] For instance, see State Council Information Office of China, *The Right to Development: China's Philosophy, Practice and Contribution*, State Council Information Office, 2016. English version is available at http://www.xinhuanet.com/english/bilingual/2016-12/01/c_135873846.htm, last visited 26 July 2023. Qi Yanping, 'On the Mechanism of Protecting Individual's Right to Development', *Study & Exploration (2)*, 2008, 99-106, p. 99.（例如，齐延平："论发展权的制度保护"，载《学习与探索》2008 年 2 期，第 99 页。）Xia Qingxia, 'Research on Individual Human Right to Development', *The Political Science and Law Tribune (6)*, 2004, 171-179, pp. 174-175.（夏清瑕："个人发展权探究"，载《政法论坛》2004 年 6 期，第 174-175 页。）Wang Xigen, 'The Jurisprudence of the Right to Development', *Cass Journal of Law (4)*, 1999, 16-24, p. 22.（汪习根："发展权法理探析"，载《法学研究》1999 年 4 期，第 22 页。）

[739] See Wang Xigen, 'The Definition of the Right to Development in Philosophy of Law', *Modern Law Science (6)*, 2004, 3-8, p. 4.（参见汪习根："发展权含义的法哲学分析"，载《现代法学》2004 年 6 期，第 4 页。）See also Bonny Ibhawoh, 'The Right to Development: The Politics and Polemics of Power and Resistance', *Human Rights Quarterly 33(1)*, 2011, 76-104, p. 79. Oscar Schachter, 'Implementing the Right to Development: Programme of Action', *The Right to Development in International Law*, 1992, 27-30.

[740] For instance, see Xia Qingxia, 'Research on Individual Human Right to Development', *The Political Science and Law Tribune (6)*, 2004, 171-179, p. 177.（例如，夏清瑕："个人发展权探究"，载《政法论坛》2004 年 6 期，第 177 页。）

Because of their nature as collective entitlements and the lack of conceptual clarity, the rights to subsistence and development are usually reflected in the Chinese state's political or economic agendas. The Chinese authorities have used the language of 'human rights' to describe their actions meeting obligations arising from the ICESCR or addressing economic prerequisites for human rights,[741] which language is embodied in most of China's official documents presented to the UN.[742]

In their human rights discourse, the Chinese authorities define the rights to subsistence and development as a 'top priority'.[743] This approach has been interpreted by observers as a lack of willingness to protect civil and political rights.[744] At the same time, the Chinese government has implemented numerous reforms out of concern for the protection of civil and political rights. For instance, regarding judicial independence and impartiality and the right of access to a court, the judicial system is now taking charge of its own management of personnel, finance and property, and a 'case-filing register system' has been introduced.[745] More recently, after the system of 're-education through labour' was abolished,[746] the 'custody and education' sanction for prostitutes and their customers came to an end;[747] this previously caused serious concerns to be raised over the right to liberty. In my reading, this shows that the prioritising approach does not prevent civil and political rights from being protected, and nor is it applied when rights to subsistence and development are in conflict with civil and political rights.

---

741 See Zhu Yansheng, 'The Concept of the Right to Development', *Cass Journal of Political Science (3)*, 2001, 33-41.（参见朱炎生：“发展权概念探析”，载《政治学研究》2001 年 3 期。）

742 For example, UN General Assembly, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China, A/HRC/WG.6/31/CHN/1 (2018), paras. 22-24.

743 See Sonya Sceats and Shaun Breslin, 'China and the International Human Rights System', *Chatham House*, 2012, retrieved 7 April 2020, from https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/r1012_sceatsbreslin.pdf.

744 For example, see Bonny Ibhawoh, 'The Right to Development: The Politics and Polemics of Power and Resistance', *Human Rights Quarterly 33(1)*, 2011, 76-104, p. 95.

745 See the State Council Information Office of China, "New Progress in the Judicial Protection of Human Rights in China", *State Council Information Office of China*, June 2016, retrieved 7 April 2020, from http://english.www.gov.cn/archive/white_paper/2016/09/12/content_281475440241794.htm.

746 See Marcel A. Green, "China to Abolish Re-Education through Labor", *The Diplomat*, 5 January 2014, retrieved 25 March 2020, from https://thediplomat.com/2014/01/china-to-abolish-re-education-through-labor/. See also, Amnesty International, "China: Abolition of Labour Camps must Lead to Wider Detention Reform", *Amnesty International*, 15 November 2013, retrieved 25 March 2020, from https://www.amnesty.org/en/latest/news/2013/11/china-re-education-through-labour-camps/.

747 See BBC, "China Ends Forced Labour for Sex Workers", *BBC News*, 28 December 2019, retrieved 25 March 2020, from https://www.bbc.com/news/world-asia-china-50934305.

How, then, should we understand the 'top priority' given to these rights, as Chinese authorities have repeatedly emphasised? Prioritising the rights to subsistence and development corresponds to the economic growth at the core of the performance legitimacy of the governing authorities. In other words, it reflects the governing authorities' major concerns in the human rights discourse. Civil and political rights, or any reforms that concern them, are expected to contribute to economic development or to maintaining stability, or at least not to impede or endanger them. In this regard, and while we have observed certain improvements in the protection of civil and political rights, those regarded by the governing authorities as serious obstacles to economic growth and stability are still subject to many limitations. From a human rights perspective, the prioritising approach attempts to integrate the regime's performance legitimacy into the rights to subsistence and development, and serves as an essential argument in China's human rights philosophy.

4.1.2.2 Civil and political rights vs. public interests

A constitution is normally entrusted with two tasks: to regulate how sovereign power is distributed and exercised,[748] and to set out people's fundamental rights.[749] The second chapter of China's Constitution lays down people's rights and also their obligations. The notion of human rights has been accepted in the political and legal sense since the 2004 amendment, which added to the Constitution the clause that 'the State respects and preserves human rights'.[750] Some observers downplay its significance by arguing that the clause is too vague to play a normative role.[751] Others are more optimistic and contend that the 'human rights clause' serves to cover basic rights that are not otherwise provided for by the Constitution.[752] But since the Constitution is not used as a legal basis in domestic courts,[753] the implications of the clause are inconclusive.

---

[748] See Albert Venn Dicey, 'The True Nature of Constitutional Law', in *Introduction to the Study of the Law of the Constitution*, Liberty Fund, 1982, cxxv-cxlvii, p. cxl.

[749] See Fu Yang, 'Discussions on the Constitution Seventy Years ago', *Shuwu (2)*, 2004, 64-69, p. 64.（参见付阳："七十年前的宪法讨论"，载《书屋》2004 年 2 期，第 64 页。）

[750] The English version of the Constitution of the People's Republic of China (2018 Amendment) is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[751] See Han Dayuan, 'The System of Basic Rights of the Chinese Constitutional Science', *Journal of Jianghan University (Social Science Edition) (1)*, 2008, 58-61, p. 60.（参见韩大元："中国宪法学上的基本权利体系"，载《江汉大学学报（社会科学版）》2008 年 1 期，第 60 页。）

[752] See Lin Laifan and Ji Yanmin, 'Human Rights Protection: The Role as the Principle', *Studies in Law and Business (4)*, 2005, 64-69, p. 66.（参见林来梵、季彦敏："人权保障：作为原则的意义"，载《法商研究》2005 年 4 期，第 66 页。）

[753] See Daniel Sprick, 'Judicialization of the Chinese Constitution Revisited: Empirical Evidence from Court Data', *China Review 19(2)*, 2019, 41-68, pp. 43-45.

In general, enumerating rights is the principal way in which the Constitution provides fundamental rights.[754] Among the rights listed in the second chapter of the Chinese Constitution, civil and political rights include the right to equality and non-discrimination of Articles 33(2) and 48; the right to vote (on a local level) of Article 34; the freedom of expression, assembly and association of Article 35; the freedom of religion of Article 36; the right to liberty of Article 37; the right to respect of home and correspondence of Articles 39 and 40; and the right to an effective remedy of Article 41(3). In addition, the protection of dignity enshrined in Article 38 is considered by scholars to be connected to the prohibition of torture.[755] Owing, however, to the Chinese way of implementing the Constitution, those rights need to be further substantiated in law before they can be applied in reality.[756]

A wide range of laws and regulations in China can be regarded as applying constitutional rights directly relevant to civil and political rights.[757] We can classify these into two categories. One category of legislation seeks to regulate the work of the criminal justice system and administrative institutions. Regarding the right to liberty, for instance, public security organs have been deprived of the power to impose the 'custody and education' sanction described

---

[754] See Xu Shuang, 'The Basic Rights of Citizens and National Construction in the Chinese Constitution', in *Constitution and Legal Protection of Citizens' Basic Rights*, Social Sciences Academic Press, 2017, Chapter 1.（参见徐爽：“中国宪法中的公民基本权利与国家建设”，徐爽著，《公民基本权利的宪法和法律保障》，社会科学文献出版社 2017 年，第一章）See also Han Dayuan, 'The System of Basic Rights of the Chinese Constitutional Science', *Journal of Jianghan University (Social Science Edition) (1)*, 2008, 58-61, p. 60.（参见韩大元：“中国宪法学上的基本权利体系”，载《江汉大学学报（社会科学版）》2008 年 1 期，第 60 页。）

[755] The English version of the Constitution of the People's Republic of China (2018 Amendment) is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021. See Han Dayuan, 'The System of the Essential Right of the Chinese Constitutional Science', *Journal of Jianghan University (Social Sciences) (1)*, 2008, 58-61.（参见韩大元：“中国宪法学上的基本权利体系”，载《江汉大学学报（社会科学版）》2008 年 1 期。）Liu Liantai, 'Comparation between International Bill of Human Rights and China's Constitution', *Journal of Zhejiang Provincial Party School (5)*, 1999, 84-88, p. 85.（刘连泰：“《国际人权宪章》与我国宪法的相关比较”，载《中共浙江省委党校学报》1999 年 5 期，第 85 页。）

[756] See Xu Shuang, 'How to Understand the Human Rights Clauses in the Chinese Constitution', *Global Law Review (6)*, 2012, 55-57, p. 57.（参见徐爽：“如何认识中国宪法中的人权条款”，载《环球法律评论》2012 年 6 期，第 57 页。）

[757] See Ban Wenzhan, 'Human Rights Legislation Analysis Report', in Li Junru (ed.), *Annual Report on China's Human Rights No.1(2011)*, Social Sciences Academic Press, 2011, 465-484, p. 465.（参见班文战：“人权立法分析报告”，李君如编，《中国人权事业发展报告 No.1 (2011)》，社会科学文献出版社 2011 年，第 465 页。）See also Ban Wenzhan, '2019 National Human Rights Legislation Analysis Report', in Li Junru (ed.), *Annual Report on China's Human Rights No.10(2020)*, Social Sciences Academic Press, 2020, pp. 361-377 & 488.（另见，班文战：“2019 年国家人权立法分析报告”，“2019 年制定、修订或修改的与人权直接相关的法律法规（数据库）”，李君如编，《中国人权事业发展报告 No.10 (2020)》，社会科学文献出版社 2020 年，第 361-377、488 页。）

above.[758] The police is required to provide video and audio recordings of six kinds of work that its officers do in the field.[759] Another example is that prosecutors now have to review defence lawyers' arguments against detaining a suspect, and write down their decision and reasoning.[760] More pointedly, the right to a fair trial, although absent from the Constitution, has been put under the spotlight by the government in recent years[761] by the introduction and specification, under the heading of judicial reform, of a series of regulations and mechanisms, including an exclusionary rule of illegal evidence, a responsibility for courts to record interventions by government officials in a case, and a standard of double-checking the lawfulness of the police's interrogation process by the prosecutor, to name but a few.[762] The Chinese authorities have made a political commitment to promoting these rights by flagging them, among other civil and political rights, in the 'National Human Rights Action Plan'.[763]

The other category of legislation seeks to clarify the rights. Put succinctly, the Constitution sets out basic rights, leaving the task of specifying how they are to be protected to lawmakers. Not all rights have corresponding legislation:

---

[758] Decision of the Standing Committee of the National People's Congress to Repeal the Relevant Legal Provisions on and System of Custody and Education. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=1ea53f89482c77b7bdfb&lib=law, last visited on 31 October 2021.

[759] Provisions on the Video and Audio Recording the On-site Law Enforcement Work by Public Security Organs, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=2890f7c7f9cce66cbdfb&keyword=%e5%85%ac%e5%ae%89%e6%9c%ba%e5%85%b3%e7%8e%b0%e5%9c%ba%e6%89%a7%e6%b3%95%e8%a7%86%e9%9f%b3%e9%a2%91%e8%ae%b0%e5%bd%95%e5%b7%a5%e4%bd%9c%e8%a7%84%e5%ae%9a&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited on 31 October 2021.

[760] See Article 261(4) of Rules of Criminal Procedure for People's Procuratorates. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=3ac1ab4c036fa907bdfb&lib=law, last visited on 31 October 2021.

[761] See State Council of China, 'National Human Rights Action Plan of China (2021-2025)', *State Council of China*, 9 September 2021, retrieved 31 October 2021, from http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a111c6d0df57f98dfeec.html.

[762] See Institute for Human Rights of Southeast University, 'The Evaluation Report of the National Human Rights Action Plan of China (2016-2020)', *Institute for Human Rights of Southeast University*, 30 September 2021, retrieved 31 October 2021, from https://rqyjy.seu.edu.cn/2021/0930/c27799a385410/page3.htm.（参见“国家人权行动计划（2016-2020 年）实施情况评估报告”，网址 https://rqyjy.seu.edu.cn/2021/0930/c27799a385410/page3.htm，最后访问日期 2021 年 10 月 31 日。）

[763] See State Council of China, 'National Human Rights Action Plan of China (2021-2025)', *State Council of China*, 9 September 2021, retrieved 31 October 2021, from http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a111c6d0df57f98dfeec.html.

parliament has enacted laws on the right to vote,[764] on the freedom of assembly[765] and against gender discrimination.[766] The remaining civil and political rights are currently regulated by laws at a low level in the legal hierarchy, such as administrative regulations and policies.[767] Why is it important to have constitutional rights enacted by parliament? What makes legislation different from an administrative regulation and policy? Apart from their legal effect,[768] scholars argue that they involve different stakeholders, and the interests at stake are arguably weighed differently.[769] Some scholars believe that a lack of legislation partially contributes to an excessive number of restrictions on constitutional rights being in regulations and policies.[770]

Civil and political rights, along with other constitutional rights, can be subject to legitimate limitations. Apart from limitations applying to certain specific rights,[771] civil and political rights are subject to the general limitation

---

[764] Election Law of the People's Republic of China for the National People's Congress and Local People's Congresses at All Levels. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=7e4a467b09d142f0bdfb&lib=law, last visited on 31 October 2021.

[765] Law of the People's Republic of China on Assemblies, Processions and Demonstration. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=6973fefa97d2eaa8bdfb&lib=law, last visited on 31 October 2021.

[766] Law of the People's Republic of China on the Protection of Women's Rights and Interests. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=f20e7cd055022d39bdfb&lib=law, last visited on 31 October 2021.

[767] See Institute for Human Rights of Southeast University, 'The Evaluation Report of the National Human Rights Action Plan of China (2016-2020)', *Institute for Human Rights of Southeast University*, 30 September 2021, retrieved 31 October 2021, from https://rqyjy.seu.edu.cn/2021/0930/c27799a385410/page3.htm.（参见"国家人权行动计划（2016-2020 年）实施情况评估报告"，网址 https://rqyjy.seu.edu.cn/2021/0930/c27799a385410/page3.htm，最后访问日期 2021 年 10 月 31 日。）

[768] See Xu Yuanxian and Wu Donghao, 'The Constitutional Basis of the Administrative Regulations in China', *The Jurist (3)*, 2005, 63-68, p. 67.（参见许元宪、吴东镐："论国务院制定行政法规的宪法根据"，载《法学家》2005 年 3 期，第 67 页。）

[769] See Hou Shuwen, 'On the System Reform of China's Administrative Legislation', *Oriental Law (4)*, 2012, 90-97, pp. 91 & 97.（参见侯淑雯："论我国行政立法的体制改革与制度完善"，载《东方法学》2012 年 4 期，第 91、97 页。）

[770] See Xie Libin, 'Level of Legislative Guarantee of Basic Rights', *Journal of Comparative Law (4)*, 2014, 40-50, p. 40.（参见谢立斌："论基本权利的立法保障水平"，载《比较法研究》2014 年 4 期，第 40 页。）See also Lin Laifan, *Lectures of Constitutional Law*, Tsinghua University Press, 2018, pp. 415-416.（林来梵：《宪法学讲义》（第三版），清华大学出版社 2018 年，第 415-416 页。）

[771] As to the right to vote, Article 34 reads: 'All citizens of the People's Republic of China who have reached the age of 18 … shall have the right to vote and stand for election; persons deprived of political rights in accordance with law shall be an exception.'

As to the freedom of religion, Article 36(2) and (3) read:

> '(2) No state organ, social organization or individual shall coerce citizens to believe in or not to believe in any religion, nor shall they discriminate against citizens who believe in or do not believe in any religion.

norm set out in Article 51: 'Citizens of the People's Republic of China, in exercising their freedoms and rights, shall not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.'[772] Those interests 'of the State', 'of society' and 'of the collective' are normally summarised by scholars as the public interest.[773]

There is no lack of criticism about China's protection mechanisms for fundamental rights in the international arena, and its imposing of excessive limitations is of greatest concern to the critics. Human rights groups such as Amnesty International and Human Rights Watch have even held that Chinese fundamental rights are generally and systematically reduced in the name of public interests.[774] These undue restrictions on human rights are attributed to defects in legal mechanisms. Beginning with Article 51 of the Constitution, this part of the study explores these defects and how they 'make things worse'.

The general limitation norm enshrined in Article 51 reveals an underlying presumption among legislators; namely, that rights are more likely to be abused by individuals. This neglects, intentionally or otherwise, the risk that this norm will be taken advantage of by national and local authorities to introduce

---

(3) The state shall protect normal religious activities. No one shall use religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the state's education system.'

As to the right to liberty, Article 37(2) and (3) read:

'(2) No citizen shall be arrested unless with the approval or by the decision of a people's procuratorate or by the decision of a people's court, and arrests must be made by a public security organ.

(3) Unlawful detention, or the unlawful deprivation or restriction of a citizen's personal freedom by other means, is prohibited; the unlawful search of a citizen's body is prohibited.'

As to the freedom and privacy of correspondence, Article 40 reads:

'Freedom and confidentiality of correspondence of citizens of the People's Republic of China shall be protected by law. Except in cases necessary for national security or criminal investigation, when public security organs or procuratorial organs shall examine correspondence in accordance with procedures prescribed by law, no organization or individual shall infringe on a citizen's freedom and confidentiality of correspondence for any reason.'

The provisions above are available at https://www.pkulaw.com/en_law/7c7e81f43957c58bbdfb.html, last visited 14 May 2023.

[772] The English version of the Constitution of the People's Republic of China (2018 Amendment) is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[773] See Zheng Yongliu, 'The Text and Interpretation of Public Interests in China's Public Laws', in Zheng Yongliu, and Zhu Qingyu, *Public Interests in Chinese Law*, Peking University Press, 2014, p. 11. See Wang Jinwen, 'Interpreting and Applying Limitation Clauses' Functions on Protecting Fundamental Constitutional Rights: How to Confirm and Protect the Emerging Rights', *ECUPL Journal (5)*, 2018, 88-102, p. 91.（王进文："宪法基本权利限制条款权利保障功能之解释与适用"，载《华东政法大学学报》2018 年 5 期，第 91 页。）

[774] For instance, the human rights situation overviews present by Human Rights Watch and Amnesty International, available at https://www.hrw.org/world-report/2020/country-chapters/china-and-tibet#eaa21f, and https://www.amnesty.org/en/countries/asia-and-the-pacific/china/report-china/, last visited 10 February 2021.

unjustified restraints on human rights both in legislation and in practice.[775] The first example of this neglect is the lack of a requirement for legal reservation, which can result in overstepping by the executive branch. In the context of rights limitations, the principle of legal reservation (*Gesetzesvorbehalt*) stipulates that certain fundamental rights, such as those provided in the Constitution, can be reduced only by legislation enacted by parliament.[776] In the case of China, the importance of this principle is amplified by two factors: first, the constitutional rights are prescribed quite briefly, which means that further specification is required and any specification will automatically involve delimiting the scope of rights. Second, China's Constitution is not applied directly in courts, but through laws at each level in the legal hierarchy. This implies that fundamental rights are not implementable until they are written into laws and/or regulations.

Without this requirement for legal reservation, the executive branch can impose excessive restrictions on basic rights as it both makes the law *and* enforces it. Public interests are a primary concern of the government administration, which would therefore tend to limit people's freedoms out of concern for public interests.[777] For example, the freedom of the press, freedom of association and freedom of religion provided by the Constitution are regulated by administrative regulations instead of by laws: the Regulation on the Administration of Publication,[778] the Regulation on the Administration of the Registration of Social Organizations[779] and the Regulation on Religious

[775] See Yang Guisheng, 'On the Essence, Problems and Solutions of Limits of Our Constitutional Rights', *Journal of Sichuan Administration College (4)*, 2009, 59-62, p. 60.（参见杨贵生："论我国宪法权利限制的实质、困境与对策"，载《四川行政学院学报》2009 年 4 期，第 60 页。）Zhao Shiyi, Liu Liansu, and Liu Yi, 'Comments on Defects in Current Version of Constitution', *Law and Social Development (3)*, 2003, 57-72, p. 61.（另见赵世义、刘连素、刘义："现行宪法文本的缺失言说"，载《法制与社会发展》2003 年 3 期，第 61 页。）

[776] See Sun Zhanwang, 'The Differences between Legal Reservation and Parliament Reservation: Article 8 of Legislation Law', *Tribune of Political Science and Law (2)*, 2011, 105-112, pp. 105-106.（参见孙展望："法律保留与立法保留关系辨析——兼论《立法法》第 8 条可纳入法律保留范畴"，《政法论坛》2011 年 2 期，第 105-106 页。）

[777] See Shi Wenlong, 'On the Development of the Fundamental Right Restraint System in China: The Comparison Analysis between the Article 51 in China's Constitution and the Article 19 in German Basic Law', *Journal of Comparative Law (5)*, 2014, 161-174, p. 166.（参见石文龙："论我国基本权利限制制度的发展 ——我国《宪法》第 51 条与德国《基本法》第 19 条之比较"，载《比较法研究》2014 年 5 期，第 166 页。）See also Lin Laifan, *Lectures of Constitutional Law*, Tsinghua University Press, 2018, pp. 415-416.（林来梵：《宪法学讲义》（第三版），清华大学出版社 2018 年，第 415-416 页。）

[778] The Regulation on the Administration of Publication is available at http://en.pkulaw.cn/display.aspx?cgid=8cbbe69f7fc700c2bdfb&lib=law, last visited 10 February 2021.

[779] The Regulation on the Administration of the Registration of Social Organizations is available at http://en.pkulaw.cn/display.aspx?cgid=05417332ffd631e4bdfb&lib=law, last visited 10 February 2021.

Affairs,[780] as well as numerous departmental rules on these issues.[781] These are more about regulating and restraining the exercising of rights rather than protecting them.[782] This aspect also gives rise to another strange phenomenon, whereby a law at a lower level in the legal hierarchy often imposes more restrictions on constitutional rights than one at a higher level.[783]

While some provisions stipulate a requirement for legal reservation in the case of certain constitutional rights, these are sometimes violated by administrative regulations. An example of this can be found in the 're-education through labour' measure, which, despite being severe in that it involved imprisonment, was provided for in a series of regulations adopted by the State Department and rules adopted by the Ministry of Public Security.[784] This was a radical departure from the provision that 'compulsory measures and penalties involving deprivation of a citizen's political rights or restriction of personal freedom' are only to be governed by laws passed by the National People's Congress (NPC) or its Standing Committee.[785] A parliament with weak powers

[780] The Regulation on Religious Affairs is available at http://en.pkulaw.cn/display.aspx?cgid=299c29bbb1a0c690bdfb&lib=law, last visited 10 February 2021.

[781] Such departmental rules include, for example, Provisions on the Administration of Newspaper Publication, available at http://en.pkulaw.cn/display.aspx?cgid=9b6cbc46d7fbe778bdfb&lib=law; and Provisions on the Administration of Periodical Publication, available at http://en.pkulaw.cn/display.aspx?cgid=10187ffc5dd479c6bdfb&lib=law, last visited 10 February 2021.

[782] See Shi Wenlong, 'On the Development of the Fundamental Right Restraint System in China: The Comparison Analysis between the Article 51 in China's Constitution and the Article 19 in German Basic Law', *Journal of Comparative Law (5)*, 2014, 161-174, p. 164.（参见石文龙："论我国基本权利限制制度的发展——我国《宪法》第 51 条与德国《基本法》第 19 条之比较"，载《比较法研究》2014 年 5 期，第 164 页。）

[783] See Xia Xinhua and Wu Qingshan, 'The Reconstruction of Restrictive Clauses of the Constitutional Right in China – Take the Article 51 of the Constitution as the Centre', *Journal of Xiangtan University (Philosophy and Social Sciences) (1)*, 2017, 25-29, p. 27.（参见夏新华、吴青山："我国宪法权利限制性条款的重构——以宪法第 51 条为中心"，载《湘潭大学学报（哲学社会科学版）》2017 年 7 期，第 27 页。）

[784] See Hua Wensheng, 'Reflections on the Problems and Countermeasures of the "Re-education through Labour" System', *Journal of Wuhan Public Security Cadre's College (1)*, 2009, 65-67, p. 65.（参见黄文胜："对我国劳动教养制度存在的问题和对策思考"，载《武汉公安干部学院学报》2009 年 1 期，第 65 页。）See also Liu Renwen, 'The "Re-education through Labour" System and its Reform', *Administrative Law Review (4)*, 2001, 13-21.（另见刘仁文："劳动教养制度及其改革"，载《行政法学研究》2001 年 4 期。）

[785] Article 8 of the Legislation Law of the People's Republic of China reads:

> 'The following matters shall only be governed by laws:
> …
> (5) Compulsory measures and penalties involving deprivation of a citizen's political rights or restriction of personal freedom.
> …'

The English version of the law is available at http://en.pkulaw.cn/display.aspx?cgid=9073d435178b9633bdfb&lib=law, last visited 24 February 2021.

and acting as a 'rubber stamp' will eventually end up with an executive branch that oversteps its role.[786]

The second example of the neglect is that China's rights limitation regime does not provide any quality control of law, and nor does it provide any effective constitutional review mechanism for remedies. To begin with, the general limitation provision of Article 51 does not prescribe any quality requirement when constitutional rights are reduced. In particular, the provision makes no mention of 'not impairing the very essence of rights' or the principle of proportionality.[787] The Law on Assemblies, Processions and Demonstrations is a typical example of how rights can be deterred to null. This law requires permission from government authorities to hold an assembly or demonstration, as well as providing broad reasons for denying such permission, such as claiming that it would oppose principles of the Constitution or threaten national security.[788] In practice, it is extremely rare for applications for an assembly or demonstration to be approved.[789] What makes it worse is that, technically

[786] 'Re-education through labour' has been abolished in 2013. See China Daily, "China Abolishes Re-education through Labor", *China Daily*, 28 December 2013, retrieved 18 August 2021, from https://www.chinadaily.com.cn/china/2013-12/28/content_17202294.htm.

[787] See Xia Xinhua and Wu Qingshan, 'The Reconstruction of Restrictive Clauses of the Constitutional Right in China – Take the Article 51 of the Constitution as the Centre', *Journal of Xiangtan University (Philosophy and Social Sciences) (1)*, 2017, 25-29, p. 28. （参见夏新华、吴青山："我国宪法权利限制性条款的重构 ——以宪法第 51 条为中心"，载《湘潭大学学报（哲学社会科学版）》2017 年 7 期，第 28 页。）Yang Guisheng, 'Restrictions on Constitutional Rights of China: Substance, Problems and Solutions', *Journal of Sichuan Administration Institute (4)*, 2009, 59-62, p. 61. （杨贵生："论我国宪法权利限制的实质、困境与对策"，载《四川行政学院学报》2009 年 4 期，第 61 页。）

[788] Article 7 of the Law on Assemblies, Processions and Demonstrations reads:

> 'For the holding of an assembly, a procession or a demonstration, application must be made to and permission obtained from the competent authorities in accordance with the provisions of this Law…'

Article 12 of the Law reads:

> 'No permission shall be granted for an application for an assembly, a procession or a demonstration which involves one of the following circumstances:
> (1) opposition to the cardinal principles specified in the Constitution;
> (2) harming the unity, sovereignty and territorial integrity of the state;
> (3) instigation of division among the nationalities; or
> (4) the belief, based on sufficient evidence, that the holding of the assembly, procession or demonstration that is being applied for will directly endanger public security or seriously undermine public order.'

The English version of the Law on Assemblies, Processions and Demonstrations is available at http://en.pkulaw.cn/display.aspx?cgid=6973fefa97d2eaa8bdfb&lib=law, last visited 24 February 2021.

See also Lin Laifan, *Lectures of Constitutional Law*, Tsinghua University Press, 2018, pp. 415-416. （林来梵：《宪法学讲义》（第三版），清华大学出版社 2018 年，第 415-416 页。）

[789] See Zhu Zhiling, 'Implementation Dilemma and Solutions of the Law on Assemblies, Processions and Demonstrations in China', *Journal of Hunan Police Academy 26(4)*, 2014, 100-105. （参见朱志玲："《中华人民共和国集会游行示威法》的实施困境及对策探讨"，载《湖南警察学院学报》第 26 卷 4 期，2014 年。）

speaking, the law would not be held to be unconstitutional because the Constitution does not specify any quality requirements for limitations on fundamental rights in the first place.

The current constitutional review mechanism does not provide any effective remedy either. While the NPC and its Standing Committee are entrusted with powers to void laws and regulations that go against the Constitution,[790] this cannot be done through a lawsuit. The laws in question are free from constitutionality challenges before domestic courts, which cannot be raised either *in abstracto* or in specific cases.[791] Instead, *parliamentary laws* are not subject to any challenges except for the NPC's 'own-motion review'. As for *administrative regulations* and *other laws at low levels in the legal hierarchy,* these may be checked for their compatibility with the Constitution, based on requests from certain governing authorities or suggestions from individuals.[792] However, practice shows that this review mechanism does not provide an effective remedy for constitutional rights being undermined by law, given that the regulations providing 're-education through labour' were in place for more than 50 years before being abolished and never officially held to violate the Constitution.[793]

4.1.3 Conclusion: A National Security Priority Model?

Most scholars and commenters have no difficulty in concluding that China prioritises national security over civil and political rights. This conclusion can be derived from China's collectivist traditions, which ask individuals to sacrifice personal interests and freedoms for common benefits.[794] Consequently,

---

[790] See Article 97 of Legislation Law, English version is available at http://en.pkulaw.cn/display.aspx?cgid=9073d435178b9633bdfb&lib=law, last visited 1 March 2021.

[791] See Hou Yu, 'Options for Constitutional Review in China', J*ournal of Central South University (Social Sciences) 13(3)*, 2007, 280-285, p. 284.（参见侯宇："论我国违宪审查模式的选择"，载《中南大学学报（社会科学版）》第 13 卷 3 期，2007 年，第 284 页。）

[792] See Cui Hong, 'Reflection and Way out for China's Constitutional Review System', *Social Science Journal (5)*, 2008, 81-83, p. 82.（参见崔红："我国违宪审查制度的反思和出路"，载《社会科学辑刊》2008 年 5 期，第 82 页。）See also Articles 97 and 99 of Legislation Law, English version is available at http://en.pkulaw.cn/display.aspx?cgid=9073d435178b9633bdfb&lib=law, last visited 1 March 2021.

[793] See Cui Hong, 'Reflection and Way out for China's Constitutional Review System', *Social Science Journal (5)*, 2008, 81-83, pp. 81-82.（参见崔红："我国违宪审查制度的反思和出路"，载《社会科学辑刊》2008 年 5 期，第 81-82 页。） See also State Council of China, "Decision of the Standing Committee of the National People's Congress on Abolishing the Legal Provisions on Re-education through Labour", State Council of China, 28 December 2013, retrieved 7 April 2020, from http://www.gov.cn/jrzg/2013-12/28/content_2556412.htm.（参加中央政府门户网站："全国人民代表大会常务委员会关于废止有关劳动教养法律规定的决定"，2013 年 12 月 28 日，网址 http://www.gov.cn/jrzg/2013-12/28/content_2556412.htm，最后访问日期 2020 年 4 月 7 日。）

[794] See Jiang Na, 'Cultural Collectivism in Law', in Na Jiang, *Wrongful Convictions in China: Comparative and Empirical Perspectives*, Springer, 2016, pp. 111-113.

national security as a crucial public interest comes first, and under no circumstances can it be infringed upon by an individual exercising his or her rights.[795] This conclusion may also be drawn from the importance of national security in relation to human rights protections. National security, in its narrow sense, is a life-or-death issue to a state. Without a state that is 'alive' and safe, there is no-one to protect human rights.[796] Their selective adaptation of which rights to foreground means the Chinese authorities do not see themselves as being against international human rights norms.[797] By emphasising that international human rights conventions accommodate limitation clauses, Chinese authorities hold that reducing civil and political rights is legitimate. Legally speaking, interfering in human rights does not necessarily constitutes a violation of international human right law, as long as the government authorities can prove that the interference is in accordance with the law, and is necessary to protect public interests or rights of others.

I would argue that China takes a national security priority approach due to the essential features of the regime. The socialist regime has recognised its essential features to be political monopoly, economic growth and social stability, and the latter two contribute to the regime's performance legitimacy. As discussed in Section 3.4.1.8, balancing is a form of reasoning or argumentation for assigning priorities to one set of interests over another.[798] From the broad categorical perspective, it is held that civil and political rights are not directly related to those features defined as essential by the governing authorities – in fact, they may actually be damaging to them. However, national security *is* closely linked to those features as it accommodates protection of the political monopoly and social stability, and constitutes the prerequisite for economic growth. Therefore, China prioritises national security when weighing the interests of national security against civil and political rights. A serious problem in this respect is the notable lack of a proportionality analysis of government interference in a specific case. This makes the tendency to favour security a far more decisive element on a case-by-case basis. Judges are guided

[795] See Xia Xinhua and Wu Qingshan, 'The Reconstruction of Restrictive Clauses of the Constitutional Right in China – Take the Article 51 of the Constitution as the Centre', *Journal of Xiangtan University (Philosophy and Social Sciences) (1)*, 2017, 25-29, p. 27.（参见夏新华、吴青山："我国宪法权利限制性条款的重构——以宪法第 51 条为中心"，载《湘潭大学学报（哲学社会科学版）》2017 年 7 期，第 27 页。）

[796] See Han Dayuan, 'On the Relations between National Security and Human Rights Defined in the Constitution of People's Republic of China', *Human Rights (5)*, 2019, pp. 4 & 6.（参见韩大元："论中国宪法上的国家安全与人权的关系"，载《人权》2019 年 5 期，第 4、6 页。）

[797] See Pitman B. Potter, 'Selective Adaptation and Institutional Capacity: Perspectives on Human Rights in China', *International Journal 61(2)*, 2006, 389-407.

[798] See Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' *International Journal of Constitutional Law* 7(3), 2009, p. 473.

more by utilitarianism than by any weighing and balancing of the features of a case. These defects are amplified by the Chinese authorities' sensitivities with regard to CCP's ruling position, communist and nationalist ideologies, and social order. In my observation, these sensitivities mean that when dealing with threats to these areas, the governing authorities show a rather low tolerance to perceived threats, an expanded 'defence perimeter' and exclusion of external scrutiny. To some extent, these sensitivities even contribute to state authorities' reluctance to remedy the defects in China's balancing approach.

4.2 THE SCOPE OF THE IMPACT ON HUMAN RIGHTS IN CHINA

4.2.1 Who May be Subject to the Impact

Chinese citizens have an obligation to protect national security,[799] and those who impair national security may face administrative sanctions and criminal charges. Each individual's liberty is thus extensively limited as no-one is allowed to undermine the security of the state. In other words, anyone can be subject to the impact of national security on the enjoyment of their human rights. In practice, the identity or occupation of a person is usually a matter of fact, which does not necessarily merit their liberty being limited due to national security concerns. Nevertheless, some cases raise observers' concerns over human rights violations more readily than others. In this section I will analyse three groups of people whose cases often raise such concerns. These people are from certain occupations or regions, and their cases, all related to national security, are regularly criticised for violating human rights. By explaining the underlying reasons for why they are targeted by the government, I will show how Chinese authorities' sensitivities about national security are reflected in practice.

4.2.1.1 Terrorists and Muslim minorities

China has implemented counterterrorism measures against its Muslim citizens, particularly those who are resident in the Xinjiang Uyghur Autonomous Region (XUAR). Although the government authorities constantly stress that counterterrorism measures by no means intend to target any specific group of people, thereby trying to avoid accusations of discrimination and ethno-religious tensions, Xinjiang is in fact the 'front line' where China seeks to combat

[799] Article 54 of the Constitution Law. The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 2 November 2021.

terrorism.[800] So far, the four terrorist organisations, as well as the terrorists identified by the Chinese authorities, have all supported Islamic radicalism,[801] and Xinjiang has been the primary region affected by their activities.[802]

During the past three decades, China has turned its counterterrorism measures from reactive to proactive, especially in Xinjiang. As a result, the scope of people whose civil and political rights might be impacted out of concern for national security has expanded. The Urumqi riots in 2009 are regarded as the start of this shift in approach for two reasons: first, when dealing with this incident, the Chinese authorities came to realise that they did not have sufficient local public security forces at their disposal, nor did they have any plans for responding to large-scale and violent unrest.[803] It is worth noting that this shortage was partly due to the large expanse of Xinjiang's territory, meaning that the security forces were dispersed over the region. The second, much more decisive, aspect was that the appeasing approach of relying heavily on promoting the local economy did not resolve the ethnic tensions as effectively as expected, let alone integrate the Muslim population into the nation state.[804]

The reactive approach to fighting terrorists mainly targeted actual perpetrators, either by means of criminal justice or military operations. The specifically targeted perpetrators can be categorised into three groups: members of a terrorist organisation; those carrying out attacks; and those

[800] Zhou Zunyou, '"Fighting Terrorism According to Law": China's Legal Efforts against Terrorism', in Michael Clarke (ed.), *Terrorism and Counter-Terrorism in China: Domestic and Foreign Policy Dimensions*, Oxford University Press, 2018, p. 75.
[801] The lists can be found at http://www.china-embassy.org/chn/xw/t56259.htm, and http://www.gov.cn/xwfb/2008-10/21/content_1126352.htm, last visited 1 March 2021.
[802] Xinhua, "The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang", *Xinhuanet,* 18 March 2019, retrieved 1 May 2020, from http://news.cn/english/2019-03/18/c_137904166.htm.
[803] On 7 July 2009, two days after the outbreaks of the incident, the Ministry of Public Security ordered urgently the Special Weapons and Tactics Units (SWAT) from 31 cities to reinforce Urumqi; and the People's Armed Police (PAP) outside Xinjiang were also deployed in Urumqi. See Sina, "Due to the 7.5 Incident, SWAT Teams for 31 Cities Dispatched to Xinjiang", *Sina,* 18 August 2009, retrieved 1 May 2020, from http://news.sina.com.cn/o/2009-08-18/062716140170s.shtml.（参见新浪网："7/5 事件后急调 31 市特警赴疆"，新浪网 2009 年 8 月 18 日报道，网址 http://news.sina.com.cn/o/2009-08-18/062716140170s.shtml，最后访问日期 2020 年 5 月 1 日。）Boxun, "The Army and Police from All Parts of China are Dispatched: Xinjiang Becomes an Anti-terrorist Training Base", *Boxun,* 14 July 2009, retrieved 1 May 2020, from https://www.boxun.com/news/gb/china/2009/07/200907140509.shtml.
[804] See Julia Famularo, '"Fighting the Enemy with Fists and Daggers": The Chinese Communist Party's Counter-Terrorism Policy in the Xinjiang Uyghur Autonomous Region', in in Michael Clarke (ed.), *Terrorism and Counter-Terrorism in China: Domestic and Foreign Policy Dimensions*, Oxford University Press, 2018, p. 47.

financing terrorism or laundering its money.[805] Normally, these perpetrators were either defeated by security forces[806] or prosecuted after capture. Before 2009, the reactive approach did not raise too many concerns over human rights, given the limited scope of persons targeted. More importantly, their offences were directly linked with terrorist activities. This direct causal link was demonstrated by the fact that their activities constituted either material prerequisites for a terrorist attack or the execution of a terrorist attack.

China's shift, however, to a proactive approach significantly increased the scope of persons impacted in Xinjiang under the heading of 'counterterrorism'. The fact that the current approach requires a less direct causal link between an individual's activities and a terrorist attack has resulted in more human rights concerns being raised, especially concerns regarding civil and political rights. For example, all residents have been affected by policing measures that have become more intrusive in their daily lives. Since 2009, there has been a significant expansion of security-related jobs advertised by local governments across Xinjiang in an attempt to increase the police presence in communities.[807] The intensive deployment of security personnel aims to detect any potential threats and respond quickly. Technology is also used in pursuit of this objective: government authorities have introduced high-tech counterterrorism measures in Xinjiang, such as installing more video surveillance cameras and testing a facial-recognition system.[808] Xinjiang is regarded by Chinese authorities as the

[805] See Liu Renwen, 'Terrorism and Criminal Law: The 9th Amendment of China's Criminal Law', *China Law Review (2)*, 2015, 168-174.（参见刘仁文："恐怖主义与刑法规范——以《刑法修正案九》（草案）为视角"，载《中国法律评论》2015 年 2 期。）Hu Shaofen, *Improve China's Criminal Law against Terrorism*, Thesis for Master Degree of Hunan University, 2015.（胡韶芬：《论我国反恐怖主义犯罪刑事立法完善》，湖南大学硕士论文，2015 年。）See also paragraphs 3 and 4 of Amendment (III) of the Criminal Law of China, English version is available at http://en.pkulaw.cn/display.aspx?cgid=65e3e32f00f4cef8bdfb&lib=law, last visited 1 March 2021.

[806] See Sohu News, "Xinjiang Police Raid a Terrorist Training Camp of 'East Turkistan Islamic Movement'", *Sohu News*, 8 January 2007, retrieved 1 May 2020, from http://news.sohu.com/20070108/n247488217.shtml.（参见搜狐新闻："新疆警方捣毁一'东突伊斯兰运动'恐怖训练营"，搜狐新闻 2007 年 1 月 8 日报道，网址 http://news.sohu.com/20070108/n247488217.shtml，最后访问日期 2020 年 5 月 1 日。）Chen Ming, 'The Strategic Role of Xinjiang Production and Construction Corps', *21st Century (online) August,* 2005, pp. 8-10, retrieved 1 May 2020, from http://www.cuhk.edu.hk/ics/21c/media/online/0502033.pdf.（陈铭："浅析新疆生产建设兵团的战略作用"，载《二十一世纪》网络版 2005 年 8 月号，第 8-10 页，网址 http://www.cuhk.edu.hk/ics/21c/media/online/0502033.pdf，最后访问日期 2020 年 5 月 1 日。）Liu Xiaoxiao, '"East Turkistan Islamic Movement" Terrorism and Chinese Government's Countermeasures', *Academic Exploration (10)*, 2004, 84-89, pp. 86-87.（参见刘潇潇："'东突'恐怖主义与中国政府对策"，载《学术探索》2004 年 10 期，第 86-87 页。）

[807] See Sheena Chestnut Greitens, Myunghee Lee, and Emir Yazici, 'Counterterrorism and Preventive Repression: China's Changing Strategy in Xinjiang', *International Security 44(3)*, 2020, 9-47, p. 16.

[808] See Julia Famularo, '"Fighting the Enemy with Fists and Daggers": The Chinese Communist Party's Counter-Terrorism Policy in the Xinjiang Uyghur Autonomous Region', in Michael Clarke, *Terrorism*

'front line' of combating terrorism,[809] and the government has blurred the line between public security and national security. Measures that used to be in place mainly for public security concerns are now being 'promoted' to serving to protect national security and combat terrorism.[810] As a result, policing measures in Xinjiang have become more intrusive than elsewhere in China, raising concerns over the right to liberty and the right to privacy, as well as the presumption of innocence.

Another important development is that the scope of 'perpetrators' of terrorism has been expanded to include people who have yet to commit an attack, but are preparing for one. This is because preparatory acts now qualify as terrorist crimes. This move arguably copies the legal reform undertaken by Europe and the USA during the 'war on terror'. China's 2015 Amendment to the Criminal Law introduced five kinds of preparatory acts into the family of terrorism offences:

- Equipping weapons for terrorist attacks;[811]
- Organising or participating in terrorist training programmes;[812]
- Contacting overseas terrorist organisations or persons for conducting terrorist activities;[813]
- Planning for terrorist attacks;[814]
- Recruiting or shipping people for joining a terrorist group, for committing a terrorist act or for participating in terrorist training programmes.[815]

In my reading, the criminalisation of these preparatory acts is not just a reflection of the government taking a proactive approach, but also provides legitimacy for its expansion of the national 'defence perimeter'. Shifting the

and Counter-Terrorism in China: Domestic and Foreign Policy Dimensions, Oxford University Press, 2018, pp. 57-58. Liu Yong, Cai Ruihang, Cheng Shusheng, and Ma Xinyue, 'Implementation and Application of Face Recognition System in Xinjiang Public Security Bureau', *Electronic Technology & Software Engineering (15)*, 2015, 100-101.（刘勇、蔡瑞航、成书晟、马新月："新疆公安厅人脸识别系统的实现与应用"，载《电子技术与软件工程》2015 年 15 期。）See also Paul Mozur, "One Month, 500,000 Face Scans: How China is Using A.I. to Profile a Minority", *New York Times*, 14 April 2019, retrieved 1 May 2020, from https://cn.nytimes.com/technology/20190415/china-surveillance-artificial-intelligence-racial-profiling/.

[809] State Council of China, 'The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang', *State Council of China*, 18 March 2019, retrieved 1 May 2020, from http://www.gov.cn/zhengce/2019-03/18/content_5374643.htm.

[810] See Julia Famularo, '"Fighting the Enemy with Fists and Daggers": The Chinese Communist Party's Counter-Terrorism Policy in the Xinjiang Uyghur Autonomous Region', in Michael Clarke, *Terrorism and Counter-Terrorism in China: Domestic and Foreign Policy Dimensions*, Oxford University Press, 2018, pp. 58-59.

[811] See Article 120(II)(1) of the Criminal Law. Amendment (IX) to the Criminal Law of China, available at https://www.pkulaw.com/en_law/6c18c6f3a93ad220bdfb.html, last visited 5 March 2021.

[812] See Article 120(II)(2) of the Criminal Law. Amendment (IX) to the Criminal Law of China.

[813] See Article 120(II)(3) of the Criminal Law. Amendment (IX) to the Criminal Law of China.

[814] See Article 120(II)(4) of the Criminal Law. Amendment (IX) to the Criminal Law of China.

[815] See Article 120(I)(2) of the Criminal Law. Amendment (IX) to the Criminal Law of China.

threshold of crimes to an earlier stage[816] triggers a chain reaction: preparatory acts of newly defined 'crimes' are now coming to the attention of law enforcement agencies, whose primary focus is on preventing crimes. As an example, the police cannot arrest a person with a knife but who has yet to commit a murder, unless such a preparatory act has been defined as a crime in law. Taking a proactive approach also makes controlling and tracing knife sales more legitimate than before. In effect, this results in a great expansion in the scope of persons who fall into the 'terrorist' category compared to the scope targeted by the reactive approach.

In addition to preparatory acts, the Chinese government's proactive approach takes the 'ideological battle' into account. It is widely accepted that extremist and terrorist thoughts are the internal drivers of terrorist activities,[817] thus underlining the importance of halting the spread of such information, as well as acts that manifest these sorts of thoughts.[818]

Last but not least, persons in China whose acts are deemed to be motivated by extremism or terrorism have been subject in recent years to de-extremification programmes. Although these programmes attempt to change a person's thoughts or beliefs, the government regards them as a soft approach in the form of an early intervention that will reduce the chances of an individual committing a terrorist crime in the first place. Xinjiang's Vocational Education and Training Centres (also known as 're-education' camps) operate under this logic. Three specific groups of people are reported to be admitted to such centres (details will be discussed in Section 4.4.2.2):

- those who have carried out an act of terrorism that does not amount to a crime;
- those who have carried out an act of terrorism that amounts to a crime and who choose to join a programme instead of receiving a prison sentence;

[816] Anna Oehmichen, *Terrorism and Anti-terror Legislation - The Terrorised Legislator? A Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France*, Intersentia, 2009, p. 312.

[817] See Alex P. Schmid, 'Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review', *The International Centre for Counter-Terrorism – The Hague 4(2)*, 2013, pp. 8-11. Quirine Eijkman and Bart Schuurman, 'Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation', *The International Centre for Counter-Terrorism – The Hague 2(5)*, 2011, p. 22. See also State Council of China, 'The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang', *State Council of China*, 18 March 2019, retrieved 1 May 2020, from http://www.gov.cn/zhengce/2019-03/18/content_5374643.htm.

[818] See Article 120(III), (IV), (V), and (VI) of the Criminal Law. Amendment (IX) to the Criminal Law of China, available at https://www.pkulaw.com/en_law/6c18c6f3a93ad220bdfb.html, last visited 5 March 2021.

- those who have served a sentence for a terrorism crime but are deemed to still be potentially dangerous to society.[819]

As extremist ideology in the region is usually propagated in the name of Islam, Muslims may be the *de facto* vulnerable group to Islamic extremism in the context of counterterrorism in China. A UN treaty body, the OHCHR and some Western countries have accused Chinese authorities of detaining millions of Uighurs and other Muslim minorities in the centres.[820] There are also reports claiming that those admitted to such programmes have never been limited to the three groups of people listed above.[821]

The de-extremification approach taken by the Chinese government inevitably entails an obstacle: no-one can read other people's minds, and beliefs can be concluded only from words or actions. Therefore, the Uyghur Autonomous Region Regulation on De-extremification (as amended in 2018) lists fourteen kinds of actions or words that imply a person might be under influence of extremism. While some of these actions or words relate mainly to propagating ideology, others concern residents' daily lives.[822] The proactive approach identifies extremism as an early sign of terrorism, and thus involves persons deemed to have extremist thinking into Xinjiang's counterterrorism discourse.

The terrorism problems in Xinjiang hit a sensitive nerve in the Chinese authorities' concerns over national security: in one of its official white papers,

---

[819] State Council of China, 'The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang', *State Council of China*, 18 March 2019, retrieved 1 May 2020, from http://www.gov.cn/zhengce/2019-03/18/content_5374643.htm.

[820] See Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China and Macao, China), CERD/C/CHN/CO/14-17(2018), para. 40. OHCHR, *Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, OHCHR, 31 August 2022, retrieved 4 July 2023 from https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region. See also, US Congress, Uyghur Human Rights Policy Act of 2020, S.3744. German Federal Foreign Office, "Statement by a Federal Foreign Office Spokesperson on Today's Video Conference between Foreign Minister Annalena Baerbock and Her Chinese Counterpart, Wang Yi", *Federal Foreign Office*, 24 May 2022, retrieved 4 July 2023 from https://www.auswaertiges-amt.de/en/newsroom/news/baerbock-wang-yi-vtc/2532572. GOV.UK, "UN Human Rights Council 47: Joint Statement on the Human Rights Situation in Xinjiang", *GOV.UK*, 22 June 2021, retrieved 4 July 2023 from https://www.gov.uk/government/news/un-human-rights-council-47-joint-statement-on-the-human-rights-situation-in-xinjiang.

[821] See Human Rights Watch, '"Eradicating Ideological Viruses": China's Campaign of Repression Against Xinjiang's Muslims', *Human Rights Watch*, 9 September 2018, retrieved 11 May 2020, from https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs#c6a416.

[822] Article 9 of Uyghur Autonomous Region Regulation on De-extremification, retrieved 11 May 2020, from https://www.guancha.cn/politics/2018_10_10_474949.shtml. See also Special Procedures Communication to China, OL CHN 21/2018, retrieved 11 May 2020, from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24182.

the regime defined 'Three Evil Forces' in Xinjiang – terrorism, ethnic separatism and religious extremism – as major threats.[823] Of these three, independence from China is the ultimate goal, whereas terrorism serves as the means, and extremism provides the ideological support.[824] These three are diametrically opposed to the main points identified by the government authorities as essential to secure its rule: retaining the dominance of Marxism and nationalism ideologies, and maintaining social stability. These collisions have contributed greatly to the Chinese authorities' shift towards a proactive and intrusive approach that substantially broadens the scope of people whose human rights may be impacted by national security measures.

4.2.1.2 Human rights lawyers

Another group of people who have encountered repercussions because of national security are human rights lawyers. This group has attracted two, completely opposing, views of their work. On the one hand, some Western countries and human rights groups have applauded their endeavours of striving for fundamental rights, defining them as 'human rights defenders' [825] suppressed by Chinese authorities for advocating human rights in China.[826] On the other hand, Chinese authorities have accused some human rights lawyers of endangering state security by slandering the regime and encouraging anti-government sentiment in society.[827] Which of these views represents human

---

[823] State Council of China, 'The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang', *State Council of China*, 18 March 2019, retrieved 1 May 2020, from http://www.gov.cn/zhengce/2019-03/18/content_5374643.htm. See Al Jazeera, "Xinjiang: The Story China Wants the World to Forget", *Al Jazeera*, 7 September 2019, retrieved 12 May 2020, from https://www.aljazeera.com/programmes/listeningpost/2019/09/xinjiang-story-china-world-forget-190907080927464.html.

[824] Fu Hualing, 'Responses to Terrorism in China', in Victor V. Ramraj, Michael Hor, Kent Roach, and George Williams (eds.), *Global Anti-terrorism Law and Policy*, Cambridge University Press, 2012, pp. 344-345.

[825] Regarding the definition of human rights defenders, see OHCHR, "About Human Rights Defenders", *OHCHR*, retrieved 12 May 2020, from https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx#ftn1.

[826] For example, see U.S. Mission to the United Nations in Geneva, "Joint Statement – Human Rights Situation in China", *U.S. Mission to the United Nations in Geneva*, 10 March 2016, retrieved 12 May 2020, from https://geneva.usmission.gov/2016/03/10/item-2-joint-statement-human-rights-situation-in-china/. See also Raphaël Viana David, *Strategies of Silence: Repression of Chinese Human Rights Defenders*, International Service for Human Rights, 30 November 2021, retrieved 4 July 2023 from https://ishr.ch/latest-updates/three-years-after-un-review-china-failing-to-uphold-commitments-on-human-rights-defenders-and-civil-society-space/.

[827] See Zou Wei and Huang Qingchang, "Unveiling the Insider Story of Rights Activists", *People's Daily Online*, 12 July 2015, retrieved 12 May 2020, from http://politics.people.com.cn/n/2015/0712/c1001-27290030.html.（参见邹伟、黄庆畅："揭开'维权'事件的黑幕"，人民网 2015 年 7 月 12 日报道，网址 http://politics.people.com.cn/n/2015/0712/c1001-27290030.html，最后访问日期 2020 年 5 月 12 日。）

rights lawyers best? And, more importantly, why have these lawyers been targeted by Chinese authorities in the name of national security?

Human rights lawyers in China are legal professionals who are willing to appeal for individual rights and freedoms in sensitive cases, which often involve official abuse.[828] Some of these cases are highly politically sensitive, such as those related to Falun Gong and the 1989 Tiananmen Square protests. In some cases, local authorities may be embarrassed when asked to explain their behaviour in, for example, cases of forced evictions or torture and efforts to obstruct petitioners from seeking justice.[829] These cases fall into the wide gap between the law and its implementation in practice in contemporary China. When handling such cases, human rights lawyers generally work within the current legal framework, but demand that this gap be filled immediately in order to remedy the petitioner's situation. Moreover, they often employ extra-legal rather than legal strategies in seeking to get their demands satisfied. As I outline below, these extra-legal strategies have been a primary reason for the government's crackdown on human rights lawyers over the past six years.

In July 2015, the Chinese authorities launched a nation-wide operation mainly targeting lawyers and other staff from the Fengrui law firm. Most of them were accused of 'subversion of state power' or 'inciting subversion of state power',[830] which are categorised as 'offences against national security' by the Criminal Law of China.[831] Due to the nature of the offences, the government authorities adopted some exceptional procedures for criminal proceedings,

[828] See Eva Pils, 'The Party's Turn to Public Repression: An Analysis of the "709" Crackdown on Human Rights Lawyers in China', *China Law and Society Review 3(1)*, 2018, 1-48, pp. 3-6. Fu Hualing, 'The July 9th 709 Crackdown on Human Rights Lawyers Legal Advocacy in an Authoritarian State', *Journal of Contemporary China 27(112)*, 2018, 554-568, pp. 555-556.

[829] See Fu Hualing, 'The July 9th 709 Crackdown on Human Rights Lawyers Legal Advocacy in an Authoritarian State', *Journal of Contemporary China 27(112)*, 2018, 554-568, p. 557.

[830] See Human Rights in China, "Mass Crackdown on Chinese Lawyers, Defenders and International Reactions: A Brief Chronology", *HRIC*, 15 September 2017, retrieved 12 May 2020, from https://www.hrichina.org/en/mass-crackdown-chinese-lawyers-defenders-and-international-reactions-brief-chronology.

[831] Article 105 of the Criminal Law reads:

> 'Whoever organizes, plots, or acts to subvert the political power of the state and overthrow the socialist system, the ringleaders or those whose crimes are grave are to be sentenced to life imprisonment, or not less than 10 years of fixed-term imprisonment; active participants are to be sentenced from not less than three years to not more than 10 years of fixed-term imprisonment; other participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.
>
> Whoever instigates the subversion of the political power of the state and overthrow the socialist system through spreading rumours, slandering, or other ways are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights; the ringleaders and those whose crimes are grave are to be sentenced to not less than five years of fixed-term imprisonment.'

The English version of the Criminal Law of China is available at http://en.pkulaw.cn/display.aspx?cgid=39c1b78830b970eabdfb&lib=law, last visited 9 March 2021.

including, for instance, the fact that the whereabouts of the human rights lawyers were not made known to their families at the outset. This raised concerns over arbitrary detention, enforced disappearance and torture.[832]

Why have some human rights lawyers been subject to such a systematic crackdown? Is this simply retaliation for their embarrassing the Chinese authorities in sensitive cases, or is state security indeed threatened by their acts? In my observation, the crackdown seems to have been instigated not because of the kinds of cases these lawyers represented, but because of how they did it. In their legal disputes, the lawyers relied heavily on extra-legal means, such as social media advocacy and organised protests.[833] Meanwhile, stories posted on social media platforms were generally based on two main aspects: first, the lawyers alleged that government authorities had abused their powers by infringing on the lawyers' clients' rights and interests; second, they stated that the government was trying to cover this up by obstructing lawyers' legal involvement.[834] The means also included protests against local government agencies by lawyers, victims and their families, and other persons, and subsequent online postings about such actions.[835]

Take the case of the Qing'an incident.[836] The local authorities alleged that the victim, Xu Chunhe, was shot dead at a railway station for attacking a policeman.[837] The lawyers in the case provided a totally different version of the story online; namely, that Mr Xu was refused permission to board a train because of being on the local government's 'blacklist' as a petitioner, and that the incident was actually caused by the policeman's attempt to stop him from travelling elsewhere to raise his petition.[838] The two sides also disagreed on

---

[832] See Special Procedures Communication to China, OL CHN 15/2018, retrieved 11 May 2020, from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23997.
[833] See Fu Hualing, 'The July 9th 709 Crackdown on Human Rights Lawyers Legal Advocacy in an Authoritarian State', *Journal of Contemporary China 27(112)*, 2018, 554-568, pp. 556-557.
[834] See Eva Pils, 'The Party's Turn to Public Repression: An Analysis of the "709" Crackdown on Human Rights Lawyers in China', *China Law and Society Review 3(1)*, 2018, 1-48, pp. 20-21.
[835] See Fu Hualing, 'The July 9th 709 Crackdown on Human Rights Lawyers Legal Advocacy in an Authoritarian State', *Journal of Contemporary China 27(112)*, 2018, 554-568, pp. 556-557.
[836] See South China Morning Post, "Chinese Policeman Guns Down Unarmed Traveller in front of His Three Children and Elderly Mother", *SCMP*, 13 May 2015, retrieved 11 May 2020, from https://www.scmp.com/news/china/society/article/1794689/chinese-policeman-guns-down-unarmed-traveller-front-his-three.
[837] See Xinhua, "CCTV Restore Qing'an Incidence, Police Said Feeling Aggrieved", *Xinhua*, 31 May 2015, retrieved 11 May 2020, from http://www.xinhuanet.com/politics/2015-05/31/c_127860705.htm.（参见新华网："央视全程高清还原庆安枪击案 开枪民警称感觉很委屈"，新华网 2015 年 5 月 31 日报道，网址 http://www.xinhuanet.com/politics/2015-05/31/c_127860705.htm，最后访问日期 2020 年 5 月 11 日。）
[838] See Boxun, "Joint Statement of Four Lawyers for 'Qing'an Shooting Case'", *Boxun*, 12 May 2015, retrieved 11 May 2020, from https://boxun.com/news/gb/china/2015/05/201505122057.shtml.（参见博讯："'庆安枪杀案'4 位代理律师的联合声明"，博讯网 2015 年 5 月 12 日报道，网

whether Mr Xu posed such a threat that he had to be shot dead on the spot.[839] The case attracted public attention because of two opposing versions of the story being presented.[840] Suspicion against the local government increased as lawyers claimed that they had been denied access to critical evidence; namely, security camera footage of the incident. They also turned to higher-level government authorities to protest against the local authorities' attempt to cover up the incident and asked for an independent investigation.[841]

The problem of this non-judicial approach is that, in order to put pressure on local authorities, human rights lawyers try to exaggerate well-known systemic dysfunctions. This approach does not necessarily focus on the merits of the case concerned, but does have the potential to change the case into a media trial. While preventing petitioners from appealing is an infamous practice of some local governments,[842] there was no direct relationship in the Qing'an case between the victim's attack of the police and the subsequent shooting. The government authorities discredited this detail by alleging that it was made up[843] simply to spark a public debate.

There are three main reasons why human rights lawyers provoke government authorities' alarm over national security. Firstly, these lawyers are strongly inclined to work specifically on sensitive cases and repeatedly take a non-judicial approach to resolving them. In many cases in which defendants

---

址 https://boxun.com/news/gb/china/2015/05/201505122057.shtml，最后访问日期 2020 年 5 月 11 日。）

[839] See Boxun, "Joint Statement of Four Lawyers for 'Qing'an Shooting Case'", *Boxun*, 12 May 2015, retrieved 11 May 2020, from https://boxun.com/news/gb/china/2015/05/201505122057.shtml. （参见博讯："'庆安枪杀案'4 位代理律师的联合声明"，博讯网 2015 年 5 月 12 日报道，网址 https://boxun.com/news/gb/china/2015/05/201505122057.shtml，最后访问日期 2020 年 5 月 11 日。）

[840] See Reuters, "Chinese Police Officer Who Killed Man at Station Cleared of Wrongdoing", *Reuters*, 14 May 2015, retrieved 11 May 2020, from https://www.reuters.com/article/us-china-police/chinese-police-officer-who-killed-man-at-station-cleared-of-wrongdoing-idUSKBN0NZ11420150514.

[841] See Boxun, "Lawyers Representing Xu's Case Protested at Public Security Department of Heilongjiang", *Boxun*, 14 May 2015, retrieved 11 May 2020, from https://boxun.com/news/gb/china/2015/05/201505140141.shtml. （参见博讯："徐纯合被击毙案的代理律师黑龙江公安厅举牌抗议"，博讯 2015 年 5 月 14 日报道，网址 https://boxun.com/news/gb/china/2015/05/201505140141.shtml，最后访问日期 2020 年 5 月 11 日。）

[842] See BBC, "Security Crackdown on Petitioners in China", *BBC*, 6 March 2014, retrieved 11 May 2020, from https://www.bbc.com/news/av/world-asia-26477849/security-crackdown-on-petitioners-in-china.

[843] See China Daily, "Police and Prosecutors Investigate the Qing'an Incident and Found the Police Fired in Accordance with the Regulations", *China Daily*, 24 May 2015, retrieved 12 May 2020, from http://www.chinadaily.com.cn/interface/toutiao/1138561/2015-5-24/cd_20800962.html. （参见人民日报："警方检方调查庆安事件认定——民警开枪依规合法"，人民日报 2015 年 5 月 24 日报道，网址 http://www.chinadaily.com.cn/interface/toutiao/1138561/2015-5-24/cd_20800962.html，最后访问日期 2020 年 5 月 12 日。）

were accused of 'subverting state power' or 'inciting subversion of state power', although not always explicitly challenging the entire regime, they amplified and utilised people's aggressive attitudes towards local governments and the judicial system, thus undermining their authority and effectiveness.[844] Secondly, Chinese authorities are cautious about citizens' self-organised actions, with the government accusing human rights lawyers of setting up a network connecting petitioners willing to participate in a demonstration that has nothing to do with their own cases.[845] In the eyes of the government, the network becomes a hub of individuals sharing anti-government sentiments and ready to cause disturbances in society. This is then taken to mean that whatever they are protesting about does not represent public opinion. Thirdly, some human rights lawyers have connections with foreign media or NGOs. The government argues that these media and NGOs are keen on bad news about China at best, and hostile to the Chinese regime at worst. Through them, human rights lawyers get their voices heard abroad and, in some cases, receive funding.[846] Together,

[844] This point can be found in many judgments of those lawyers being accused of 'subversion of state power', or 'inciting subversion of state power' in the 9 July crackdown. For example, in the judgment of Xie Yang's case, the court found that the accused mobilised residents to gather outside of the court, inciting confrontation with the government, during a trial of a case related to administrative land acquisition; in the case of Qing'an, he hyped the incident by gathering people offline and inciting confrontation online; and in another case of business disputes, he defamed local police on social media by claiming that they hired mafia to resolve the disputes, inciting hatred against the authorities. See Changsha Intermediate People's Court, 'Judgment of the First Trial of Xie Yang's Incitement to Subversion of State Power', *Changsha Intermediate People's Court*, 26 December 2017, retrieved 3 July 2023 from http://cszy.hunancourt.gov.cn/article/detail/2017/12/id/3139850.shtml. See also the case of Zhou Shifeng, Hu Shigen, Zhai Yanmin, and Gou Hongguo related to subversion of state power, People's Court Daily, 'Zhou Shifeng, Hu Shigen, Zhai Yanmin, and Gou Hongguo's Case of Subversion of State Power: Verdict Delivered in Court', *People's Court Daily*, 6 August 2016, retrieved 3 July 2023 from http://rmfyb.chinacourt.org/paper/images/2016-08/06/03/2016080603_pdf.pdf. (People's Court Daily is an official paper of Supreme People's Court.)

[845] See Zou Wei and Huang Qingchang, "Unveiling the Insider Story of Rights Activists", *People's Daily Online*, 12 July 2015, retrieved 12 May 2020, from http://politics.people.com.cn/n/2015/0712/c1001-27290030.html.（参见邹伟、黄庆畅："揭开'维权'事件的黑幕"，人民网 2015 年 7 月 12 日报道，网址 http://politics.people.com.cn/n/2015/0712/c1001-27290030.html，最后访问日期 2020 年 5 月 12 日。）Fu Hualing, 'The July 9th 709 Crackdown on Human Rights Lawyers Legal Advocacy in an Authoritarian State', *Journal of Contemporary China 27(112)*, 2018, 554-568, p. 557.

[846] See Zou Wei and Huang Qingchang, "Unveiling the Insider Story of Rights Activists", *People's Daily Online*, 12 July 2015, retrieved 12 May 2020, from http://politics.people.com.cn/n/2015/0712/c1001-27290030.html.（参见邹伟、黄庆畅："揭开'维权'事件的黑幕"，人民网 2015 年 7 月 12 日报道，网址 http://politics.people.com.cn/n/2015/0712/c1001-27290030.html，最后访问日期 2020 年 5 月 12 日。）See also, Fu Hualing and Zhu Han, 'After the July 9 (709) Crackdown: The Future of Human Rights Lawyering', *Fordham International Law Journal 41(5)*, 2018, 1135-1164, p. 1160. Tom Phillips, "China Passes Law Imposing Security Controls on Foreign NGOs", *The Guardian*, 28 April 2016, retrieved 12 May 2020, from https://www.theguardian.com/world/2016/apr/28/china-passes-law-imposing-security-controls-on-foreign-ngos.

these three dimensions have caused concern among government authorities that some human rights lawyers' work is part of a 'peaceful evolution' that would erode the dominant role of China's political ideology. What the state is trying to avoid is a potential 'colour revolution' embedded in human rights lawyers' systematic adopting of extra-legal means in sensitive cases.

4.2.1.3 Overseas non-governmental organisations

It is not unusual to hear Chinese authorities assert that 'foreign forces' are involved in a political incident in China. From the 1989 Tiananmen Square protests to the 2011 Chinese pro-democracy protests,[847] 'foreign forces' were allegedly behind them all, even though these forces were barely specified by the Chinese authorities. Such abstract accusations often downgrade their credibility in the eyes of observers and commentators. Since President Xi Jinping came to power in 2012, 'foreign forces' have been further specified, in some cases, as overseas NGOs, and some of them have been regarded by Chinese authorities as a potential threat to national security ever since. In 2014, the newly established National Security Commission launched a thorough and nation-wide investigation into overseas NGOs in mainland China.[848] Later, in 2016, China adopted the Law on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China (the Overseas NGOs Law).[849] This law is widely regarded by observers as part of China's national security legal architecture,[850] although Article 1, on its legislative purposes, makes no mention at all of national security.[851] Why are overseas

[847] See Ian Johnson, "Calls for a 'Jasmine Revolution' in China Persist", *New York Times*, 23 February 2011, retrieved 12 May 2020, from https://www.nytimes.com/2011/02/24/world/asia/24china.html.

[848] See Chen Xiaochun and Yan Yige, 'Managing Overseas NGOs in China: From the Perspective of National Security', *Guihai Tribune 31(2)*, 2015, 21-26, pp. 21-22.（参见陈晓春、颜屹仡："国家安全视角下的在华境外非政府组织管理研究"，载《桂海论丛》2015 年 2 期，第 21-22 页。）See also Didi Kirsten Tatlow, "New Signs that China is Scrutinizing Foreign NGOs", *New York Times*, 30 June 2014, retrieved 12 May 2020, from https://cn.nytimes.com/china/20140630/c30ngo/en-us/.

[849] The English version of China's Overseas NGOs Law is available at http://en.pkulaw.cn/display.aspx?cgid=03b980cb0f3f9369bdfb&lib=law, last visited 10 March 2021.

[850] See He Jun and Wang Yan, 'The Impact of Foreign NGOs' Activities on China's Political Security and Countermeasures', *Journal of Yunnan Police College (3)*, 2016, 58-63, p. 63.（参见何军、王焱："境外非政府组织涉华活动对我国政治安全的 影响及对策研究"，载《云南警官学院学报》2016 年 3 期，第 63 页。）See also Amnesty International, 'China: Human Rights Violations in the Name of "National Security": Amnesty International Submission for the UN Universal Periodic Review, 31st Session of the UPR Working Group', *Amnesty International*, 1 March 2018, p. 6, retrieved 12 May 2020, from https://www.amnesty.org/en/documents/asa17/8373/2018/en/.

[851] Article 1 of the Overseas NGOs Law reads:

> 'This Law is developed to regulate and guide the activities conducted by overseas non-governmental organizations within the territory of China, protect their lawful rights and interests, and promote exchanges and cooperation.'

The English version of China's Overseas NGOs Law is available at http://en.pkulaw.cn/display.aspx?cgid=03b980cb0f3f9369bdfb&lib=law, last visited 10 March 2021.

NGOs considered a threat to the security of the state? By what means do they create threats to China?

The government's primary concern is some foreign NGOs' potential to stir up a 'colour revolution'. Lessons learned from the Cold War mean Chinese authorities have been alert to the possibility of a 'peaceful evolution' plotted by Western countries, with 'colour revolutions' being a newly developed form of this.[852] 'Colour revolutions' refer to the mass popular uprisings seen in 1989 and the 1990s in some Eastern European and former Soviet countries.[853] While these movements normally started with a series of peaceful uprisings, they ended up with regime change.[854] Such uprisings have mainly been attributed to economic recessions and their accompanying social conflicts.[855] When it comes to China, even though its economy has managed to continue performing well since 1979, there is no lack of social grievances due to pursuing economic growth.[856] As accumulated grievances provide a breeding ground for uprisings,

[852] See Fu Wei, '"Colour Revolutions", "Cultural Hegemony" and Peaceful Evolution Strategy', *Social Sciences in Guangxi (8)*, 2016, 192-195.（傅维："'颜色革命'、'文化霸权'与和平演变战略"，载《广西社会科学》2016 年 8 期。）See also Hu Jian, '"Colour Revolutions" – the Second "Peaceful Evolution" of Post-Socialist Countries?', *Social Sciences Digest (6)*, 2006, 26-27, p. 26.（胡键："'颜色革命'——后社会主义国家的第二次'和平演变'"？，载《社会观察》2006 年 6 期，第 26 页。）

[853] See Susan Stewart, 'Democracy Promotion before and after the "Colour Revolutions"', *Democratization 16(4)*, 2009, 645-660, p. 645. See also Titus C. Chen, 'China's Reaction to the Color Revolutions: Adaptive Authoritarianism in Full Swing', *Asian Perspective 34(2)*, 2010, 5-51.

[854] See Leah Gilbert and Payam Mohseni, 'Disabling Dissent: The Colour Revolutions, Autocratic Linkages, and Civil Society Regulations in Hybrid Regimes', *Contemporary Politics 24(4)*, 2018, 454-480, p. 472 at note 11. See also Titus C. Chen, 'China's Reaction to the Colour Revolutions: Adaptive Authoritarianism in Full Swing', *Asian Perspective 34(2)*, 2010, 5-51, p. 9. Xu Jian and Xie Tian, '"Colour Revolution" and "Arab Spring", Causes and Social Early Warning Mechanism', *Journal of Shanghai Jiaotong University(Philosophy and Social Sciences) (3)*, 2017, 23-33.（徐剑、谢添："'颜色革命'和'阿拉伯之春'的成因及社会预警机制建立"，载《上海交通大学学报（哲学社会科学版）》2017 年 3 期。）Tian Wenlin, "The Mentality and Tactics of the Western Powers to Manipulate the 'Colour Revolution'", *Guangming*, 11 September 2019, p. 12, retrieved 12 May 2020, from http://m.cwzg.cn/theory/201909/51402.html?page=full.（田文林："西方大国操纵'颜色革命'的心态与手法"，《光明日报》2019 年 9 月 11 日 12 版，网址 http://m.cwzg.cn/theory/201909/51402.html?page=full，最后访问日期 2020 年 5 月 12 日。）

[855] See Xu Jian and Xie Tian, 'Social Early Warning Analysis of International Political Turbulence', *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences) 25(3)*, 2017, 23-33.（参见徐剑、谢添："国际政治动荡的社会预警分析"，载《上海交通大学学报（哲学社会科学版）》2017 年 3 期。）

[856] See Mao Xinjuan and Ma Zhanchao, 'Stay Alert of "Colour Revolution" and Maintain Political Security', *Journal of Jiangnan Social University 19(4)*, 2017, 16-20, p. 17.（参见毛欣娟、马振超："高度重视防范'颜色革命'风险 维护我国政治安全"，载《江南社会学院学报》2017 年 4 期，第 17 页。）See also Titus C. Chen, 'China's Reaction to the Color Revolutions: Adaptive Authoritarianism in Full Swing', *Asian Perspective 34(2)*, 2010, 5-51, pp. 11-12.

the role played by Western NGOs in the 'colour revolutions' has come under close scrutiny by the Chinese authorities.[857]

One way in which some NGOs and the Chinese authorities sharply diverge is in their approaches to tackling social problems such as land expropriation, labour relations, gender equality and environmental protection.[858] On the one hand, Chinese authorities take an institutional approach, believing that the existing legal mechanisms for remedies are not only available but effective. For instance, an applicant may ask for an administrative reconsideration of government action, the parties in a labour relations case may go to arbitration and, for most social problems, people may file a complaint with a court or, as a supplementary resort, go through the petition system.[859] However, as mentioned before, what the law provides on paper may diverge from how effectively it is implemented in practice. The other variables involved could be a local government's reluctance to admit misconduct, or a court taking into account the potential social impact of a case.

Some foreign NGOs, on the other hand, have a pragmatic approach to protecting personal interests. They have spotted a weakness of Chinese authorities at a local level; namely, that the latter are easily upset by collective actions.[860] On this basis, these foreign NGOs perceive collective measures as the most efficient and beneficial way to protect victims' interests. Concentrating their work at the local level,[861] they provide two main 'weapons': political legitimacy and money. Firstly, by advocating liberal ideology, they make people realise that they are entitled to 'fight back' against government authorities,[862] especially when they believe their interests cannot be protected through existing remedies. This hits a nerve among Chinese authorities seeking to

[857] See Titus C. Chen, 'China's Reaction to the Color Revolutions: Adaptive Authoritarianism in Full Swing', *Asian Perspective 34(2)*, 2010, 5-51, p. 9. See also Julie Famularo, "The China-Russia NGO Crackdown", *The Diplomat*, 23 February 2015, retrieved 12 May 2020, from https://thediplomat.com/2015/02/the-china-russia-ngo-crackdown/.

[858] See Chen Sheyin and Hao Zhidong, 'Gender, Ethnicity, Labor, and the Environment as Social Issues and Public Policy Challenges', in Chen Sheyin and Hao Zhidong (eds.), *Social Issues in China: Gender, Ethnicity, Labor, and the Environment*, Springer, 2014, 1-20.

[859] Gao Xujun and Long Jie, 'On the Petition System in China', *University of St. Thomas Law Journal 12(1)*, 2015, 34-55.

[860] See Fu Hualing, 'The July 9th 709 Crackdown on Human Rights Lawyers Legal Advocacy in an Authoritarian State', *Journal of Contemporary China 27(112)*, 2018, 554-568, p. 563.

[861] See Chen Xiaochun and Yan Yige, 'Managing Overseas NGOs in China: From the Perspective of National Security', *Guihai Tribune 31(2)*, 2015, 21-26, p. 5.（参见陈晓春、颜屹乾："国家安全视角下的在华境外非政府组织管理研究"，载《桂海论丛》2015 年 2 期，第 5 页。）

[862] See Wang Cunkui and Peng Aili, 'Foreign NGOs' Activities in China and Countermeasures: From the Perspective of Maintaining Political Security', *Journal of People's Public Security University of China(Social Sciences Edition) 30(1)*, 2014, 122-128, p. 125.（参见王存奎、彭爱丽："境外非政府组织在华运行现状及管理对策——以维护国家政治安全为视角"，载《中国人民公安大学学报（社会科学版）》2014 年 1 期，第 125 页。）

maintain the dominant political ideologies, and alerts them to potential confrontations that could be provoked between citizens and government.[863] Secondly, funding provided by foreign NGOs is decisive for their approach.[864] In some cases, money is used to set up local NGOs and support their operations.[865] In other cases, money is provided as funding for specific types of cases, including sensitive cases taken on by human rights lawyers.[866] In addition, NGOs offer training programmes to China's human rights activists and propose useful strategies and success stories to inspire them.[867]

4.2.2 Which Rights May be Subject to the Impact

[863] See Rongtong Open Source Data Institute, *Analysis Report on the Activities of Foreign NGOs in China (2017-2021)*, Rongtong Open Source Data Institute, 2022, pp. 22-23.（参见融通开源数据研究院：境外非政府组织在华活动分析报告（2017-2021），融通开源数据研究院 2022 年，第 22-23 页。）Jiang Hui, 'Overseas Experience and Inspiration of Foreign Agents Law', *Chinese Review of International Law (1)*, 2022, 69-83, pp. 80-81.（江辉："外国代理人法的域外经验与启示"，载《国际法研究》2022 年 1 期，第 80-81 页。）Chen Xiaochun and Yan Yige, 'Managing Overseas NGOs in China: From the Perspective of National Security', *Guihai Tribune 31(2)*, 2015, 21-26, pp. 23-24.（参见陈晓春、颜屹仡："国家安全视角下的在华境外非政府组织管理研究"，载《桂海论丛》2015 年 2 期，第 23-24 页。）

[864] See He Jun and Wang Yan, 'The Impact of Foreign NGOs' Activities on China's Political Security and Countermeasures', *Journal of Yunnan Police College (3)*, 2016, 58-63, p. 59.（参见何军、王焱："境外非政府组织涉华活动对我国政治安全的 影响及对策研究"，载《云南警官学院学报》2016 年 3 期，第 59 页。）

[865] See Ivan Franceschini and Elisa Nesossi, 'State Repression of Chinese Labor NGOs: A Chilling Effect?', *The China Journal 80*, 2018, 111-129, p. 125. See also Zhou Bing, 'Foreign NGOs' Political Infiltration into China, the Case Study on the "Labour Movement Star"', *Zhonghuahun (7)*, 2016, 25-27.（参见周兵："从'工运之星'案件看当前境外 NGO 对我国的政治渗透"，载《中华魂》2016 年 7 期。）An example is National Endowment for Democracy, who granted $90,000 for the project 'Supporting Grassroots NGOs' in mainland China in 2017. The project was to build the capacity of NGOs and engage young people in policy advocacy. See National Endowment for Democracy's grants database, available at https://www.ned.org/wp-content/themes/ned/search/grant-search.php.

[866] For instance, in 2017, National Endowment for Democracy granted $40,000 for the project 'Religious Freedom, Rights Defense, and Rule of Law' in mainland China, which aims to support lawyers who take on cases of individuals whose rights have been violated because of their religious beliefs, and to train other lawyers and interested citizens about their rights under Chinese law. See National Endowment for Democracy's grants database, available at https://www.ned.org/wp-content/themes/ned/search/grant-search.php. See also People's Court Daily, 'State Security Authorities Announce Three Cases of Endangering Political Security', *People's Court Daily*, 19 April 2019, retrieved 4 July 2023 from https://www.chinacourt.org/article/detail/2019/04/id/3846427.shtml.

[867] For instance, in 2017, National Endowment for Democracy granted $63,500 for the project 'Supporting Labor Rights' in mainland China, which includes curriculum development and educational workshops, casework to promote labour law enforcement, and policy advocacy to improve labour conditions for vulnerable workers. See National Endowment for Democracy's grants database, available at https://www.ned.org/wp-content/themes/ned/search/grant-search.php. See also Zhou Bing, 'Foreign NGOs' Political Infiltration into China, the Case Study on the "Labour Movement Star"', *Zhonghuahun (7)*, 2016, 25-27, p. 25.（参见周兵："从'工运之星'案件看当前境外 NGO 对我国的政治渗透"，载《中华魂》2016 年 7 期，第 25 页。）

In a legal sense, China's wish to protect national security serves as a legitimate purpose to reduce all the fundamental rights of Chinese citizens,[868] while civil and political rights have always been grounds on which international observers have criticised China's commitment to protecting human rights. Due to this research's comparative nature, this section focuses on those rights with civil and political characteristics that often attract the attention of Western countries and human rights groups. Unlike the ECHR, the formulation of limitation clauses attached to rights in Chinese law does not show a clear distinction based on which rights can be categorised as qualified, limited or absolute. Instead, I categorise the civil and political rights prescribed by Chinese law into substantive and procedural ones.

4.2.2.1 Substantive rights

Freedom of expression

Of the civil and political rights in China, Chinese law does not attach any special importance to freedom of expression. The Constitution grants citizens not only the freedom of expression,[869] but also a right to criticise the authorities.[870] In the meantime, the extent of this freedom is delimited by laws at lower levels of legal hierarchy in each specific field, both online and offline. In general, these laws' approach to protecting freedom of expression is to rule out 'what is not allowed'. This 'ruling out' approach is mainly based on contents of the expression and on the intentions of the perpetrator. In practice, some cases cause controversy about whether people are being punished, in the name of national security, for speaking out against the government, where, for example, their right to free speech is curtailed on the grounds of inciting subversion of state power,[871] advocating terrorism or extremism[872] and inciting secession.[873]

In line with the ICCPR, the right also accommodates freedom to seek and receive information and ideas.[874] Gaining knowledge of the news, public debate,

[868] Article 51 of the Constitution Law reads:
'Citizens of the People's Republic of China, in exercising their freedoms and rights, shall not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.'
The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.
[869] Article 35 of the Constitution Law.
[870] Article 41 of the Constitution Law.
[871] Article 105(2) of the Criminal Law. The English version of the Criminal Law of China is available at http://en.pkulaw.cn/display.aspx?cgid=39c1b78830b970eabdfb&lib=law, last visited 9 March 2021.
[872] Article 120(III) of the Criminal Law.
[873] Article 103(2) of the Criminal Law.
[874] Article 19(2) of the ICCPR reads:

political speeches and other forms of information is essential for having one's own thoughts and opinions. With regard to national security, this aspect of freedom often clashes with China's internet censorship,[875] which blocks access to overseas information deemed hostile to the regime, as well as to information seen as advocating cults, extremism and terrorism.

Freedom of assembly

An assembly does not necessarily amount to a threat to national security, but it usually concerns public order. This freedom is protected by the Constitution,[876] with restrictions stipulated by specific legislation and an administrative regulation.[877] Freedom of assembly has been widely seen as an 'empty promise', given that applications for demonstrations are normally refused by government authorities, mostly due to public security and order concerns.[878] However, assemblies, demonstrations, protests and sit-ins have never been unheard of in practice.[879] Despite being illegal, these activities are not always immediately

---

'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

See also Human Rights Committee, General Comment No. 34 - Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34(2011), paras. 11-12.

[875] See James Griffiths, *The Great Firewall of China: How to Build and Control an Alternative Version of the Internet*, Zed Books, 2019.

[876] Article 35 of the Constitution Law. The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[877] Law of the People's Republic of China on Assemblies, Processions and Demonstrations, available at http://en.pkulaw.cn/display.aspx?id=fda00466531cf397bdfb&lib=law&SearchKeyword=&SearchCKeyword=%bc%af%bb%e1%d3%ce%d0%d0%ca%be%cd%fe%b7%a8, last visited 10 February 2021. Regulation on the Implementation of the Law of the People's Republic of China on Assemblies, Processions and Demonstrations, available at http://en.pkulaw.cn/display.aspx?cgid=3fd9db478df1887bbdfb&lib=law, last visited 10 February 2021.

[878] See Zhu Zhiling, 'Implementation Dilemma and Solutions of the Law on Assemblies, Processions and Demonstrations in China', *Journal of Hunan Police Academy 26(4)*, 2014, 100-105, p. 101.（参见朱志玲："《中华人民共和国集会游行示威法》的实施困境及对策探讨"，载《湖南警察学院学报》第 26 卷 4 期，2014 年，第 101 页。）See also Boxun, 'How the Freedom to Assembly Falls into Disuse: A Report on the Freedom to Assembly', *Boxun*, 5 January 2010, retrieved 17 May 2020, from https://boxun.com/news/gb/pubvp/2010/01/201001051252.shtml.（另见博讯："公民的集会自由权利何以名存实亡——公民和平集会权利的现状调查及分析报告"，博讯 2010 年 1 月 5 日报道，网址 https://boxun.com/news/gb/pubvp/2010/01/201001051252.shtml，最后访问日期 2020 年 5 月 17 日。）ISHR, "New Chinese-Language Factsheets from UN Expert on Right to Peaceful Assembly and Association Provide Valuable Resource in Face of Major Crackdown", *ISHR*, 21 October 2016, retrieved 17 May 2020, from https://www.ishr.ch/news/china-new-chinese-language-factsheets-un-expert-right-peaceful-assembly-and-association-provide.

[879] For instances, Sohu, "Police Personnel from Two Provinces Clashed at the Broder, China Daily: Constraints Hurt the Feelings of People from Hubei", *Sohu*, 28 March 2020, retrieved 17 May 2020, from https://www.sohu.com/a/383785569_161795.（例如，搜狐："黄梅九江警员省界起冲突，人民日报：处处限制湖北人员是一种伤害"，搜狐 2020 年 3 月 28 日报道，网址

suppressed, but sometimes tolerated by the authorities either because of the large number of participants or the moral arguments.[880]

Freedom of association

Along with the freedom of expression and assembly, the freedom of association is provided by the same provision in the Constitution.[881] As a general rule, every organisation has to register at the Civil Affairs Department and find a 'professional leading unit', being a government agency working in the same field, to supervise its operations.[882] While an organisation set up in the field of education, sport, health or charity, or in other economic, social and cultural areas, is less likely to endanger national security, organisations with a political agenda or political features are dissolved or even punished. As for political parties, China admits only eight parties other than the Communist Party itself: the Revolutionary Committee of the Chinese Kuomintang, the China Democratic League, the China National Democratic Construction Association, the China Association for Promoting Democracy, the Chinese Peasants and Workers Democratic Party, the China Zhi Gong Dang, the Jiu San Society and the Taiwan Democratic Self-Government League.[883] Establishing other political parties is regarded as a challenge to the CCP's leadership,[884] provoking the sensitive nerve of China's national security concerns.

---

https://www.sohu.com/a/383785569_161795，最后访问日期 2020 年 5 月 17 日。）Wee Sui-Lee, "China Says It will Shut Plant as Thousands Protest", *Reuters*, 14 August 2011, retrieved 17 May 2020, from https://www.reuters.com/article/us-china-protests-idUSTRE77D0EK20110814.

[880] See Zhu Zhiling, 'Implementation Dilemma and Solutions of the Law on Assemblies, Processions and Demonstrations in China', *Journal of Hunan Police Academy 26(4)*, 2014, 100-105, p. 103.（参见朱志玲："《中华人民共和国集会游行示威法》的实施困境及对策探讨"，载《湖南警察学院学报》第 26 卷 4 期，2014 年，第 103 页。）

[881] Article 35 of the Constitution Law. The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[882] Articles 3 and 6 of the Regulation on the Administration of the Registration of Social Organizations. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=05417332ffd631e4bdfb&lib=law, last visited 10 February 2021. See Yu Keping, 'China's Civil Society: Concept, Categories, and Policies', *Social Sciences in China (1)*, 2006, 109-122 & 207-208, p. 116.（参见俞可平："中国公民社会：概念、分类与制度环境"，载《中国社会科学》2006 年 1 期，第 116 页。）

[883] See State Council of China, "Eight Political Parties", *State Council of China*, 9 March 2020, retrieved 1 May 2020, from http://www.gov.cn/guoqing/2017-12/31/content_5269697.htm.（参见国务院："八大民主党派"，网址 http://www.gov.cn/guoqing/2017-12/31/content_5269697.htm，最后访问日期 2020 年 5 月 1 日。）

[884] The China Democracy Party is an example. See Human Rights Watch, 'China: Nipped in the Bud – The Suppression of the China Democracy Party', *Human Rights Watch*, 1 September 2000, retrieved 17 May 2020, from https://www.hrw.org/report/2000/09/01/china-nipped-bud/suppression-china-democracy-party. See also, BBC, "Qin Yongmin: Prominent Chinese Dissident Jailed for 13 Years", *BBC*, 11 July 2018, retrieved 17 May 2020, from https://www.bbc.com/news/world-asia-china-44789492.

Freedom of religion

Although the right to freedom of religion is guaranteed by the Constitution,[885] the exercising of this right is enshrined in numerous administrative regulations.[886] Five major religions are currently officially recognised by the Chinese authorities: Buddhism, Taoism, Islam, Catholicism and Protestantism.[887] With respect to national security, the Dalai Lama has been accused of inciting separatism in Tibet, while Islamic extremism has incited terrorism in and outside Xinjiang, and some house churches and pastors, such as Pastor Wang Yi of the Early Rain Covenant Church,[888] have been regarded as national security threats. In addition, cults could conceivably be used to pursue political purposes and so are covered by national security laws,[889] as well as by the Criminal Law, under provisions on, for instance, inciting subversion of state power and inciting secession.[890] A good example of China's national security concerns regarding freedom of religion is Falun Gong,[891] which was outlawed after more than ten thousand members protested in front of Zhongnanhai, the central headquarters of the CCP and the State Council.[892]

---

[885] Article 36 of the Constitution Law. The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[886] For example, the Regulation on Religious Affairs. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=299c29bbb1a0c690bdfb&lib=law, last visited 11 March 2021.

[887] See Human Rights Council, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, A/HRC/WG.6/31/CHN/1(2018), para. 53.

[888] See RFI, "China Jails Protestant Pastor for 9 Years for 'Inciting' Subversion", *RFI*, 30 December 2019, retrieved 17 May 2020, from http://www.rfi.fr/en/wires/20191230-china-jails-protestant-pastor-9-years-inciting-subversion.

[889] For example, Article 27 of the National Security Law, and Article 8(6) of the Detailed Rules for the Implementation of the Counterespionage Law. The English versions are available at https://www.pkulaw.com/english/.

[890] Article 10 of the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in the Handling of Criminal Cases Involving Sabotaging the Enforcement of Laws by Organizing and Utilizing Cult Organizations reads:

> 'Where in the course of organizing or exploiting cults to undermine the implementation of State laws or administrative regulations, one also has criminal conduct such as inciting separatism or the subversion of state power, or insulting or defaming others, follow the provisions for concurrent punishment of multiple crimes in giving punishment.'

The English version of the Interpretation is available at https://www.pkulaw.com/en_law/7b8539acf6707f97bdfb.html, last visited 11 March 2021.

[891] See Xinhua, "International Forum Analyzes Evil Nature of Falun Gong", *Xinhua*, 3 December 2017, retrieved 17 May 2020, from http://www.xinhuanet.com/english/2017-12/03/c_136797683.htm.

[892] See Niu Aimin, Wang Leiming, and Li Shufeng, "The Truth about the Siege of Zhongnanhai", *China News*, 8 March 2001, retrieved 18 August 2021, from http://www.chinanews.com/2001-03-08/26/76782.html.（参见牛爱民、王雷鸣、李术峰："围攻中南海事件真相"，中国新闻网 2001 年 3 月 8 日报道，网址 http://www.chinanews.com/2001-03-08/26/76782.html，最后访问日期 2021 年 8 月 18 日。）

Right to respect for one's correspondence

The Constitution provides for this right, including a specific limitation clause: first, the right may only be reduced for national security or criminal investigation concerns and, second, any interference with correspondence must be in accordance with procedures prescribed by law.[893] This interference includes the use of secret communication surveillance, which is provided by the National Intelligence Law, the Counterespionage Law and the Counterterrorism Law. Law enforcement departments may also require telecom operators to provide 'technical interface, decryption and other technical support'.[894] Due to their lack of accessibility and foreseeability, these interferences have raised serious concerns over privacy protection and abuse of power.[895]

Right to life

China has not abolished capital punishment for serious offences. With respect to national security-related crimes, those punishable by death are:

- colluding with foreign states in plotting to jeopardise the sovereignty, territorial integrity or security of the country (Article 102);
- organising, plotting or acting to split the country or undermine national unification (Article 103(1));
- organising, plotting or carrying out armed rebellion or armed riots (Article 104);
- defecting to the enemy or turning traitor (Article 108);
- joining an espionage organisation or accepting a mission assigned by it or its agent; or pointing out bombing or shelling targets to the enemy (Article 110);
- stealing, secretly gathering, purchasing by bribery or illegally providing state secrets or intelligence for an organisation, institution or personnel outside the country (Article 111);

[893] Article 40 of the Constitution Law. The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

[894] Article 18 of Counterterrorism Law. The English version is available at https://www.pkulaw.com/en_law/0cf3fa54e1202bc8bdfb.html, last visited 11 March 2021.

[895] For example, Samantha Hoffman and Elsa Kania, "Huawei and the Ambiguity of China's Intelligence and Counter-espionage Laws", *Australian Strategic Policy Institute*, 13 September 2018, retrieved 17 May 2020, from https://www.aspistrategist.org.au/huawei-and-the-ambiguity-of-chinas-intelligence-and-counter-espionage-laws/. See also Arjun Kharpal, "Huawei Says It would never Hand Data to China's Government. Experts Say It wouldn't Have a Choice", *CNBC*, 4 March 2019, retrieved 21 August 2019, from https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html.

- providing the enemy with armed equipment or military materials during war time (Article 112).

In addition, some offences that are often included in acts of terrorism are also capital crimes. These include:

- murder (Article 232);
- intentional assault (Article 234);
- kidnapping (Article 239);
- arson; breaching dikes; causing explosions; spreading pathogens of infectious diseases, poisonous or radioactive substances or other substances, or using other dangerous means to endanger public security (Article 115);
- sabotaging transportation instruments (Articles 116 and 119);
- sabotaging transportation infrastructures (Articles 117 and 119);
- sabotaging electric power or inflammable or explosive facilities (Articles 118 and 119);
- hijacking an aircraft (Article 121);
- illegally manufacturing, trading, transporting, mailing or storing guns, ammunition or explosives (Article 125(1));
- illegally manufacturing, trading, transporting or storing pathogens of infectious diseases, poisonous or radioactive substances or other substances (Article 125(2));
- stealing or forcibly seizing any gun, ammunition or explosive; or stealing or forcibly seizing pathogens of infectious diseases, poisonous or radioactive substances or other substances (Article 127(1));
- grabbing any gun, ammunition or explosive; or grabbing pathogens of infectious diseases, poisonous or radioactive substances, or other substances (Article 127(2)).

4.2.2.2 Procedural rights

Right to liberty and security

Article 37 of the Constitution protects individuals from unlawful arrest. Deprivation of liberty can be prescribed only in laws adopted by the parliament, not in administrative regulations.[896] In national security cases, 'residential surveillance in a designated location' can be used to avoid impeding the criminal investigation.[897] However, by not disclosing the whereabouts of detainees, this procedural arrangement can be abused by government

[896] Article 8(5) of the Legislation Law. The English version is available at https://www.pkulaw.com/en_law/9073d435178b9633bdfb.html, last visited 11 March 2021.
[897] Article 75(1) of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

authorities, thus raising concerns about enforced disappearance, arbitrary detention or even torture.[898] In most criminal cases, including national security cases, pre-trial detention is also a common practice rather than an exception.[899] Compared with the *habeas corpus* provided by Article 9 of the ICCPR,[900] Chinese law contains a notable lack of effective judicial review on the legality of detention.[901]

Right to a fair trial

While the right to a fair trial is not prescribed in the Constitution, its procedural requirements have been guaranteed in several procedural laws. For example, the Criminal Procedure Law provides that:

(a) the court shall hear a case in public, and announce the sentence publicly;[902]
(b) the suspect or defendant is entitled to legal counsel;[903]
(c) the defendant shall be tried or released within a finite period of time;[904]
(d) the witness can be cross-examined before court;[905] and

---

[898] See Special Procedures Communication to China, OL CHN 15/2018, retrieved 11 May 2020, from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23997.
[899] See the Paper, "Is 'Pre-trial Detention' Getting Better in Recent 5 Years? We Found the Answer from 3 Million Judgements", *the Paper*, 4 December 2018, retrieved 18 May 2020, from https://m.thepaper.cn/newsDetail_forward_2704356.（参见澎湃："这五年'审前羁押'状况改善了吗？303 万文书里有答案"，澎湃 2018 年 12 月 4 日报道，网址 https://m.thepaper.cn/newsDetail_forward_2704356，最后访问日期 2020 年 5 月 18 日。）See also Lin Xifen, 'China's Practice of Pre-trial Detention: An Empirical Analysis of Comparative Law', *Wuhan University Journal (Philosophy & Social Science) 70(6)*, 2017, 83-95.（另见林喜芬："解读中国刑事审前羁押实践——一个比较法实证的分析"，载《武汉大学学报（哲学社会科学版）》2017 年第 6 期。）Tang Liang, 'An Empirical Analysis of China's Pre-trial Detention', *Law Science (7)*, 2001, 29-35.（唐亮："中国审前羁押的实证分析"，载《法学》2001 年第 7 期。）
[900] UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171.
[901] See Song Yuansheng, 'Reform of Custody Necessity Censorship', *Oriental Law (2)*, 2017, 89-96.（参见宋远升："羁押必要性审查的改革逻辑"，载《东方法学》2017 年 2 期。）Lin Xianzuo, 'Custody Necessity Censorship and Human rights Protection – In the Perspective of the Criminal Procedure Law Revision', *Hebei Law Science 32(12)*, 2014, 196-200.（林贤佐："羁押必要性审查与人权保障"，载《河北法学》2014 年 12 期。）Wang Minyuan, 'Judicial Control of Criminal Custody in China', *Global Law Review (4)*, 2003, 403-407.（王敏远："中国刑事羁押的司法控制"，载《环球法律评论》2003 年 4 期。）See also Notice of the Supreme People's Procuratorate on Issuing the Provisions on the Handling of Cases about Examination of Custody Necessity by People's Procuratorates (for Trial Implementation), available at https://www.pkulaw.com/en_law/0f37e081a326234fbdfb.html, last visited 11 March 2021.
[902] Articles 11 and 202(1) of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.
[903] Article 34 of the Criminal Procedure Law.
[904] Articles 156-159, and 172 of the Criminal Procedure Law.
[905] Article 192 of the Criminal Procedure Law.
However, the practice compromises the requirement, see Zheng Rong, 'Empirical Research Report on the Witness Cross-examination Mechanism in Criminal Trials', *China Court*, 8 January 2017,

(e) no one shall be compelled to testify against himself or to confess guilt.[906] In addition, with regard to the equality of arms, procedural arrangements are in place for classified materials to be admitted and challenged.[907]

As discussed in Section 4.1.1.2, the exclusiveness of information and public supervision is a predominant feature of how states operate when it comes to national security. Such exclusiveness is also shown by the reducing of the defendant's procedural rights in national security cases. For example:

- the trial shall be held in camera;[908]
- meetings between a defendant and lawyer can only happen with the governing authorities' permission;[909] in some cases, defendants can find themselves being denied legal counsel for a long period;[910]
- secret evidence is either edited to avoid exposing intelligence-gathering capabilities or methods, or verified by judges out of court;[911] and, more commonly, classified information is used as clues for police investigations, leading to other 'normal' evidence.[912]

Other procedural requirements of the right to a fair trial can also be reduced in national security cases, as in the following examples from practice:

---

retrieved 18 May 2020, from https://www.chinacourt.org/article/detail/2017/01/id/2516422.shtml.（峥嵘："刑事庭审询问证人制度实证研究报告"，中国法院网 2017 年 1 月 8 日，网址 https://www.chinacourt.org/article/detail/2017/01/id/2516422.shtml，最后访问日期 2020 年 5 月 18 日。）

[906] Article 52 of the Criminal Procedure Law. See Sun Yuan, 'An Outline of the Substantive Explanation of the Clause against Self-incrimination', *Tribune of Political Science and Law 34(2)*, 2016, 59-69.（参见孙远："不强迫自证其罪条款之实质解释论纲"，载《政法论坛》2016 年 2 期。）Fang Weihua, 'The Relations between "Privilege against Self-Incrimination" and "Answer Truthfully"', *China Court*, 4 May 2016, retrieved 18 May 2020, from https://www.chinacourt.org/article/detail/2016/05/id/1850496.shtml.（方卫华："'不得强迫自证其罪'与'如实回答'关系研究"，中国法院网 2016 年 5 月 4 日，网址 https://www.chinacourt.org/article/detail/2016/05/id/1850496.shtml，最后访问日期 2020 年 5 月 18 日。）

[907] Articles 154 and 188 of the Criminal Procedure Law. See Xie Xiaojian, 'Cross-examination of Secret Evidence after the Amendment of the Criminal Procedure Law', *Legal Forum 28(5)*, 2013, 92-99.（谢小剑："刑诉法修改后涉密证据的质证"，载《法学论坛》2013 年 5 期。）

[908] Article 188(1) of the Criminal Procedure Law.

[909] Article 39(3) of the Criminal Procedure Law.

[910] For example, Human Rights Watch, "China: Detained Lawyers, Activists Denied Basic Rights", *Human Rights Watch*, 3 April 2016, retrieved 18 May 2020, from https://www.hrw.org/news/2016/04/03/china-detained-lawyers-activists-denied-basic-rights.

[911] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170.（参见程雷："技术侦查证据使用问题研究"，载《法学研究》2018 年 5 期。）

[912] See Xie Xiaojian, 'Cross-examination of Secret Evidence after the Amendment of the Criminal Procedure Law', *Legal Forum 28(5)*, 2013, 92-99, p. 94.（谢小剑："刑诉法修改后涉密证据的质证"，载《法学论坛》2013 年 5 期，第 94 页。）

- The investigation period in some cases can last for years,[913] which is much longer than the standard 2-7 months, but is not necessarily against the law;[914]
- In practice, witnesses rarely testify in court. Instead, it is more common to cross-examine a witness's written statement;[915]
- While the law protects an accused from self-incrimination, it also stipulates that a suspect is obliged to answer interrogators' questions truthfully.[916] These contradictory requirements raise doubts about whether, in practice, an accused can effectively exercise his right to remain silent and refuse to incriminate himself.[917] In some national security cases, accused persons have alleged that the police extorted confessions by torture;[918]
- In several cases related to human rights lawyers, the accused confessed their crimes on state-run television even before the trial.[919] Critics believe this practice violates the presumption of innocence. Some human rights lawyers have also alleged that they were forced to do the interviews.[920]

[913] For example, Amnesty International, "China: Trial of Lawyer Wang Quanzhang a 'Cruel Charade'", *Amnesty International*, 26 December 2018, retrieved 18 May 2020, from https://www.amnesty.org/en/latest/news/2018/12/china-lawyer-wang-quanzhang-trial-cruel-charade/.

[914] Article 160(1) of the Criminal Procedure Law reads:
'Where, during the period of criminal investigation, a criminal suspect is discovered to have committed another major crime, the period of custody during criminal investigation shall be recounted from the date of discovery according to the provisions of Article 156 of this Law.'
The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[915] See Zheng Rong, 'Empirical Research Report on the Witness Cross-examination Mechanism in Criminal Trials', *China Court*, 8 January 2017, retrieved 18 May 2020, from https://www.chinacourt.org/article/detail/2017/01/id/2516422.shtml.（峥嵘："刑事庭审询问证人制度实证研究报告"，中国法院网 2017 年 1 月 8 日，网址 https://www.chinacourt.org/article/detail/2017/01/id/2516422.shtml，最后访问日期 2020 年 5 月 18 日。）

[916] Article 120 of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[917] See Jiang Na and Han Rong, 'Definitions of the Right to Remain Silent in China', *Arts and Humanities Open Access Journal 3(2)*, 2019, 106-108, p. 106.

[918] For example, Michael Caster (ed.), *The People Republic of the Disappeared*, Safeguard Defenders, 2017.

[919] See Steven Lee Myers, "How China Uses Forced Confessions as Propaganda Tool", *New York Times*, 11 April 2018, retrieved 18 May 2020, from https://www.nytimes.com/2018/04/11/world/asia/china-forced-confessions-propaganda.html. See also Al Jazeera, "China's TV Confessions", *Al Jazeera*, 21 February 2019, retrieved 18 May 2020, from https://www.aljazeera.com/program/101-east/2019/2/21/chinas-tv-confessions.

[920] See Steven Lee Myers, "How China Uses Forced Confessions as Propaganda Tool", *New York Times*, 11 April 2018, retrieved 18 May 2020, from https://www.nytimes.com/2018/04/11/world/asia/china-forced-confessions-propaganda.html.

4.2.3 Summary

In this section, I have analysed three groups of people or organisations whose cases and situations often raise questions about whether Chinese authorities have violated human rights in the name of national security. The Chinese authorities' responding measures reflect their sensitivities over national security in practice. The first group includes terrorists (or suspected terrorists) and Muslim minorities, who are directly and indirectly affected by Chinese authorities' measures for two main reasons: first, China has changed its counterterrorism course from reactive to proactive, as reflected, among other things, in legislation and law enforcement; second, Chinese authorities has designated terrorism, ethnic separatism and religious extremism in Xinjiang as major threats to security. The second group includes some human rights lawyers accused of subverting state power or of inciting subversion of state power. These people were on the government's radar because they preferred to employ extra-legal strategies in sensitive cases. These actions amplified and utilised people's aggressive attitudes towards government and the judicial system, thus undermining their authority and effectiveness. The third group, which includes some overseas NGOs, raised Chinese authorities' concerns that the liberal ideology they advocated and the funding they provided could contribute to another 'colour revolution'.

I have also analysed civil and political rights that often attract the attention of Western countries and human rights groups. These rights can be categorised into substantive rights (freedom of expression, freedom of assembly, freedom of association, freedom of religion, the right to respect for one's correspondence and the right to life) and procedural rights (the right to liberty and security and the right to a fair trial). Unlike the provisions in the ICCPR and ECHR, the restriction clauses can be scattered in the Constitution, parliamentary laws, and government regulations. In this section, I have summarised how rights may be restricted for national security reasons, whether as prescribed by legislation or as a matter of practice.

4.3 Pathways of Impact on Human Rights in China

Chinese authorities have attempted to improve their legitimacy by adhering to the principle of rule of law.[921] Its embracing of the rule of law has become much

[921] See Susan H. Whiting, 'Authoritarian "Rule of Law" and Regime Legitimacy', *Comparative Political Studies 50(14)*, 2017, 1907-1940, p. 1908. Daniela Stockmann and Mary E. Gallagher, 'Remote Control: How the Media Sustain Authoritarian Rule in China', *Comparative Political Studies 44(4)*, 2011, 436-467, p. 439.

more noticeable since 2012, when President Xi Jinping took power,[922] and is reflected in Chinese authorities' tendency to rely mainly on legal means to manage threats to the security of the state, such as by adopting national security laws, on enforcing those laws and on bringing violators to trial through the judicial system. However, the 'rule of law' in China is not free from the ruling party's influence, if not strictly controlled by the party.[923] An approach prioritising national security is embedded in these legal means. In this section I will outline these means and evaluate their impact on human rights protections.

4.3.1 The Law and its Quality

In recent years, China has been developing a legal framework for national security. Since President Xi proposed his 'holistic security concept' in 2014,[924] the process has witnessed a clear increase in the number of newly adopted laws and amendments, as well as in the pace at which they are adopted.[925] Does China's emerging framework of national security regimes satisfy the standards of quality of law – specifically accessibility and foreseeability – when it comes to the government's interferences with human rights? To answer this question, I will now introduce the legal framework, assess its accessibility and evaluate the foreseeability by concentrating on several articles that have raised wide concerns.

4.3.1.1 National security regime and accessibility

China's legal framework on national security consists of those laws and provisions whose primary purpose is to protect the security of the state.[926] This

[922] See The 18th Central Committee of the Communist Party of China, CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward, retrieved 18 May 2020, from http://www.eu-asiacentre.eu/documents/uploads/news_134_ccp_central_committee_decision_concerning_some_major_questions_in_comprehensively_moving_governing_the_country_according_to_the_law.pdf.
[923] See Li Ling, '"Rule of Law" in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China', *Asian Journal of Law and Society 2(1)*, 2015, 93-113, pp. 114-115.
[924] Xinhua, "Xi Jinping Presided over the First Meeting of CNSC, Emphasized the Holistic Security Concept and the Path of National Security with Chinese Characteristics", *Xinhua*, 15 April 2014, retrieved 18 May 2020, from http://www.xinhuanet.com//politics/2014-04/15/c_1110253910.htm.（新华网："习近平主持召开中央国家安全委员会第一次会议强调 坚持总体国家安全观 走中国特色国家安全道路 李克强张德江出席"，新华网 2014 年 4 月 15 日报道，网址 http://www.xinhuanet.com//politics/2014-04/15/c_1110253910.htm，最后访问日期 2020 年 5 月 18 日。）See also Timothy Heath, 'The "Holistic Security Concept": The Securitization of Policy and Increasing Risk of Militarized Crisis', *China Brief 15(12)*, 2015, 7-9.
[925] See Fu Hualing, 'China's Imperatives for National Security Legislation', in Cora Chan and Fiona De Londras (eds.), *China's National Security: Endangering Hong Kong's Rule of Law?*, Hart Publishing, 2020, 41-60, p. 48.
[926] See Guangming, "Accelerate the Establishment of a National Security Legal System", *Guangming*, 25 April 2016, p. 4.（参见光明日报："加快构建国家安全法律制度体系"，2016 年 4 月 25 日报道，第 4 版。）See also Kang Junxin and Yu Wenliang, 'The Construction of the National Security Legal System in the Post-"National Security Law" Era', *Journal of Zhengzhou University (Philosophy*

purpose can either be found in an article included in 'general provisions' of legislation[927] or specifically mentioned in official drafting materials.[928] This list of national security laws has also been supplemented by scholars and international observers on the basis of laws' actual purpose and practical effect.[929] It includes at least the following laws that have a direct impact on human rights:[930]

- Emergency Response Law (adopted in 2007);
- Law on Guarding State Secrets (adopted in 1988, revised in 2010);
- Counterespionage Law (adopted in 2014, revised in 2023);
- National Security Law (adopted in 2015);
- Cybersecurity Law (adopted in 2016);
- Law on the Administration of Activities of Overseas Non-Governmental Organisations within the Territory of China (adopted in 2016, revised in 2017);
- National Intelligence Law (adopted in 2017, revised in 2018);
- Counterterrorism Law (adopted in 2015, revised in 2018);
- Macau Special Administrative Region National Security Law[931] (adopted in 2009 by the Legislative Assembly of Macao Special Administrative Region);

and Social Sciences Edition) 49(3), 2016, 35-38.（另见康均心、虞文梁："后《国家安全法》时代的国家安全法律体系建设"，载《郑州大学学报（哲学社会科学版）》2016 年 3 期。）

[927] For example, Article 1 of the Counterespionage Law reads: 'This Law is enacted in accordance with the Constitution for the purposes of strengthening the counterespionage work, preventing, frustrating, and punishing espionage, maintaining national security, and protecting the interest of the people.' The English version is available at https://www.pkulaw.com/en_law/6329ea125eca430bbdfb.html, last visited 25 July 2023.

[928] For example, see Li Shishi, "Introduction of the 'Amendment (IX) to the Criminal Law of China' (draft) at the 11th Session of the Standing Committee of the Twelfth National People's Congress, 27 October 2014", *The Website of the National People's Congress of the People's Republic of China*, retrieved 18 May 2020, from http://www.npc.gov.cn/wxzl/gongbao/2015-11/06/content_1951884.htm.（例如，李适时："关于《中华人民共和国刑法修正案（九）（草案）》的说明——2014 年 10 月 27 日第十二届全国人民代表大会常务委员会第十一次会议上"，全国人大网。）

[929] A typical case is the Law on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China. See Amnesty International, "China: Scrap Foreign NGO Law Aimed at Choking Civil Society", *Amnesty International*, 28 April 2016, retrieved 18 May 2020, from https://www.amnesty.org/en/latest/news/2016/04/chinascrap-foreign-ngo-law-aimed-at-choking-civil-society/.

[930] The legislation on the military and national defence issues also falls into the category of national security. However, considering that few new laws have been passed after 2015 and the military system is operating separately from the civil issues, in this research, I will concentrate primarily on the 'civil' aspect of the security.

[931] The law is available at https://bo.io.gov.mo/bo/i/2009/09/lei02_cn.asp, last visited 12 March 2021.

- The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region[932] (adopted in 2020);
- Provisions under the heading of national security and terrorism in Criminal Law and Criminal Procedure Law.

In addition, it should be noted here that the national security framework is not limited to those laws passed by the parliament, but also includes judicial interpretations, regulations, rules and other laws at lower levels in the legal hierarchy.

To help us understand this framework, which is still in construction, the national security regimes can be classified according to their functions and objectives. As a reminder, the definition of national security comprises two main elements: being free from dangers, and having the ability to tackle such dangers. The regimes' functions can be correspondingly categorised into counter-threat and capacity-building functions. The direct role played by counter-threat laws is to provide targeted measures against diverse threats that have been specifically identified by government authorities. In accordance, for example, with the Counterespionage Law and the Counterterrorism Law, law enforcement agencies are allowed to carry out surveillance for investigating cases of espionage and terrorism.[933] There are also laws whose function is not to eliminate threats, but to enhance agencies' optional effectiveness and efficiency. These sorts of laws include those that establish new organs, clarify the distribution of power, classify state secrets and maintain the availability of intelligence services. In terms of accessibility, the law has prescribed the agencies in charge and the measures at their disposal, and has established their mechanisms of cooperating with other agencies.

Another way to perceive laws under the umbrella of national security is based on their primary objectives. As discussed in Section 3.3.1, the regime of national security has one of the following two objectives: to provide power to government authorities, or to regulate people's conduct. While the latter objective lies at the basis of systems of sanctions and punishments, the former informs the 'arsenal' of measures for detecting and preventing dangers, as well as for investigating crimes. Except for the Criminal Law and some legislative articles on administrative sanctions in China, most national security laws are

[932] The law is available at https://www.isd.gov.hk/nationalsecurity/eng/law.html, last visited 12 March 2021.

[933] Article 37 of the Counterespionage Law. The English version is available at https://www.pkulaw.com/en_law/6329ea125eca430bbdfb.html, last visited 25 July 2023. Article 45 of the Counterterrorism Law. The English version is available at https://www.pkulaw.com/en_law/0cf3fa54e1202bc8bdfb.html, last visited 11 March 2021.

about regulating the powers enjoyed by the authorities. Especially when it comes to pre-emptive measures, the law offers wide discretion and less strict procedural formalities.[934]

The national security laws, including laws, provisions, regulations and rules, serve as the main grounds for Chinese authorities' interference with human rights. The existence of these laws would, *prima facie*, satisfy the accessibility test, which requires an interference to have a basis in domestic law, and for the authorities to specifically indicate the provisions concerned. [935] Taking precautions, detecting plots, stopping perpetration and bringing prosecution – all these measures in the Chinese state's 'arsenal' have a *prima facie* legality. In practice, this is one of China's main arguments for justifying restrictions on human rights.[936]

However, the adequacy of accessibility might be questioned if a case involves normative documents defined as state secrets. As discussed in Section 4.1.1.2, norms classified as secret usually concern detailed procedures and operational instructions. The question then is whether the state can still satisfy the accessibility test, given that these rules remain classified. From a practical perspective, government authorities do not necessarily use non-disclosure rules as legal grounds for their actions. For example, to justify a secret surveillance measure, law enforcement agencies do not have to turn to those norms for internal circulation as a legal basis. Instead, they often invoke legislation that prescribes the impugned measure, but lacks detailed procedural instructions. [937] In some cases, the plaintiff has challenged the legality of

[934] See Liu Fangquan, '"Two Sides in One": Research on the Relationship between Public Security Administrative Power and Criminal Investigation Power – Analysis Based on their Functions', *Legal Forum (4)*, 2008, 82-89.（参见刘方权：“‘两面一体’：公安行政权与侦查权关系研究——基于功能的分析”，载《法学论坛》2008 年 4 期。）

[935] See Mao Junxiang, *Study on Limitation Clauses of the International Conventions on Human Rights*, Law Press 2011.（参见毛俊响：《国际人权条约中的权利限制条款研究》，法律出版社 2011 年。）

[936] See the replies of Permanent Mission of China to the United Nations Office at Geneva to the Special Procedures communications, for example, the reply to OL CHN 15/2018 (22 August 2018), retrieved 11 May 2020, from https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=34431. And the reply to UA CHN 3/2017 (22 March 2017), retrieved 11 May 2020, from https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=33449.

[937] Article 15 of the National Intelligence Law reads:

> 'A national intelligence department may, as required by the work, take technical reconnaissance and identity protection measures in accordance with the relevant provisions issued by the state, upon satisfaction of rigorous approval formalities.'

Article 37 of the Counterespionage Law reads:

> 'As needed for the counterespionage work, a national security department may take technical reconnaissance measures and identity protection measures after undergoing strict approval formalities in accordance with the relevant provisions of the state.'

Article 45(1) of the Counterterrorism Law reads:

classifying detailed procedures and operational instructions in a Chinese court. In response, the government has provided the legal basis, even though this very normative document, too, is classified.[938] However, it would be hard to claim that the accessibility requirement is fulfilled when the agencies' actions are challenged. This is especially so if the legislation prescribes only that the agency in question has the power to adopt the impugned measure, leaving all the detailed arrangements, such as targeted offences and persons, optional methods and authorisation procedures, to classified normative documents.

4.3.1.2 Foreseeability

While the emerging legal framework would seem to satisfy the accessibility element, the mere fact of an increase in the number of national security laws does not necessarily meet the requirement of foreseeability. In weighing security against liberty, creating a specialised regime for national security is essentially a way for a government to ensure that the value of security outweighs the other.[939] In the context of China, then, the primary motivation behind adopting national security laws is to legitimise, rather than to restrict, specialised powers exercised by government authorities,[940] as well as to enhance their efficiency in coping with perils.[941] This dominant motivation has impacted on the quality of the law. Moreover, in some separate instances, what the newly adopted laws authorise are measures that have already been

'Public security authorities, national security authorities and military authorities may, within the scope of their powers and duties, take technical reconnaissance measures as required for counterterrorism intelligence information work after undergoing strict approval formalities according to the relevant provisions of the state.'

The English version of the preceding laws are available at http://en.pkulaw.cn/.

[938] For example, see *Chen Jianwei v. Public Security Bureau of Qingfeng County and Public Security Bureau of Puyang City*, Judgment of the Second Instance, issued by the Intermediate People's Court of Puyang City, 2016, retrieved 7 March 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=897e331efdb341d08b13a74400ff6de0.（例如，陈建伟诉清丰县公安局、濮阳市公安局政府信息公开及行政复议案，二审判决书，河南省濮阳市中级人民法院（2016）豫 09 行终 114 号。） See also *Qiu Shuai v. Public Security Bureau of Runan County,* Judgment of the Second Instance, issued by the Intermediate People's Court of Zhumadian City, 2019, retrieved 7 March 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=9f84c672ad474fac82b7aaf60089cef6.（再如，邱帅诉汝南县公安局政府信息公开案，二审判决，河南省驻马店市中级人民法院（2019）豫 17 行终 112 号。）

[939] See Jacques deLisle, 'Security First? Patterns and Lessons from China's Use of Law to Address National Security Threats', *International Security 4(2)*, 2010, 397-436, p. 415.

[940] See Jacques deLisle, 'Security First? Patterns and Lessons from China's Use of Law to Address National Security Threats', *International Security 4(2)*, 2010, 397-436, p. 399.

[941] See Zhang Taisu and Tom Ginsburg, 'Legality in Contemporary Chinese Politics', *Virginia Journal of International Law*, retrieved 20 May 2020, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250948. See Fu Hualing, 'China's Imperatives for National Security Legislation', in Cora Chan and Fiona De Londras (eds.), *China's National Security: Endangering Hong Kong's Rule of Law?*, Hart Publishing, 2020, 41-60, p. 49.

imposed in practice. In other words, such powers are now wrapped in a thin veil of legality,[942] which can then be exercised in the open or without distorting other provisions.[943] The 'Vocational Education and Training Centres', for example, had already been put into use before being formally legalised by Article 17 of the Regulations of the Xinjiang Uygur Autonomous Region on De-extremification.[944]

The requirement for foreseeability is not consistent for different kinds of national security law. For those seeking to regulate people's conduct, foreseeability demands that the law (or the provision in question) should be sufficiently clear to enable a person to perceive what acts and omissions will make him or her liable, and what any adverse consequence would be.[945] The rationale of this requirement rests on the principle of non-retroactivity of crime.[946] As not only criminal penalties but also administrative sanctions are provided in China's national security regimes,[947] the latter should likewise be foreseeable. Ideally, foreseeability ensures that people can reliably predict whether their acts breach national security laws.[948]

---

[942] See Fu Hualing, 'Duality and China's Struggle for Legal Autonomy', *China Perspectives 1(116)*, 2019, 3-10, p. 5.

[943] See Fu Hualing, 'Duality and China's Struggle for Legal Autonomy', *China Perspectives 1(116)*, 2019, 3-10, p. 5. See also Amnesty International, 'Briefing on China's Criminal Procedure Law: In Line with International Standards?', *Amnesty International*, 2013, p. 16, retrieved 20 May 2020, from https://www.amnesty.org/download/Documents/12000/asa170212013en.pdf. Chinese Human Rights Defenders, 'A Review of the Implications of 'Residential Surveillance in a Designated Location' on the Fulfilment by China of its International Human Rights Obligations and Commitments', *Chinese Human Rights Defenders*, 16 May 2018, retrieved 20 May 2020, from https://www.nchrd.org/2018/05/rsdl-submission-un/.

[944] The existence of the Centres was reported in 2018, when a UN human rights treaty body reviewed China's implementing the Convention on the Elimination of All Forms of Racial Discrimination. Not until one month later has the regulation been revised to add the provision concerning the "Vocational Education and Training Centres". See BBC, "China Uighurs: Xinjiang Legalises 'Re-education' Camps", *BBC*, 10 October 2018, retrieved 20 May 2020, from https://www.bbc.com/news/world-asia-45812419?ocid=socialflow_twitter. See also Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China and Macao, China), CERD/C/CHN/CO/14-17 (2018), para. 40. Xinhua, "Full Text: Vocational Education and Training in Xinjiang", *Xinhua*, 16 August 2019, retrieved 20 May 2020, from http://www.xinhuanet.com/english/2019-08/16/c_138313359.htm. The Uyghur Autonomous Region Regulation on De-extremification, is available at https://www.guancha.cn/politics/2018_10_10_474949.shtml, last visited 13 March 2021.

[945] See, for instance, *Novikova and Others v. Russia*, nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, § 125, ECHR 2016; *Protopapa v. Turkey*, no. 16084/90, § 97, ECHR 2009.

[946] See Talita de Souza Dias, 'Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?', *Human Rights Law Review 19(4)*, 2019, 649-674, p. 652.

[947] See generally, Chen Xingliang, 'On Relation between Administrative Sanction and Criminal Sanction', *China Legal Science (4)*, 1992, 25-32.（陈兴良："论行政处罚与刑罚处罚的关系"，载《中国法学》1992 年 4 期。）

[948] See Ben Emmerson, Andrew Ashworth, and Alison Macdonald, *Human Rights and Criminal Justice*, Sweet & Maxwell, 2007, pp. 379-380.

With regard to foreseeability, vague and overly broad terms used in an article are often criticised by human rights observers.[949] For instance, the crime of 'inciting subversion of state power'[950] is held to be a vague charge in cases involving human rights lawyers because its implementation is not predictable.[951] This charge is designed to be brought against persons who denounce the state authorities, the CCP's leadership and the socialist system,[952] especially when based on untruthful or overly distorted information.[953] What remains unclear is where the threshold of the crime lies between dissent and incitement to subvert. While Europe focuses on whether the statement in question advocates violence, this is not what happens in China. Due to the lack of a clear-cut standard, such as the one offered in Europe, the question asked concerns the foreseeability of the provision. We cannot find the answer to this question solely by examining the definition and proceeding with linguistic analysis. Instead, I examine how the threshold of the crime has been set in case law. The assessment of a specific provision's foreseeability also takes account of previous case law implementing the provision.[954] A relatively 'rigorous and consistent' application of the charge against human rights lawyers means the threshold of the crime has become increasingly more foreseeable. Lawyers' dissent and speeches amount to incitement when they adopt organised actions to amplify their voices, such as by organising protests and setting up a website. As a counterexample, the prosecuting authorities dropped the charge of inciting

[949] See, for example, Amnesty International, 'China: Submission to the NPC Standing Committee's Legislative Affairs Commission on the Criminal Law Amendments (9) (Second Draft)', *Amnesty International*, 5 August 2015, p. 12, retrieved 20 May 2020, from https://www.amnesty.org/en/documents/asa17/2205/2015/en/.

[950] Article 105(2) of the Criminal Law reads:

> 'Whoever instigates the subversion of the political power of the state and overthrow the socialist system through spreading rumours, slandering, or other ways are to be sentenced to no more than five years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights; the ringleaders and those whose crimes are grave are to be sentenced to no less than five years of fixed-term imprisonment.'

The English version of the Criminal Law of China is available at http://en.pkulaw.cn/display.aspx?cgid=39c1b78830b970eabdfb&lib=law, last visited 9 March 2021.

[951] See also Amnesty International, 'China: Human Rights Violations in the Name of "National Security": Amnesty International Submission for The UN Universal Periodic Review, 31st Session of the UPR Working Group', *Amnesty International*, 1 March 2018, pp. 6 & 8, retrieved 12 May 2020, from https://www.amnesty.org/en/documents/asa17/8373/2018/en/.

[952] See Zhao Bingzhi (ed.), *The Implementation of Crimes against National Security and Other Related Crimes*, China Legal Publishing House, 2016, pp. 42-47.（参见赵秉志主编：《危害国家安全罪暨相关犯罪的法律适用》，中国法制出版社 2015 年，第 42-47 页。）

[953] See Zhao Bingzhi (ed.), *The Implementation of Crimes against National Security and Other Related Crimes*, China Legal Publishing House, 2016, pp. 42-47.（参见赵秉志主编：《危害国家安全罪暨相关犯罪的法律适用》，中国法制出版社 2015 年，第 42-47 页。）

[954] See *Dmitriyevskiy v. Russia*, no. 42168/06, § 79, ECHR 2017.

subversion of state power in the *Chen Pingfu* case.[955] Among other facts, his only 'actions' were posting and retweeting articles criticising the government and the CCP, and he did not participate in any collective actions like protests.[956] Therefore, while Article 105(2) of the Criminal Law (inciting subversion of state power) comprises vague terms that make the threshold ambiguous, its consistent application in a specific type of case has significantly reduced that ambiguity, thus contributing to its foreseeability.

The foreseeability requirement shifts its focus when it comes to articles that regulate power enjoyed by eligible agencies. Instead of sticking to the predictability factor and fair notice effect, the focus of the requirement now leans towards protections against abuse of power.[957] Two main reasons lie behind this shift. The first is that law enforcement agencies need a certain degree of discretion, especially when facing imminent dangers. It is not possible, therefore, for the texts of such provisions to be entirely predictable, given that the circumstances they describe cannot be described exhaustively. For example, the police power to stop and search is often regarded as unpredictable[958] as it requires police officers to conduct a comprehensive analysis of various

[955] See Sina, "Prosecutors Dropped the Case of Chen Pingfu, Who was Accused of Inciting Subversion of State Power Due to his Online Comments", *Sina*, 19 December 2012, retrieved 20 May 2020, from http://news.sina.com.cn/o/2012-12-19/083925846119.shtml.（参见新浪："发批评帖被控颠覆政权 失业教师陈平福案撤诉"，新浪 2012 年 12 月 19 日报道。）New York Times, "The First Instance Trial of Chen Pingfu", *New York Times*, 6 September 2012, retrieved 20 May 2020, from https://cn.nytimes.com/china/20120906/cc06caixin/.（纽约时报："陈平福涉煽动颠覆国家政权案开庭"，纽约时报 2012 年 9 月 6 日报道。）

[956] See the indictment announced by the People's Procuratorate of Lanzhou City, Gansu Province, retrieved 20 May 2020, from https://www.hrichina.org/chs/content/6292.（参见甘肃省兰州市人民检察院起诉书，兰检公诉一诉[2012]120 号。）See also Peng Chen, 'Inciting Subversion of State Power under Rule of Law and Freedom of Speech', *Theory Research (2)*, 2014, 97-98.（另见彭琛："论言论自由下法治国家的煽动颠覆国家政权罪"，载《学理论》2014 年 2 期。）

[957] See Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, 2008, p. 3. Mao Junxiang, *Study on Limitation Clauses of the International Conventions on Human Rights*, Law Press 2011.（参见毛俊响：《国际人权条约中的权利限制条款研究》，法律出版社 2011 年。）Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018, pp. 312-313. Human Rights Committee, General Comment No. 27 Freedom of Movement (Article 12), CCPR/C/21/Rev.1/Add.9 (1999), para. 13.

[958] For example, Article 24 of the Counterespionage Law reads:

> 'When carrying out counterespionage tasks in accordance with the law, staff members of the State security organs, after showing their work passes in accordance with the regulations, may check the identity documents of Chinese citizens or foreigners, may ask the individuals and organisations concerned about relevant information, and may check the belongings of persons whose identity is unknown or who are suspected of espionage.'

The English version is available at https://www.pkulaw.com/en_law/6329ea125eca430bbdfb.html, last visited 25 July 2023.

circumstances to establish whether a person is 'suspicious'.[959] The second reason concerns the performance of measures. This argument is fairly persuasive when it comes to measures needing to be taken in secret: it is precisely the absence of foreseeability that determines the effectiveness of those powers.[960] In other words, such provisions cannot be detailed so precisely that the person could adjust their behaviour to avoid the measure being implemented. Examples that support this argument include wiretapping and secret surveillance programmes. If terrorists get a good understanding of when and how their communications could come onto the radar of government authorities, they will look for alternatives to avoid being detected.

While being predictable is not the primary concern for the foreseeability test in a power-authorising scheme, a provision too vague or ambiguous might still fail the test. This is because vague wording could have a chilling effect. Provisions could significantly reduce the chilling effect by indicating decision-making formalities and providing judicial remedies. In the case of China, the foreseeability of the provision on communication surveillance is questionable in this regard. This surveillance is regulated by Article 15 of the National Intelligence Law, which reads:

> A national intelligence department may, *as required by the work*, take technical reconnaissance and identity protection measures *in accordance with the relevant provisions* issued by the State, *upon satisfaction of rigorous approval formalities*[961] [emphasis added].

On the one hand, the article indicates several conditions, substantive and procedural, for carrying out surveillance. On the other hand, the way in which these conditions are described is very general: the term 'approval formalities' is not explained in any further detail, 'the relevant provisions' direct the reader nowhere, and the scope of work defined in Article 11 offers little help in clarifying 'as required by the work'.[962]

---

[959] See Le Jie, 'Inheritance and Transcendence: The Legislation Connotation of the Police's Power to Stop and Search in a New Era', *Journal of Southwest University of Political Science and Law (5)*, 2018, 93-102.（参见李婕：“继承与超越：新时代警察临检权的法治内涵”，载《西南政法大学学报》2018 年 5 期。）

[960] See *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116.

[961] The English version of the National Intelligence Law is available at http://en.pkulaw.cn/display.aspx?cgid=eae461be038ae511bdfb&lib=law, last visited 10 February 2021.

[962] Article 11 of the National Intelligence Law reads:
'A national intelligence department shall collect and handle in accordance with the law the intelligence in relation to any act which is detrimental to the national security and interests of the People's Republic of China, performed by an overseas institution, organization or individual, or by

Bearing in mind that high predictability is not the primary concern, the right question to ask here is whether the chilling effect could be reduced in any meaningful way by simply alleging that certain arrangements are out there for preventing arbitrariness. The answer can be given by making a horizontal comparison with a selected European country's surveillance law. The Intelligence and Security Services Act passed by the Netherlands in 2017 mainly concerns surveillance powers.[963] With regard to 'approval formalities', surveillance has to be authorised by the Minister of the Interior and Kingdom Relations and go through a prior independent review by the Investigatory Powers Commission (*Toetsingscommissie Inzet Bevoegdheden, TIB*),[964] as prescribed in multiple articles concerning different investigation methods.[965] As to the 'scope of work', the Act categorises this on the basis of its purpose under Section 3.2.5 (in other words, work including observing and tracking, investigating closed places or objects, exploring and penetrating computerised works, as well as research).[966] In addition, with regard to legislative drafting technique,[967] the Act directly indicates which specific provisions are intended to be invoked, rather than simply relying on the term 'the relevant provisions'.

Through such a horizontal comparison between China's legislation and that of a European counterpart, we may draw the following two conclusions: firstly, that disclosing relatively detailed accounts of different kinds of surveillance measures and their authorisation formalities does not necessarily undermine

any other person as instigated or funded thereby, or by collusion between domestic and overseas institutions, organizations or individuals, so as to provide intelligence basis or reference for preventing, putting an end to or punishing the aforesaid act.'

The English version is available at http://en.pkulaw.cn/display.aspx?cgid=eae461be038ae511bdfb&lib=law, last visited 10 February 2021.

963 See General Intelligence and Security Services of the Netherlands (AIVD), "Powers: All of AIVD's Powers are Listed in the Wiv 2017", *AVID*, retrieved 22 May 2020, from https://english.aivd.nl/about-aivd/the-intelligence-and-security-services-act-2017/powers. See also Bits of Freedom, 'New Dutch Law for Intelligence Services Challenged in Court', *European Digital Rights (EDRi)*, 16 May 2018, retrieved 22 May 2020, from https://edri.org/new-dutch-law-for-intelligence-services-challenged-in-court/.

964 See General Intelligence and Security Services of the Netherlands (AIVD), 'AVID Annual Report 2018', *AIVD*, 2019, retrieved 22 May 2020, p. 22, from https://english.aivd.nl/publications/annual-report/2019/05/14/aivd-annual-report-2018.

965 To be specific, such provisions include, Articles 40(3), 42(4), 45(3), 45(4), 45(10), 47(2), 48(2), 49(4), 50(2) and 50(4), as well as Article 32(2). See Wet op de inlichtingen- en veiligheidsdiensten 2017, retrieved 22 May 2020, from https://wetten.overheid.nl/BWBR0039896/2020-01-01#Hoofdstuk2.

966 See para. 3.2.5, Bijzondere bevoegdheden van de diensten of Wet op de inlichtingen- en veiligheidsdiensten 2017, retrieved 22 May 2020, from https://wetten.overheid.nl/BWBR0039896/2020-01-01#Hoofdstuk2.

967 See Luo Chuanxian, *Overview of Legislative Procedures and Technique*, Wu-Nan Book, 2013, pp. 127-128.（参见罗传贤：《立法程序与技术概要》，五南图书出版股份有限公司 2013 年，第 127-128 页。）

intelligence service's effective operations and, secondly and more importantly, that by conveying a strong message that secret powers will be kept in check, the specifications further reduce the chilling effect. The provision in China's National Intelligence Law, by contrast, cannot reduce the chilling effect to the same degree.[968]

4.3.2 Law Enforcement: Abuse of Power?

The two most prominent law enforcement agencies in China with regard to people's daily lives are public security organs and state security organs.[969] Both have been entrusted with various powers to implement national security laws, such as investigating cases and imposing administrative sanctions. In this regard, it is police powers that they are wielding.[970] In this section, I will shed light on two kinds of measures designed for investigation purposes – arrest and search – which often interfere with human rights. As you will see from the following discussion, the police lean towards wielding these powers in an easy rather than in a legitimate way.[971]

4.3.2.1 Arrest

As prescribed by law, there are several different ways to deprive a person of their liberty for the purpose of investigating an offence. Depending on whether evidence is available, coercive measures can be classified into two groups. The first group of measures, normally taken based on suspicions,[972] includes further

[968] As to powers concerning surveillance, these are also provided by Counterespionage Law and Counterterrorism Law, and both articles are of no substantive difference from Article 15 of the National Intelligence Law. The English versions of the preceding laws are available at http://en.pkulaw.cn/.

[969] In China, *Public Security Organs* include the Ministry of Public Security, and its local levels branches. *State Security Organs* refer to the Ministry of State, and its local levels branches.

[970] In China, the People's Police consist of staff working in public security organs (Ministry of Public Security, and regional branches) and state security organs (Ministry of State Security, and regional branches), in charge of law enforcement. See Article 2 of People's Police Law of China (2012 Amendment), and Articles 2 and 104 of the new draft amendment. The English version of People's Police Law of China (2012 Amendment) is available at http://en.pkulaw.cn/display.aspx?cgid=c241962955bfb84ebdfb&lib=law, last visited 15 March 2021. The new draft is available at http://gaj.gxhz.gov.cn/dczj/t1653949.shtml, last visited 15 March 2021.

[971] See Liu Fangquan, '"Two Sides in One": Research on the Relationship between Public Security Administrative Power and Criminal Investigation Power – Analysis Based on their Functions', *Legal Forum (4)*, 2008, 82-89, p. 84.（参见刘方权：“‘两面一体’：公安行政权与侦查权关系研究——基于功能的分析”，载《法学论坛》2008 年 4 期，第 84 页。）

[972] Of course, such suspicious should be supported by certain facts, with a relatively low requirement on qualification. See Ma Jinghua, 'Theoretical Research on Investigative To-case System – From Phase Perspective Point of View', *Nanjing University Law Journal (2)*, 2010, 200-217, pp. 203 & 206-207.（参见马静华：“侦查到案制度之理论建构——从阶段论角度的展开”，载《南进大学法律评论》2010 年 2 期，第 203、206-207 页。）

interrogation (after a stop and search),[973] summons or verbal summons,[974] and forced appearance.[975] These measures are usually taken by police at the initial stages of a case, calling a person in for further questioning.[976] The second group of measures involves detention (including criminal detention),[977] arrest[978] and residential surveillance at a designated location.[979] These measures often apply after the police have collected some evidence, sometimes based on interrogations during the initial stage.[980] The police have different kinds of discretion for each of these coercive measures; this determines (1) whether a warrant is required, (2) how long the suspect can be detained, and (3) whether relatives should be informed.

[973] Article 2 of the Provisions on Application of Further Interrogation by Public Security Organs. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=dbb965efb1f02439bdfb&lib=law, lasted visited 15 March 2021.

[974] Article 119(1) of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 15 March 2021.

[975] Article 78 of the Provisions on the Procedures for Handling Criminal Cases by Public Security Authorities, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=bef0133425642a74bdfb&keyword=%e5%85%ac%e5%ae%89%e6%9c%ba%e5%85%b3%e5%8a%9e%e7%90%86%e5%88%91%e4%ba%8b%e6%a1%88%e4%bb%b6%e7%a8%8b%e5%ba%8f%e8%a7%84%e5%ae%9a&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited 15 March 2021.

[976] See Ma Jinghua, 'The Investigation To-case System: From Reality to Ideal – A Research on Empirical Viewpoint', *Modern Law Science (2)*, 2007, 122-134, p. 123.（参见马静华：“侦查到案制度：从现实到理想——一个实证角度的研究”，载《现代法学》2007 年 2 期，第 123 页。）

[977] Article 82 of the Criminal Procedure Law reads: 'Under any of the following circumstances, a public security authority may first detain a person who is committing a crime or is a major criminal suspect …'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021. Article 124 of the Provisions on the Procedures for Handling Criminal Cases by Public Security Authorities, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=bef0133425642a74bdfb&keyword=%e5%85%ac%e5%ae%89%e6%9c%ba%e5%85%b3%e5%8a%9e%e7%90%86%e5%88%91%e4%ba%8b%e6%a1%88%e4%bb%b6%e7%a8%8b%e5%ba%8f%e8%a7%84%e5%ae%9a&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited 15 March 2021.

See also Xie Xiaojian, 'The Element of Urgency for Criminal Detention in China', *Modern Law Science (4)*, 2016, 110-120.（另见谢小剑：“论我国刑事拘留的紧急性要件”，载《现代法学》2016 年 4 期。）

[978] Article 81(1) of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[979] Article 75(1) of the Criminal Procedure Law.

[980] See Ma Jinghua, 'Theoretical Research on Investigative To-case System – From Phase Perspective Point of View', *Nanjing University Law Journal (2)*, 2010, 200-217, p. 204.（参见马静华：“侦查到案制度之理论建构——从阶段论角度的展开”，载《南进大学法律评论》2010 年 2 期，第 204 页。）

The most frequently used measures in the first group of measures, based on suspicion, are further interrogation and verbal summons.[981] Neither measure requires prior authorisation, but is instead left to police discretion. Normally, the police can only choose to enforce one of these measures in a given case, with the aim of detaining a suspect for further questioning.[982] In regard to the difference between the two measures, a key factor for the police is the period during which a suspect can be held: while further interrogation allows an individual to be detained for up to 48 hours, the period permitted in the case of a verbal summons is a maximum of 24 hours.[983] Another differentiating factor is whether relatives have to be notified when an individual has been taken away by the police. In this respect, the verbal summons appears to be more 'favourable' to the police on some occasions, as it does not require them to inform relatives.

The focus of the second group of measures, which are based on evidence, moves from confirming suspicions towards securing a prosecution.[984] Unlike the first group, each measure in this group requires a warrant and allows a much longer period of detention. To be specific, criminal detention can be for up to 14 days (or 37 days in certain types of cases),[985] while arrest can last for up to 3 months (or up to 5 months or 7 months in some circumstances)[986] and

---

[981] See Ma Jinghua, 'The Investigation To-case System: From Reality to Ideal – A Research on Empirical Viewpoint', *Modern Law Science (2)*, 2007, 122-134, p. 126.（参见马静华："侦查到案制度：从现实到理想——一个实证角度的研究"，载《现代法学》2007 年 2 期，第 126 页。）

[982] See Ma Jinghua, 'Research on the Implementation of Investigative To-case System under the Newly Adopted Criminal Procedure Law', *Modern Law Science (2)*, 2015, 117-125, pp. 118-119.（参见马静华："新《刑事诉讼法》背景下侦查到案制度实施问题研究"，载《现代法学》2015 年 2 期，第 118-119 页。）

[983] Article 119(2) of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[984] See Ma Jinghua, 'Theoretical Research on Investigative To-case System – From Phase Perspective Point of View', *Nanjing University Law Journal (2)*, 2010, 200-217, p. 204.（参见马静华："侦查到案制度之理论建构——从阶段论角度的展开"，载《南进大学法律评论》2010 年 2 期，第 204 页。）

[985] 37 days is for those suspected of committing crimes in multiple places, repeatedly, or in a gang. Article 91 of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

See also Li Jianglan, 'Research on Criminal Detention Conditions', *Thesis for Master Degree of Southwest University of Political Science and Law*, 2018.

[986] The period of 5 months may be applied in the following circumstances:

(1) significant and complicated cases in outlying areas where traffic is very difficult;
(2) significant cases regarding criminal gangs;
(3) significant and complicated cases regarding crimes committed in multiple places; and
(4) significant and complicated cases with a wide involvement and difficulty in gathering evidence.

See Article 158 of the Criminal Procedure Law.

The period of 7 months may be applied where a criminal suspect may be sentenced to fixed-term imprisonment of ten years or more.

individuals placed under residential surveillance at a designated location can be held for up to 6 months. This group of measures can also be applied sequentially, thus substantially prolonging the detention period. In the '709 crackdown' on human rights lawyers, for example, many of the accused were subjected to more than one measure.[987] They included Yu Wensheng, who was placed in criminal detention on 20 January 2018. Seven days later, this coercive measure was converted into residential surveillance at a designated location, and then to arrest on 19 April.[988] In the case of these three measures, relatives do not need to be notified if the police apply criminal detention in a national security case,[989] but the other two measures do require notification.[990]

In summary, while the police are not given unfettered powers to restrict or deprive people of their liberty, they seem to prefer the easiest option on a case-by-case basis. For calling someone in for initial questioning, measures not

See Article 159 of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[987] A statistics file documented by a non-government organisation notes those measures. See China Human Rights Lawyer Concern Group (CHRLCG), "'709 Crackdown' Latest Data and Development of Cases as of 8 July 2019", *CHRLCG*, 24 July 2019, retrieved 24 May 2020, from https://www.chrlawyers.hk/zh-hant/content/%E3%80%8C709%E5%A4%A7%E6%8A%93%E6%8D%95%E3%80%8D%E9%80%B2%E5%B1%95%E9%80%9A%E5%A0%B1.

[988] See the reply of the Permanent Mission of China to the United Nations Office at Geneva to the Special Procedures communications G/SO 217/1 CHINA (14 February 2018) and UA CHN 5/218 (6 March 2018), retrieved 24 May 2020, from https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=33962. See also Front Line Defenders, "Yu Wensheng Sentenced, and Transferred from the Xuzhou Detention Centre to the Nanjing Prison", *Front Line Defenders*, retrieved 24 May 2020, from https://www.frontlinedefenders.org/zh/case/yu-wensheng-detained-and-charged-disrupting-public-service.

[989] Article 85(2) of the Criminal Procedure Law reads:

> 'After a person is detained, the detainee shall be immediately transferred to a jail for custody, no later than 24 hours thereafter. The family of a detainee shall be notified within 24 hours after detention, unless such notification is impossible or such notification may obstruct criminal investigation in a case regarding compromising national security or terrorist activities. However, once such a situation that obstructs criminal investigation disappears, the family of the detainee shall be immediately notified.'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[990] Article 93(2) of the Criminal Procedure Law reads:

> 'After a person is arrested, the arrestee shall be immediately transferred to a jail for custody. The family of the arrestee shall be notified within 24 hours after arrest, unless such notification is impossible.'

Article 75(2) of the Criminal Procedure Law reads:

> 'If residential confinement is executed at a designated residence, the family of the person under residential confinement shall be notified within 24 hours after residential confinement is executed, unless such notification is impossible.'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

requiring a warrant seem beneficial to the police.[991] And when the primary concern is securing prosecution, a longer period of detention gives the police sufficient time to dig deeper into a national security case, collect evidence and detect other offenders. In addition, incarceration can prevent an individual from destroying evidence or fleeing. Where ease rather than necessity determines the measure to be imposed by the police, concerns obviously arise over abuse of power. It is highly impractical, however, to challenge the real motive behind choices made by the police.

Safeguards against the abuse of power in China are of limited effectiveness when it comes to substantive requirements and procedural arrangements. In the case of the first group of measures, arbitrary detention is the primary concern with regard to abuse of power. The law only requires the police to have a reason to suspect, instead of evidence, to verbally summon an individual.[992] No post-review procedural arrangement exists for after the suspect is taken to the police station.[993] Another measure in that group, further interrogation, also requires only a reason that supports suspicions.[994] Even though this reason will be scrutinised afterwards, the scrutiny comprises an internal review and appears to be treated as routine work.[995] In the case of the second group of measures, prolonged detention can prove problematic. To get a warrant, law enforcement agencies need to produce evidence satisfying the required

[991] See Ma Jinghua, 'The Investigation To-case System: From Reality to Ideal – A Research on Empirical Viewpoint', *Modern Law Science (2)*, 2007, 122-134, pp. 124 & 127.（参见马静华：“侦查到案制度：从现实到理想——一个实证角度的研究”，载《现代法学》2007 年 2 期，第 124、127 页。）

[992] See Ma Jinghua, 'The Investigation To-case System: From Reality to Ideal – A Research on Empirical Viewpoint', *Modern Law Science (2)*, 2007, 122-134, p. 130.（参见马静华：“侦查到案制度：从现实到理想——一个实证角度的研究”，载《现代法学》2007 年 2 期，第 130 页。）

[993] See Ma Jinghua, 'Theoretical Research on Investigative To-case System – From Phase Perspective Point of View', *Nanjing University Law Journal (2)*, 2010, 200-217, p. 119.（参见马静华：“侦查到案制度之理论建构——从阶段论角度的展开”，载《南进大学法律评论》2010 年 2 期，第 119 页。）See also Article 199(3) of the Provisions on the Procedures for Handling Criminal Cases by Public Security Authorities, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=bef0133425642a74bdfb&keyword=%e5%85%ac%e5%ae%89%e6%9c%ba%e5%85%b3%e5%8a%9e%e7%90%86%e5%88%91%e4%ba%8b%e6%a1%88%e4%bb%b6%e7%a8%8b%e5%ba%8f%e8%a7%84%e5%ae%9a&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited 15 March 2021.

[994] See Ma Jinghua, 'The Investigation To-case System: From Reality to Ideal – A Research on Empirical Viewpoint', *Modern Law Science (2)*, 2007, 122-134, p. 128.（参见马静华：“侦查到案制度：从现实到理想——一个实证角度的研究”，载《现代法学》2007 年 2 期，第 128 页。）See also Article 8 of the Provisions on Application of Further Interrogation by Public Security Organs, available at http://en.pkulaw.cn/display.aspx?cgid=dbb965efb1f02439bdfb&lib=law.

[995] See Ma Jinghua, 'The Investigation To-case System: From Reality to Ideal – A Research on Empirical Viewpoint', *Modern Law Science (2)*, 2007, 122-134, p. 128.（参见马静华：“侦查到案制度：从现实到理想——一个实证角度的研究”，载《现代法学》2007 年 2 期，第 128 页。）

standards.[996] The substantive requirement of evidence determines merely whether it is legitimate to deprive a person of their physical liberty, but not the duration of any such deprivation. As for the judicial review, the duration of detention has rarely been an issue before the court.[997] In other words, the necessity of detention and its duration are not subject to any substantive scrutiny. Only if they turn out to be innocent, can a suspect or accused claim remedies in the form of state compensation for wrongful deprivation of liberty during the period of being detained.[998]

4.3.2.2 Searching

Searching is another power that police authorities often use in an easy way. The Criminal Procedure Law provides the police with the power to look for evidence.[999] In general, a search warrant is required before searching a person's body, belongings or residence and other premises.[1000] However, besides searching residential premises, the police systematically use alternative ways to obtain evidence. These alternatives, which are powers of an administrative nature instead of criminal investigative powers, either accommodate in effect the conduct of searching or are supposed to be applied for a purpose other than collecting evidence. As a result, a search warrant, along with the procedural

---

[996] In regard to the required standards for (criminal) detention in practice, see Wu Xiaolin, *Research on Criminal Detention*, Thesis for Doctoral Degree of Southwest University of Political Science and Law, 2017, pp. 70-76.（参见武小琳：《刑事拘留制度研究》，西南政法大学博士论文，2017 年，第 70-76 页。）

As to the arrest, see Wang Lei, 'On the Two-level Standards for Arrest', *Journal of Northeastern University (Social Science) 20(3)*, 2018, 291-298.（王雷：“论逮捕双层次证明模式”，载《东北大学学报（社会科学版）》2018 年 3 期。）

The evidence standard of residential surveillance at a designated location are the same as that of the arrest, but it only applies in cases concerning national security or terrorist crimes. See Article 75(1) of the Criminal Procedure Law, available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[997] See Chen Ruihua, 'Theoretical Reflection on Pretrial Detention', *Chinese Journal of Law (2)*, 2005, 60-83, p. 71.（参见陈瑞华：“未决羁押制度的理论反思”，载《法学研究》2005 年 2 期，第 71 页。）

[998] See the Supreme People's Court of China, "Case Law of State Compensation", *The Supreme People's Court*, 7 January 2016, retrieved 24 May 2020, from http://www.court.gov.cn/zixun-xiangqing-16448.html.（参见最高人民法院：“人民法院人民检察院刑事赔偿典型案例”，最高人民法院网 2016 年 1 月 7 日，网址 http://www.court.gov.cn/zixun-xiangqing-16448.html，最后访问日期 2020 年 5 月 24 日。）

[999] Article 136 of the Criminal Procedure Law reads:

> 'To gather criminal evidence and capture a criminal, the investigators may search the body, objects, and residence of a criminal suspect or a person who may harbour a criminal or conceal criminal evidence, as well as other relevant places.'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[1000] See Article 138 of the Criminal Procedure Law, available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

guarantees against abuse prescribed by the Criminal Procedure Law, is no longer valid in practice.

Searching one's body and belongings. These measures are usually included in a police stop and search measure or in a security check when a person is detained. In the first scenario, because a person's body and belongings are searched when the police does a stop and search,[1001] the police may obtain items that can be used as evidence against the person.[1002] In a scenario without stop and search, the police normally go through a regular routine of performing security checks on a person being detained, including searching their body and belongings.[1003] This means that a security check will be performed in cases involving a summons or verbal summons, forced appearance, detention, arrest or residential surveillance at a designated location (RSDL). Therefore, these interventions inevitably produce similar results to those the police would achieve with a search warrant.[1004] Given that an individual's body and belongings can be searched through other means, it is very rare, in practice, for the police to opt for an intervention that requires a search warrant.

Searching premises other than residence. While this measure also requires a search warrant,[1005] documents, materials and other items located in premises other than a person's residence can also be collected by the police during a routine inspection. This option has been intentionally used by Chinese police to

[1001] See Interpretation of the Ministry of Public Security on Issues Related to the Implementation of the 'People's Police Law' by Public Security Organs, available at https://www.pkulaw.com/chl/ebc3f56b7a35d73cbdfb.html, last visited 19 March 2021.（参见公安部关于公安机关执行《人民警察法》有关问题的解释，网址 https://www.pkulaw.com/chl/ebc3f56b7a35d73cbdfb.html，最后访问日期 2021 年 3 月 19 日。）

[1002] See Zuo Weimin, 'Avoiding and Replacement – An Empirical Investigation of the Measure of Searching', *China Legal Science (3)*, 2007, 114-125, p. 118.（参见左卫民："规避与替代——搜查运行机制的实证考察"，载《中国法学》2007 年 3 期，第 118 页。）

[1003] Article 53 of the Provisions on the Procedures for Handling Administrative Cases by Public Security Authorities reads:

> 'The seized or appeared suspected violator shall be subject to security check, and if any contraband, apparatus under control, weapons, inflammable and explosive or any other dangerous articles or any articles related to the case which are required as evidence are found, they shall be immediately impounded; and the articles irrelevant to the case which are carried by the suspected violator shall be registered, kept and returned in accordance with relevant provisions. The inspection certificate is not required to be issued for security check.'

The English version is available at http://en.pkulaw.cn/display.aspx?cgid=6e768f312d048686bdfb&lib=law, last visited 19 March 2021.

[1004] See Zuo Weimin, 'Avoiding and Replacement – An Empirical Investigation of the Measure of Searching', *China Legal Science (3)*, 2007, 114-125, p. 118.（参见左卫民："规避与替代——搜查运行机制的实证考察"，载《中国法学》2007 年 3 期，第 118 页。）

[1005] Article 138(1) of the Criminal Procedure Law reads: 'when a search is conducted, a search warrant must be produced to the person under search.'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

replace an intervention requiring a warrant.[1006] In China, police powers derive mainly from two provinces of law: administrative and criminal.[1007] In this case, the inspection, which is of an administrative nature, should be conducted to check whether a public place follows safety protocols,[1008] such as the Fire Control Law, which empowers public security organs to enter the premises of a company.[1009] When it comes to locations designated for entertainment, like cinemas or night clubs, the police can also look through archives and recorded closed-circuit television (CCTV) videos.[1010] While none of these measures is designed for gathering evidence for a criminal case, the police have borrowed these powers in practice.[1011]

Another method commonly used to replace a search warrant relates to Article 137 of the Criminal Procedure Law,[1012] which empowers the police to

---

[1006] See Zuo Weimin, 'Avoiding and Replacement – An Empirical Investigation of the Measure of Searching', *China Legal Science (3)*, 2007, 114-125, p. 119.（参见左卫民："规避与替代——搜查运行机制的实证考察"，载《中国法学》2007 年 3 期，第 119 页。）

[1007] See Zhang Zetao, 'The Connection of Public Security Organs' Investigative Power and Administrative Power', *Social Sciences in China (10)*, 2019, 160-183 & 207.（参见张泽涛："论公安侦查权与行政权的衔接"，载《中国社会科学》2019 年 10 期。）See also Jiang Yong and Chen Gang, 'Dislocation of Public Security Organs' Administrative Power and Investigative Power – Based on the Perspective of Police Power Control', *Science of Law (Journal of Northwest University of Political Science and Law) (6)*, 2014, 75-85.（蒋勇、陈刚："公安行政权与侦查权的错位现象研究——基于警察权控制的视角"，载《法律科学（西北政法大学学报）》2014 年 6 期。）

[1008] See Xie Chuanyu, 'An Analysis of the Police Inspection Power – From System Construction to Practice', *Journal of People's Public Security University of China (Social Sciences Edition) (3)*, 2005, 31-37, pp. 32-33.（参见谢川豫："我国警察检查权剖析——从制度建构到现实考察"，载《中国人民公安大学学报（社会科学版）》2005 年 3 期，第 32-33 页。）

[1009] Article 53(1) of the Fire Protection Law reads:

> 'The fire and rescue department shall supervise and inspect the compliance of organs, social groups, enterprises, public institutions and other entities with the laws and regulations on fire protection. A police station may be responsible for the routine fire protection supervision and inspection and carry out fire protection publicity and education, for which the concrete measures shall be formulated by the Ministry of Public Security of the State Council.'

The English version of the law is available at http://en.pkulaw.cn/display.aspx?cgid=2dd465b94d9c3a4bbdfb&lib=law, last visited 11 March 2021.

See also the Provisions on the Supervision and Inspection over Fire Protection, available at http://en.pkulaw.cn/display.aspx?cgid=a5e9094f1fc3cce4bdfb&lib=law, last visited 11 March 2021.

[1010] Article 32 of the Regulation on the Administration of Entertainment Venues, available at http://en.pkulaw.cn/display.aspx?cgid=78fc82cb954488d2bdfb&lib=law, last visited 11 March 2021.

[1011] See Zuo Weimin, 'Avoiding and Replacement – An Empirical Investigation of the Measure of Searching', *China Legal Science (3)*, 2007, 114-125, p. 119.（参见左卫民："规避与替代——搜查运行机制的实证考察"，载《中国法学》2007 年 3 期，第 119 页。）See also Xie Chuanyu, 'An Analysis of the Police Inspection Power – From System Construction to Practice', *Journal of People's Public Security University of China (Social Sciences Edition) (3)*, 2005, 31-37, pp. 34-35.（参见谢川豫："我国警察检查权剖析——从制度建构到现实考察"，载《中国人民公安大学学报（社会科学版）》2005 年 3 期，第 34-35 页。）

[1012] Article 137 of the Criminal Procedure Law reads:

ask a person to hand in evidence. Strictly speaking, this is meant to be used in circumstances different from those that would require a searching method. While a searching method would be adopted when law enforcement agencies have limited knowledge about what precisely they are looking for or where to find it, Article 137 is frequently used when the police know what evidence they wish to obtain (often by interrogating the suspect).[1013] Anyone refusing to hand in evidence can be accused of perverting the course of justice,[1014] and this normally ensures that evidence is obtained with the holder's cooperation.

In summary, the police, in practice, prefer using alternatives to a search with a warrant. From the perspective of the police, they are less concerned about whether powers are used in the way prescribed by the Criminal Procedure Law than about whether they have the lawful authority to achieve their purposes. In this context, the police's purposes include looking for evidence on an individual's body, in the individual's belongings and in any premises. Intentionally 'borrowing' powers, however, constitutes an abuse of power, and the safeguards against such abuse seem dysfunctional for three reasons. First and foremost, the court admits evidence collected through means other than searching, such as an administrative inspection.[1015] While the defendant can

---

'Any entity or individual shall have the obligation to hand in physical evidence, documentary evidence, audio-visual recordings, and other evidence which may prove the guilt or innocence of a criminal suspect as required by the people's procuratorate or public security authority.'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[1013] See Zuo Weimin, 'Avoiding and Replacement – An Empirical Investigation of the Measure of Searching', *China Legal Science (3)*, 2007, 114-125, pp. 119-120.（参见左卫民："规避与替代——搜查运行机制的实证考察"，载《中国法学》2007 年 3 期，第 119-120 页。）

[1014] To be specific, it includes Crime of Covering up Criminals as of Article 310 of Criminal Law, and Crime of Refusing to Provide Evidence of Crime of Espionage as of Article 311. The law is available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=39c1b78830b970eabdfb&keyword=%e5%88%91%e6%b3%95&EncodingName=&Search_Mode=like&Search_IsTitle=0, last visited 11 March 2021. See also Wu Zhanying, 'On the Issues of the Crime of Refusing to Provide Evidence for the Crime of Espionage', *Legal Forum (3)*, 2007, 110-115.（吴占英："论拒绝提供间谍犯罪证据罪的争点问题"，载《法学论坛》2007 年 3 期。）

[1015] See Liu Yang and Zhang Bin, 'The Theoretical Basis of the Connection between Administrative Law Enforcement Evidence and Criminal Evidence', *Journal of Northeastern University (Social Science) (5)*, 2017, 518-525.（参见刘洋、张斌："行政执法证据与刑事证据衔接的理论基础"，载《东北大学学报（社会科学版）》2017 年 5 期。）Hu Jiangang, 'On the Establishment and Improvement of China's Police Security Inspection Mechanism', *Journal of Yunnan Police College (4)*, 2008, 81-84.（胡建刚："论我国警察治安检查制度的设立与完善"，载《云南警官学院学报》2008 年 4 期。）

Article 54(2) of the Criminal Procedure Law reads:

'Physical evidence, documentary evidence, audio-visual recordings, electronic data, and other evidence gathered by an administrative authority in the process of law enforcement and case investigation may be used as evidence in criminal procedures.'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

question the legality of the evidence, such evidence will not be excluded because of being obtained through means other than searching, as long as there is a legal basis. The second reason is that the powers being 'borrowed' are regarded as legitimate and necessary. In other words, the major problem remains a practical rather than a technical one: the police are wielding powers in a way for which they were not initially designed. Third, observers are not able to identify the police's intention when using a contested measure in practice, or even to prove that a misuse of power has occurred.

4.3.3 Judiciary

The impact of interventions made on grounds of national security is also reflected in judicial practice, raising concerns over the right to a fair trial. This impact is seen, in particular, in the principle of publicity, the right to legal aid and the equality of arms. For example, evidence containing confidential information is an issue caught in the middle between national security and human rights. In judicial practice, cases involving secret evidence can be categorised into two groups: the first group relates to offences involving state secrets and, therefore, classified information, whereas the second group does not necessarily concern offences involving state secrets, but rather cases in which evidence has been collected by secret means or procedures.

4.3.3.1 Crimes against state secrets

Once classified information falls into the wrong hands, the authorities usually charge a suspect with a state secrets crime.[1016] Trials in these cases inevitably revolve around the classified information, which then cannot be withheld from the defence or the domestic court despite its confidentiality. While the classification of the information determines the judgment in a substantive

See also Notice of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Issuing the Provisions on the Several Issues concerning the Strict Exclusion of the Illegally Collected Evidence in the Handling of Criminal Cases, available at http://en.pkulaw.cn/display.aspx?cgid=aa7fa2e5d8c2f563bdfb&lib=law, last visited 11 March 2021.

[1016] It involves Articles 111, 282 and 398 of the Criminal Law. The law is available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=39c1b78830b970eabdfb&keyword=%e5%88%91%e6%b3%95&EncodingName=&Search_Mode=like&Search_IsTitle=0, last visited 11 March 2021. See also Interpretation of the Supreme People's Court on Several Issues concerning the Specific Application of Law in the Trial of Cases of Stealing, Spying into, Buying or Unlawfully Supplying State Secrets or Intelligence for Entities outside the Territory of China, available at http://en.pkulaw.cn/display.aspx?cgid=e8c95df53349ab57bdfb&lib=law, last visited 19 March 2021.

Long Wenmao, 'Research on the Identifying State Secrets in the Crimes of Infringement of State Secrets', *Journal of People's Public Security University of China (Social Sciences Edition) (1)*, 2008, 55-59, p. 55.（龙文懋："侵犯国家秘密犯罪中国家秘密的甄别问题研究"，载《中国人民公安大学学报（社会科学版）》2008 年 1 期，第 55 页）

sense, the court often relies heavily on the assessment made by the State Secrets Bureau, which is in charge of administrating state secrets issues.[1017]

From a practical perspective, it is difficult for the defence to effectively challenge the State Secrets Bureau's assessment. This is because the State Secrets Bureau's assessment report contains limited information. In practice, it is rarely challenged before the court, and the assessor seldom appears in court to be cross-examined.[1018] The assessment report is often needed when a case raises a question about whether the impugned document is classified and, if so, at what level. The report consists of four parts: (a) a description of the material, (b) the assessor's conclusion and its legal basis, (c) notes on issues that need further explanation, and (d) the name of the State Secrets Bureau, and the date.[1019] It does not have to indicate the necessity or reasonableness of classifying the information in the first place,[1020] but only to list provisions on which its conclusion is based. The assessment report thus leaves few details to be argued over, and its legitimacy as evidence is seldomly denied by the court.

Since questioning the report is not a viable option, the defence usually turns to some substantive questions. However, this, too, can be quite challenging. Defendants are not allowed to question whether the contested information is legitimately classified, nor can this legitimacy be challenged through any other remedy outside the ongoing trial.[1021] Instead, the question of legitimate classification can be raised only by a state organ or entity.[1022] As a result, defendants turn to other substantive arguments that, in effect, question

---

[1017] See Human Rights in China (HRIC), 'State Secrets: China's Legal Labyrinth', *HRIC*, 2013, p. 16, retrieved 24 May 2020, from https://www.hrichina.org/en/publications/hric-report/state-secrets-chinas-legal-labyrinth.

[1018] See Chen Lan and Li Sha, 'The Properties of Criminal Evidence in the Appraisal Conclusion of State Secrets', *Journal of Guangxi University for Nationalities (Philosophy and Social Science Edition) (6)*, 2017, 187-192, p. 190.（参见陈岚、李莎：“密级鉴定结论之刑事证据属性探析”，载《广西民族大学学报（哲学社会科学版）》2017 年 6 期，第 190 页。）

[1019] Article 14 of the Regulations on Secret Level Appraisal, available at http://www.gd.gov.cn/zwgk/wjk/zcfgk/content/post_2723086.html, last visited 19 March 2021.

[1020] See Human Rights in China (HRIC), 'State Secrets: China's Legal Labyrinth', *HRIC*, 2013, p. 31, retrieved 24 May 2020, from https://www.hrichina.org/en/publications/hric-report/state-secrets-chinas-legal-labyrinth.

[1021] See Cheng Xiezhong, 'Reshape the Relationship between Confidentiality and Openness through Objections to Confidentiality and Judicial Review', *Constitution and Administrative Law Research Centre of Peking University (CALC)*, retrieved 24 May 2020, from http://www.publiclaw.cn/?c=news&m=view&id=1763.

[1022] Article 20 of the State Secrets Law reads:

> 'Where any organ or entity is confused or raises any question about whether a matter is a state secret or at which classification level a state secret is, it shall be determined by the state secrecy administrative department or the secrecy administrative department of the relevant province, autonomous region or municipality directly under the Central Government.'

The English version is available at http://en.pkulaw.cn/display.aspx?cgid=64aaf242e65550f4bdfb&lib=law, last visited 19 March 2021.

classification status. An argument commonly claimed is that the defendant had no knowledge of the information's confidentiality. This usually occurs when the information in question was extracted from its original document, which has a 'state secret' mark. The court then applies a subjective standard, based on the suspect's personal circumstances, thus turning it into a question of whether this person *should* have known about the information's secrecy, rather than whether he or she *actually* knew. The answer to this question only has to reflect whether the defendant could be expected to know the non-disclosure nature of the information, rather than whether he or she was sure of its official status as a state secret. In the *Wu Zhiwen* case, Wu was accused of gathering state secrets from a government official, but his lawyer argued that Wu had not known that the national economic data he got were confidential. The court found against the defence on the basis of Wu's occupation: as an economics expert, he should have recognised that the data he obtained were sensitive and not available to the public. In addition, when Wu informed another person about the data, he reminded this person not to disclose the information to others.[1023]

Defendants have attempted to downgrade the confidentiality status by suggesting that part of the information was already known to the public,[1024] or that the information in question could be acquired by anyone.[1025] However, domestic courts usually stick with the existing classification status and level, and the assessment provided by the State Secrets Bureau. A lapse of confidentiality does not necessarily result in information losing its classification status or level. Take the *Zheng Enchong* case, in which Zheng sent

[1023] See *People's Procuratorate of Xicheng District v. Wu Zhiwen*, Judgment of the Second Instance, issued by Beijing First Intermediate People's Court, 2012, retrieved 27 May 2020, from http://210.37.32.28:8088/FullText/fulltext_form.aspx?db=pfnl&gid=125651904&ix=2&w=H4sIAAAAAAAEAOy9B2AcSZYlJi9tynt/SvVK1+B0oQiAYBMk2JBAEOzBiM3mkuwdaUcjKasqgcplVmVdZhZAzO2dvPfee++999577733ujudTif33/8/XGZkAWz2zkrayZ4hgKrIHz9+fB8/In6NX/PX+DV+jf+bHvzE8xv9WvTP45Oy+Mn7o/Qn87opquVnu+Md/DdKT9Zlu67zz5b5uq2zcpS+XE/KYvp75ddvqrf58rPluix/XYD6hCGMT6rFolqelFnTjF/ndZGVL7M6W3zyOs/q6fz3f93W62n761H73+Bp1maTrMl/3e/O8zr/dV5XdfvrE9irqp79+mfN53W1Xv3YWfN6vVhk9fWvSc+v8Wv8mr8mcP31fm3659dZnS/LX+/Xod9++a/9X/7Nf+9//kf9tZ/t7Oz+7mm2nKX/xd/6p/8Xf5f/J/9A3/+f/HH/w2fffyf/V1//X/+x/8J/9nf8/Tn/yf/+F/83/+p/xx//mf+x4ODT+/cPDj4e/ey8/5/9g3/+f/43/FEA9Df8Hf/lX/ln/ed/4x9B4OjVh5/++M6P73yNt/a+1lsPh9+iEf5nf88f+1/9jX/0f/U3/H1mqJ/SUP+Lv/4vxVDvPdzd+/F7G3q91fuffi2sQaFf79elqf+Nt//Lv/eP+s//hr/4v/gz//L/4s/7C389sBU9v+H/EwAA//+USO7i4wIAAA==.（北京市西城区人民检察院诉伍志文，二审判决书，北京市第一中级人民法院（2012）一中刑终字第 577 号。）

[1024] See *People's Procuratorate of Suqian City v. Liu Shi*, Criminal Ruling of the Second Instance, issued by the Higher People's Court of Jiangsu Province, 2001, retrieved 27 May 2020, from http://www.chncase.cn/case/case/2193256.（江苏省宿迁市人民检察院诉刘实，二审裁定书，江苏省高级人民法院刑事裁定书（2001）苏刑二终字第 161 号。）

[1025] See Lin Xuliang's case on secretly gathering state secrets for personnel outside the country, retrieved 27 May 2020, from https://tjlx.pkulaw.com/pfnl/a25051f3312b07f347c28e3ec0ba16e5ff79c0b58677b31bbdfb.html.

a contribution published in *Neican* (internal reference reports), which was classified as a state secret, to a human rights organisation in the US. His lawyers argued that part of the information contained in that contribution was extracted from news which had already been circulated by the press. However, the court did not take this argument into account and ruled against Zheng on the grounds that *Neican* is classified as a state secret in the State Secrets Bureau's assessment reports.[1026]

4.3.3.2 Evidence collected by secret means

Investigation methods used by the police in China include some that are normally employed without the target's knowledge, such as wiretapping, geolocation tracking and undercover operations.[1027] These secret measures can provide timely information on issues that would otherwise be beyond the information-gathering capacity of the law enforcement agencies and secret services and they play an important role in national security cases, given Chinese authorities' preference for a proactive approach. When such information is used as evidence, its disclosure may expose details of the methods and undermine the operational effectiveness of law enforcement agencies and secret services, whereas non-disclosure raises concerns over equality of arms.

In the context of China, examining this sort of evidence during a trial is of significance, given that secret investigation methods need only internal approval: for example, wiretapping and location tracking require approval by the public security authority at or above the level of a districted city,[1028] while an undercover investigation requires approval from the public security authority at the county level or above.[1029] Several European counterparts, by

[1026] See Shanghai Higher People's Court, 'Criminal Ruling of the Second Instance for Zheng Enchong's Case on Illegally Providing State Secrets for a Foreign Organisation', *East China Criminal and Justice Review (2)*, 2004, 345-351.（参见上海市高级人民法院："郑恩宠为境外非法提供国家秘密案第二审刑事裁定书"，载《华东刑事司法评论》2004 年 2 期。）

[1027] Article 264(1) of the Provisions on the Procedures for Handling Criminal Cases by Public Security Authorities, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=bef0133425642a74bdfb&keyword=%e5%85%ac%e5%ae%89%e6%9c%ba%e5%85%b3%e5%8a%9e%e7%90%86%e5%88%91%e4%ba%8b%e6%a1%88%e4%bb%b6%e7%a8%8b%e5%ba%8f%e8%a7%84%e5%ae%9a&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited 15 March 2021.

[1028] Article 265(1) of the Provisions on the Procedures for Handling Criminal Cases by Public Security Authorities, available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=bef0133425642a74bdfb&keyword=%e5%85%ac%e5%ae%89%e6%9c%ba%e5%85%b3%e5%8a%9e%e7%90%86%e5%88%91%e4%ba%8b%e6%a1%88%e4%bb%b6%e7%a8%8b%e5%ba%8f%e8%a7%84%e5%ae%9a&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited 15 March 2021.

[1029] Article 271(1) of the Provisions on the Procedures for Handling Criminal Cases by Public Security Authorities.

contrast, do not simply rely on internal approval. In Germany and Italy, communication interceptions have to be approved by a judge,[1030] while in France and the Netherlands they are subject to a quasi-judicial review by the public prosecutor.[1031] In the absence of external approval formalities, some judicial arrangements *ex post* should play a crucial role in order to prevent government authorities from using secret methods arbitrarily.[1032]

In China, however, there are two reasons why such judicial arrangements rarely play that role. Firstly, government authorities are reluctant to directly use information acquired by secret means as evidence. Their primary purpose, in practice, is to seek clues for further investigation and to solve the case,[1033] rather than gathering evidence needed for prosecution.[1034] This practice takes advantage of secret methods used for investigation purposes, without risking giving away any details to the public. In some cases, the police have referred to intercepted communications while interrogating the suspect. Once the suspect's confession contains the same information as acquired by wiretapping, there is then no need to present the wiretapping materials in court.[1035] The

[1030] See Ye Xinhuo, 'Analysis and Lessons of Surveillance Measures of Foreign Countries', *ECUPL Journal (3)*, 2003, 96-101.（参见叶新火："国外监听措施的分析与启示"，载《华东政法学院学报》2003 年 3 期。）

[1031] See also Hu Ming, 'Procedural Control of Technical Investigation in the UK, France, Germany, the Netherlands and Italy', *Global Law Review (4)*, 2013, 6-18.（参见胡铭："英法德荷意技术侦查的程序性控制"，载《环球法律评论》2013 年 4 期。）

[1032] See Wan Yi, 'Criticism of Evidence Transformation Rules', *Political Science and Law (1)*, 2011, 130-140, p. 135.（参见万毅："证据转化规则批判"，载《政治与法律》2011 年 1 期，第 135 页。）

[1033] See *People's Procuratorate of Yichun City v. Sun Xianyi*, Judgment of the First Instance, issued by the Intermediate People's Court of Yichun City, Heilongjiang Province, 2019, retrieved 27 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=b2bc68a0654f4bcdb6b0ab36008e1a39.（孙宪义非法持有宣扬恐怖主义物品一审刑事判决书，黑龙江省伊春市中级人民法院（2019）黑 07 刑初 8 号。）

People's Procuratorate of Yufeng District v. Tan Xiaowu, Judgment of the First Instance, issued by the People's Court of Yufeng District, Liuzhou City, Guangxi Zhuang Autonomous Region, 2017, retrieved 27 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=3beb6b8fe0fc42179243a8ce0031ff9a.（覃小武非法持有宣扬恐怖主义、极端主义物品一审刑事判决书，广西壮族自治区柳州市鱼峰区人民法院(2017)桂 0203 刑初 372 号。）

People's Procuratorate of Guiyang City v. Zhang Hao, Judgment of the First Instance, issued by the Intermediate People's Court of Guiyang City, Guizhou Province, 2016, retrieved 27 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=42a32c904b09476d9ec55ec9b580b66f.（张豪非法提供秘密案一审判决书，贵州省贵阳市中级人民法院(2016)黔 01 刑初 41 号。）

[1034] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 165.（参见程雷："技术侦查证据使用问题研究"，载《法学研究》2018 年第 5 期，第 165 页。）

[1035] See Wan Yi, 'Criticism of Evidence Transformation Rules', *Political Science and Law (1)*, 2011, 130-140, p. 132.（参见万毅："证据转化规则批判"，载《政治与法律》2011 年 1 期，第 132 页。）

defendant thus loses the opportunity to challenge the legitimacy or rationale of wiretapping in court, which consequently means that the operation is not subject to any external review. This raises concerns about the fruit-of-the-poisonous-tree rule.[1036] The practice of using information acquired by secret means as clues instead of evidence derives from earlier policy, whereby internal provisions required evidence collected by secret methods to be kept from being directly used in a trial.[1037] This policy did not change until the 2012 Criminal Procedure Law Amendment, which prescribes certain judicial arrangements for its use.

Secondly, in cases involving secret evidence, there are two kinds of special arrangements for preserving the confidentiality of investigation tactics. One of these special arrangements involves editing the contents of evidence,[1038] with the police allowed to remove contents that may disclose crucial details about secret methods of investigation. With regard to communication surveillance, the police then offers a transcript of conversations, or an 'information note', a sort of memo of the recorded conversation, instead of the original audio recordings.[1039] This transcript does not normally include every sentence in a

[1036] See Lin Yuxiong, *Criminal Procedure Law (Volume One – General Review)*, China Renmin University Press, 2005, pp. 423 & 443.（参见林钰雄：《刑事诉讼法（上册·总论编）》，中国人民大学出版社 2005 年，第 423、443 页。）See also Wan Yi, 'Criticism of Evidence Transformation Rules', *Political Science and Law (1)*, 2011, 130-140, p. 136.（参见万毅："证据转化规则批判"，载《政治与法律》2011 年 1 期，第 136 页。）

[1037] See Xie Xiaojian, 'Cross-examination of Secret Evidence after the Amendment of the Criminal Procedure Law', *Legal Forum 28(5)*, 2013, 92-99, p. 94（谢小剑："刑诉法修改后涉密证据的质证"，载《法学论坛》2013 年 5 期，第 94 页。）

[1038] Article 154 of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[1039] See *People's Procuratorate of Qingdao City v. Deng and Qu*, Judgment of the First Instance, issued by the Intermediate People's Court of Qingdao City, Shandong Province, 2015, retrieved 27 May 2020, from https://pkulaw.com/pfnl/a25051f3312b07f3f9463300ee3fd8f9bc8d24b9001fe6bbbdfb.html.（邓某等颠覆国家政权案，一审判决书，山东省青岛市中级人民法院(2015)青刑一初字第 40 号。）

See also *People's Procuratorate of Wuzhou City v. Li Shuwang and others*, Criminal Ruling of the Second Instance, issued by the Higher People's Court of Guangxi Zhuang Autonomous Region, retrieved 27 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=5cb8c0b716404fd4bb8aab2200355545.（另见李树旺等三人运输毒品案二审刑事裁定书，广西壮族自治区高级人民法院(2019)桂刑终 322 号。）

People's Procuratorate of Yining City v. Ma Wenqing and others, Judgment of the First Instance, issued by the People's Court of Yining City, Xinjiang Uighur Autonomous Region, 2017, retrieved 27 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=977792c55b4941a2b8dfa90900ca48a8.（伊宁市人民检察院诉马文青等，一审判决书，新疆维吾尔自治区伊宁市人民法院(2017)新 4002 刑初 324 号。）

Most of the judgments of the national security cases are not disclosed on the Internet. Among those accessible, only several judgments mention technical investigation measures, but without any detailed description of it. Nevertheless, the judgments of drug crimes provide some detailed

conversation, but is instead limited to those sentences that will help to prove the suspect's guilt.[1040] The contents of 'information notes' are even briefer,[1041] commonly comprising confirmation that secret investigation measures were used in the case, and a summary of the findings.[1042] This form of evidence is mainly used to demonstrate how the accused became a person of interest to the police, and how the police identified the accused.[1043]

In terms of the equality of arms, the incomplete transcripts are disclosed to the defendant to be examined. However, the examination usually goes no further than the text of the transcripts. While this is only secondary evidence with regard to the recorded materials, domestic courts in practice rely heavily on this substitute and rarely verify or have it verified, even when requested to do so by the accused.[1044] As for 'information notes', proceeding to an effective examination will be problematic if these notes are the only secondary evidence submitted, given that they provide only limited details.[1045] If, however, they serve as a supplement to a description of the use of secret measures, 'information notes' can help in forming a chain of evidence. In regard to concerns about due process, the 2012 Criminal Procedure Law Amendment

information about the secret measures taken by the police. Therefore, I use the latter judgments for reference, considering my focus here is to find out how secret evidence plays a role in practice.

[1040] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 157.

[1041] See Tan Mi, 'Empirical Research on the "Information Note" in Criminal Proceedings', *Thesis for Master Degree of Sichuan Academy of Social Science*, 2018, p. 13.

[1042] See Cheng Lei, 'The Use of Materials Obtained by Technical Investigation', *Evidence Science (5)*, 2012, 557-564, p. 559. See also Wan Yi, 'Criticism of Evidence Transformation Rules', *Political Science and Law (1)*, 2011, 130-140, pp. 132-133. Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 157.

[1043] See Wang Chao, 'An Empirical Analysis of the Explanation of Case Handling in Criminal Proceedings – Case Study on the Z County, B City, Shandong Province', *People's Procuratorial Semimonthly (2)*, 2020, 70-74, p. 70. Tan Mi, 'Empirical Research on the "Information Note" in Criminal Proceedings', *Thesis for Master Degree of Sichuan Academy of Social Science*, 2018, pp. 11-12.

For instances, see *People's Procuratorate of Yichun City v. Sun Xianyi*, Judgment of the First Instance, issued by the Intermediate People's Court of Yichun City, Heilongjiang Province, 2019, retrieved 27 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=b2bc68a0654f4bcdb6b0ab36008e1a39.（孙宪义非法持有宣扬恐怖主义物品一审刑事判决书，黑龙江省伊春市中级人民法院（2019）黑 07 刑初 8 号。）*People's Procuratorate of Guiyang City v. Zhang Hao*, Judgment of the First Instance, issued by the Intermediate People's Court of Guiyang City, Guizhou Province, 2016, retrieved 27 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=42a32c904b09476d9ec55ec9b580b66f.（张豪非法提供秘密案一审判决书，贵州省贵阳市中级人民法院(2016)黔 01 刑初 41 号。）

[1044] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 167.

[1045] See Cheng Lei, 'The Use of Materials Obtained by Technical Investigation', *Evidence Science (5)*, 2012, 557-564, p. 559. Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 167.

legitimising the admission of evidence collected by secret methods also stipulates the requirement to provide documents evidencing their approval.[1046] In some cases, defence lawyers have challenged the legitimacy of evidence on the grounds of the absence, in violation of procedural rules, of an approval document for wiretapping.[1047] In, for example, the case of *Cui and Hu*, the lawyer argued that there was no approval document for the police's wiretapping and that, according to a police statement, wiretapping was conducted before the case was officially filed by the police, thus violating procedural rules under Article 150 of the Criminal Procedure Law.[1048]

The other special arrangement available for the admission of secret evidence is to have it verified by a judge *ex parte*.[1049] This judicial arrangement implies that the confidentiality of the secret investigation measures outweighs the rights of the defendant. In general, evidence can be used as a basis for deciding

[1046] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 155.

Article 20 of the Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, and the Legislative Affairs Commission of the Standing Committee of the National People's Congress on Several Issues concerning the Implementation of the Criminal Procedure Law reads:

> 'Article 149 of the Criminal Procedure Law provides that: "In an approval decision, the types and scopes of application of the technical investigation measures to be taken shall be determined as needed for criminal investigation." Where the materials collected by taking technical investigation measures are used as evidence, the legal documents approving technical investigation measures to be taken shall be attached to the case file, and defence lawyers may consult, extract or duplicate such legal documents in accordance with law and adduce them before court during a court session.'

The English version is available at https://www.pkulaw.com/en_law/1511e42366e814dbbdfb.html, last visited 19 March 2021.

See also Article 330(7) of the Rules of Criminal Procedure for People's Procuratorates.

[1047] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 158.

[1048] Article 150(1) of the Criminal Procedure Law reads:

> 'After opening a case regarding a crime of compromising national security, a crime of terrorist activities, an organized crime of a gangland nature, a significant drug crime, or any other crime seriously endangering the society, a public security authority may, as needed for criminal investigation, take technical investigation measures after undergoing strict approval formalities.'

The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021. See also *People's Procuratorate of Xinyu City v. Cui Wei and Hu Weihua*, Judgment of the Second Instance, issued by the Higher People's Court of Jiangxi Province, retrieved 30 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=f7bf1311d9394e36a2a1a9c3003aa15d.

[1049] Article 154 of the Criminal Procedure Law reads:

> 'Materials collected by taking technical investigation measures under this Section may be used as evidence in criminal procedures. If any use of such evidence may endanger the personal safety of relevant persons or may cause other serious consequences, protective measures such as non-disclosure of the identity of relevant persons or relevant technical methods shall be taken. When necessary, evidence may be verified by judges out of court.'

a case only after cross-examination by both sides.[1050] Evidence collected by secret means, however, is an exception.[1051] The prosecutors and the defendant's lawyers are not necessarily involved in the process in which judges verify secret evidence,[1052] nor is a cross-examination required.[1053] In practice, verification is usually conducted unilaterally by judges.[1054] In some cases, this means that judges check whether the transcript is in accordance with the original recordings[1055] and functions as a method to address the defendant's doubts about the transcript's authenticity. However, because there is no cross-examination of the secret evidence,[1056] it is hard for the defendant to make any substantive arguments.[1057]

4.3.4 Summary

I have analysed how Chinese authorities' national security protection means – i.e. legislation, law enforcement and the judiciary – engage with individuals' human rights. In terms of legislation, I have focused on the quality of law from the perspective of accessibility and foreseeability. Since 2014, China has

[1050] Article 71 of the Supreme People's Court's Interpretation on the Application of the PRC Criminal Procedure Law reads:

> 'Evidence that has not been verified by court investigation procedures such as adduction, identification, and cross-examination in court shall not be used as the basis for deciding a case.'

The Interpretation is available at http://www.court.gov.cn/fabu-xiangqing-286491.html, last visited 1 April 2021.

[1051] See Jiang Bixin (ed.), *Decoding and Applicating the 'Supreme People's Court's Interpretation on the Application of the PRC Criminal Procedure Law'*, China Legal Publishing House, 2013, p. 43.

[1052] Article 35(2) of the People's Court Rules for Handling Courtroom Investigation of in First Instance Criminal Trials Under the Ordinary Procedures (Provisional) reads:

> 'If the court decides to verify the technical investigation evidence out of court, it may call a public prosecutor and defence lawyer to be present. The attendance should obey the obligation of confidentiality.'

The People's Court Rules for Handling Courtroom Investigation of in First Instance Criminal Trials Under the Ordinary Procedures (Provisional) is available at http://gongbao.court.gov.cn/Details/ee6a5b1d20140c38c800c91c728d63.html, last visited 2 April 2021.

[1053] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, pp. 156-157.

[1054] See Cheng Lei, 'The Use of Evidence Collected by Taking Technical Investigation Measures', *Chinese Journal of Law 40(5)*, 2018, 153-170, p. 157.

[1055] For example, see *People's Procuratorate of Xinyu City v. Cui Wei and Hu Weihua*, Judgment of the Second Instance, issued by the Higher People's Court of Jiangxi Province, retrieved 30 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=f7bf1311d9394e36a2a1a9c3003aa15d.

[1056] For example, see *People's Procuratorate of Fuyang City v. Han Liying and others*, Judgment of the Second Instance, issued by the Higher People's Court of Anhui Province, retrieved 30 May 2020, from https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=45271b83a51047a98e51a9a1015482b5.

[1057] See Zhu Xuemei and Wei Jun, 'The Evidential Capacity of the Communication Interception Materials: How to Improve the Technical Investigation Regimes in the Criminal Procedure Law', *Nomocracy Forum (22)*, 2010, p. 52.

adopted a series of national security laws. As in Section 3.3.1, I have categorised these laws into two groups: those regulating people's conduct and those providing power to government authorities. The laws adopted increase the accessibility of the legislation and aim to ensure government authorities' actions are in accordance with the law. When it comes to the foreseeability requirement, I have argued that some provisions are more about legitimising specialised powers exercised by government authorities than about restricting them. In this regard, I have analysed the foreseeability of China's communication surveillance regime as an example.

National security laws are enforced by Public Security Organs and State Security Organs. I have analysed arrest and search because these two kinds of coercive measures often interfere with human rights. We have seen that while the police do not have unfettered powers to restrict or deprive a person of liberty, they seem in practice to prefer the easiest option on a case-by-case basis. Searching a person's body, belongings or premises normally needs a search warrant. Nevertheless, except for searching a residence, the police can use alternative methods, not requiring a warrant, to obtain evidence. These alternatives either include the opportunity to conduct a search or are intended to be applied for a purpose other than collecting evidence. This practice raises concerns over abuse of power by the police.

We have also seen how national security and human rights can collide in adjudication and judicial proceedings involving secret evidence. I have analysed two groups of cases: cases involving offences relating to state secrets and cases in which evidence is collected by secret means. In the case of the first group, it is difficult in judicial practice for defendants to challenge, directly or indirectly, whether the contested information has been legitimately classified. Furthermore, the case law shows that a lapse of confidentiality does not necessarily result in information losing its secrecy status or level. In the cases involving evidence collected by secret measures, the contents of such evidence are usually edited before being disclosed to the defendant. This editing serves to remove content that may disclose crucial details about secret methods of investigation: in judicial practice, prosecutors often, for example, offer an edited transcript of conversations, or 'information notes' containing much less information, rather than the original audio recordings acquired by secret surveillance. As a remedy, the secret evidence can be verified by a judge *ex parte*.

4.4 Extent of the Impact on Human Rights in China

China has no specific legislation on human rights protections, thus implying that this perspective is lacking in the country's regulating of human rights'

relationship with public interests. The extent to which national security can impact on human rights in China is more a question of setting the limits of human rights than of rationalising interference with them. Some may argue that the Constitution is a 'bill of rights', considering its nature and its contents. Nevertheless, the principle of proportionality has not been accepted either under the Constitution or through extended interpretations.[1058] As discussed in Section 4.1.2.2, its general limitation clause mainly targets individuals abusing rights, rather than undue interference by government authorities. With regard to laws that violate the Constitution, the authorities rely mainly on internal mechanisms to invalidate them. Although these mechanisms work well, the constitutional review cannot be done through a lawsuit or individual complaint. As such, the 'bill of rights' is not useful on a case-specific level.

4.4.1 Parallels with Proportionality under National Security Law System

Under China's legal framework for national security, some provisions seek to limit the extent of government authorities' interference with rights and freedoms. This is firstly provided for by the National Security Law, the leading legislation under the framework, of which Article 83 reads:

> Where it is necessary in national security work to take special measures to *restrict citizens' rights and freedom*, such measures shall be taken in accordance with the law and *to the extent of actual needs for maintaining national security*[1059] [emphasis added].

The second half of this article does include a requirement for proportionality, at least in regard to tests of suitability and less-intrusive-means (the necessity test). The provision's reference to proportionality is also confirmed by the drafters.[1060]

Attempts to avoid conferring unfettered discretion to restrict citizens' rights are accommodated in other specific laws related to national security. These

[1058] See Yao Longfei and Chen Jianhui, 'The Normative Basis of the Principle of Proportionality in the Chinese Constitution', *Journal of Shandong University of Science and Technology (Social Sciences) 18(4)*, 2016, 37-45 & 51.（参见饶龙飞、陈建晖："比例原则的中国宪法规范依据"，载《山东科技大学学报（社会科学版）》2016 年 4 期。）

[1059] The English version of the National Security Law is available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.

[1060] See National Law Office of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, *Decoding the National Security Law of the People's Republic of China*, China Legal Publishing House, 2016, pp. 373-374.（参见全国人大常委会法制工作委员会国家法室：《中国人民共和国国家安全法解读》，中国法制出版社 2016 年，第 373-374 页。）

restrictions can be categorised into three groups, according to their degree of stringency and explicitness. Of these restrictions, the most unequivocal are those applied in administrative coercive measures and administrative sanctions, requiring appropriateness or less intrusiveness.[1061] Some scholars believe that these provisions introduce part of the proportionality analysis into fields of administrative coercion and sanctions.[1062] This argument is further supported by the fact that remedies are provided where measures are clearly inappropriate.[1063] In the case of national security, some forms of interference pertain to administrative coercive measures and some to administrative sanctions, whereby the former involve searching,[1064] further interrogation (after a stop and search),[1065] compulsory summons[1066] and several restrictive measures on the liberty of terrorism suspects[1067] and the latter such things as warnings,[1068] administrative detention[1069] and expulsion or deportation.[1070]

[1061] Article 5 of the Administrative Compulsion Law. Article 5(2) of the Law on Administrative Penalty.
[1062] See Yang Dengfeng, 'From Principle of Reasonableness to Principle of Proportionality', *China Legal Science (3)*, 2016, 88-105, pp. 89-90.
[1063] See Li Qing, 'Application of the Principle of Proportionality in the Police Law of China', *Journal of Criminal Investigation Police University of China (6)*, 2019, 5-13, pp. 8-9. See also Article 28(3) of the Administrative Reconsideration Law. Articles 70 and 77 of the Administrative Litigation Law. The English versions of the two laws are available at https://www.pkulaw.com/.
[1064] For example, Articles 26 and 28 of the Counterespionage Law. See also Wu Qingrong, *Basic Theories of State Security Administrative Law*, Current Affairs Press, 2008, p. 163.
[1065] See Article 2 of the Provisions on Application of Further Interrogation by Public Security Organs.
[1066] See Article 54(2) of the Provisions on the Procedures for Handling Administrative Cases by Public Security Authorities.
[1067] See Article 53 of the Counterterrorism Law. See also Li Yuhua and Chen Feng, '"Restrictive Measures" in Public Security Organs' Counterterrorism Investigation: Article 53 of the Counterterrorism Law', *Journal of People's Public Security University of China (Social Sciences Edition) 33(1)*, 2017, 51-55, p. 52. Human Rights Watch, "China: Draft Counterterrorism Law a Recipe for Abuses", *Human Rights Watch*, 20 January 2015, retrieved 30 May 2020, from https://www.hrw.org/news/2015/01/20/china-draft-counterterrorism-law-recipe-abuses.
[1068] For instances, see Article 60 of the Counterespionage Law, Article 89 of the Counterterrorism Law, and Articles 28 and 29 of the National Intelligence Law. The English versions are available at https://www.pkulaw.com/. Erlianhaote Municipal People's Government, "List of Administrative Powers and Responsibilities of the National Security Agency", retrieved 30 May 2020, from http://www.elht.gov.cn/qlqd/ganj/201506/t20150629_71923.html.
[1069] For example, see Articles 54, 60 and 61 of the Counterespionage Law, Articles 80-82 of the Counterterrorism Law, Articles 28 and 29 of the National Intelligence Law, and Article 47 of the Overseas NGOs Law. See also Erlianhaote Municipal People's Government, "List of Administrative Powers and Responsibilities of the National Security Agency", retrieved 30 May 2020, from http://www.elht.gov.cn/qlqd/ganj/201506/t20150629_71921.html, http://www.elht.gov.cn/qlqd/ganj/201506/t20150629_71918.html, and http://www.elht.gov.cn/qlqd/ganj/201506/t20150629_71915.html.
[1070] For instances, see Article 66 of the Counterespionage Law, and Article 50 of the Overseas NGOs Law. The English versions are available at https://www.pkulaw.com/. See also Erlianhaote Municipal People's Government, "List of Administrative Powers and Responsibilities of the National Security Agency", retrieved 30 May 2020, from http://www.elht.gov.cn/qlqd/ganj/201506/t20150629_71924.html.

However, such a proportionality-like requirement has not played a constructive role in restricting the discretion of government authorities. Firstly, there are hardly any cases challenging the appropriateness or strictness of administrative coercive measures or sanctions on the grounds of national security.[1071] This is probably because these cases regularly involve classified information and so are not disclosed to the public. Be that as it may, an examination of cases related to public security can serve as an alternative means to define some features of the requirement's actual applications. One such feature is that domestic courts normally conduct a low-intensity review, which finds the impugned measure inappropriate only if it is clearly or manifestly so.[1072] Another feature is that, when reviewing appropriateness, domestic courts do not follow a coherent analytical structure but instead make decisions based on various different principles. While in some cases the court applies the principle of proportionality in terms of its three-tier test (of suitability, necessity and proportionality *stricto sensu*),[1073] in other cases it takes a different approach, such as holding that the government failed to consider factors too important to be neglected,[1074] based on the principle of reasonableness.[1075] There are also quite a few cases in which the court's review has not included any detailed reasoning at all.[1076] In summary, excessive restrictions or punishment may constitute an illegitimate extent of interference;

[1071] The Database used is provided by PKULAW.com, available at https://www.pkulaw.com/case.

[1072] See Li Qing, 'Application of the Principle of Proportionality in the Police Law of China', *Journal of Criminal Investigation Police University of China (6)*, 2019, 5-13, p. 8. See also Paul P. Craig, 'Proportionality, Rationality and Review', *New Zealand Law Review (2)*, 2010, 265-301, p. 269.

[1073] The principle of proportionality requires a three-tier test: the suitability test, the less-intrusive-means test (the necessity test), and the proportionality in the narrow sense (*stricto sensu*). For example, See *Liu Yunwu v. Jinyuan Police Office, Traffic Police Detachment, Shanxi Taiyuan Public Security Bureau*, Administrative Retrial Judgment, issued by the People's Supreme Court, retrieved 30 May 2020, from http://www.lawinfochina.com/display.aspx?lib=case&id=2080.（例如刘云务诉山西省太原市公安局交通警察支队晋源 一大队道路交通管理行政强制案，最高人民法院(2016)最高法行再 5 号行政判决书。）See also Yang Dengfeng, 'From Principle of Reasonableness to Principle of Proportionality', *China Legal Science (3)*, 2016, 88-105, p. 90.（参见杨登峰："从合理原则走向统一的比例原则"，载《中国法学》2016 年 3 期，第 90 页。）

[1074] See Li Qing, 'Application of the Principle of Proportionality in the Police Law of China', *Journal of Criminal Investigation Police University of China (6)*, 2019, 5-13, p. 9.（参见李晴："我国警察法比例原则的适用"，载《中国刑警学院学报》2019 年 6 期，第 9 页。）

[1075] See Tom R. Hickman, 'The Reasonableness Principle: Reassessing its Place in the Public Sphere', *The Cambridge Law Journal 63(1)*, 2004, 166-198. See also Gong Xiangrui, *Constitution and Administrative Law: Comparative Law*, Law Press, 2003, p. 453.（另见龚祥瑞:《比较宪法与行政法》，法律出版社 2003 年，第 453 页。）Ying Songnian (ed.), *Lectures on Administrative Law*, China University of Political Science and Law Press, 1988, p. 42.（应松年主编:《行政法学教程》，中国政法大学出版社 1988 年，第 42 页。）

[1076] See Yang Dengfeng, 'From Principle of Reasonableness to Principle of Proportionality', *China Legal Science (3)*, 2016, 88-105, pp. 90-91.（参见杨登峰："从合理原则走向统一的比例原则"，载《中国法学》2016 年 3 期，第 90-91 页。）

in practice, however, this conclusion is not necessarily drawn on the basis of the proportionality principle.

A second observation that makes it clear that proportionality plays little role in practice is that administrative coercive measures and sanctions are only two of the means available to Chinese authorities to interfere with citizens' human rights. As such, current cognate forms of proportionality analysis play merely a small role in limiting the extent of such interference. Police powers pertaining to national security derive mainly from two fields of law: criminal law and administrative law. Apart from coercive measures and sanctions with an administrative character, there are also interferences in the field of criminal justice, including such investigation measures as searching, the RSDL, detention and arrest.[1077] As such, these are not subject to current cognate proportionality analysis.[1078] Additionally, these means of interference cannot be challenged through a separate remedy mechanism, but only in a criminal trial.

In the field of criminal law, there are restrictions that have parallels with the proportionality principle and that, despite being named differently, echo the principle of proportionality. The first restriction is that the reason for producing or initiating criminal punishment must be to protect legal goods.[1079] In the field of criminal law, as a counterpart to the suitability test under the proportionality principle, criminal punishment serves as the means, whereas the protection of legal goods is the end.[1080] It would not be justified to criminalise or punish an act that does not pose any threat to interests of national security. Another example concerns criminal justice restraint, which stipulates that criminal law should serve only as a last resort.[1081] Criminalisation and the imposition of criminal punishment are quite strongly

[1077] See Chapter II Criminal Investigation of Part Two of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[1078] See Wei Xiuling, 'On the Supervision of the Criminal Investigation Actions of Public Security Organs by Administrative Judicial Power', *Policing Studies (8)*, 2003, 85-88, p. 87.（参见魏秀玲：“论行政审判权对公安机关刑事侦查行为的监督”，载《公安研究》2003 年 8 期，第 87 页。）

[1079] See Santiago Mir Puig, 'Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct', *New Criminal Law Review: An International and Interdisciplinary Journal 11(3)*, 2008, 409-418, pp. 409-410.

[1080] See Tian Hongjie, 'The Positioning, Function and Application Scope of the Proportionality Principle in Criminal Law', *Journal of Renmin University of China 33(4)*, 2019, 55-67, p. 56.（参见田宏杰：“比例原则在刑法中的功能、 定位与适用范围”，载《中国人民大学学报》2019 年 4 期，第 56 页。）See also Günther Jakobs, 'What does Criminal Law Protect: Legal interest or Applying of Norm?', Wang Shizhou trans., *Journal of Comparative Law (1)*, 2004, 96-107.（G·雅各布斯：“刑法保护什么：法益还是规范适用？”，王世洲译，载《比较法研究》2004 年 1 期。）Claus Roxin, 'The Legislation Critical Concept of Goods-in-law under Scrutiny', *European Criminal Law Review 3(1)*, 2013, 3-25.

[1081] See Douglas Husak, 'The Criminal Law as Last Resort', *Oxford Journal of Legal Studies 24(2)*, 2004, 207-235.

negative appraisals of an individual's behaviour. In particular, legislators are required to restrain from conveniently defining any security threat as a crime.[1082] The final restriction is the appeal of retributive justice.[1083] While this appeal concerns law-making, the main focus is on criminal sentencing.[1084] The requirement demands a just and fair punishment that reflects the severity of the offence. In summary, the first two requirements serve mainly to limit state authorities' interference regarding law-making, and the final requirement applies in national security adjudication and falls under the discretion of judges. In this regard, the principle of proportionality is reflected in several requirements in Chinese criminal law, but does not function as an intact analysis structure for reviewing a specific case.

A second group of principles attempting to avoid abuse of discretion is much more implicit than the first group. The main point of these principles is to provide various ways of interfering with Chinese citizens' rights, differentiated in their stringency, to suit different circumstances. For instance, as prescribed by the Criminal Procedure Law, the measures that deprive a person of liberty include, in ascending order based on their severity, release on bail, [1085] residential surveillance,[1086] the RSDL,[1087] criminal detention[1088] and arrest.[1089] Correspondingly, the more intrusive a measure is, the graver the threat a suspect must pose to others.[1090] Taken as a whole, these measures form an

[1082] See Tian Hongjie, 'The Positioning, Function and Application Scope of the Proportionality Principle in Criminal Law', *Journal of Renmin University of China 33(4)*, 2019, 55-67, pp. 56-57.（参见田宏杰："比例原则在刑法中的功能、 定位与适用范围"，载《中国人民大学学报》2019 年 4 期，第 56-57 页。）See also Shi Yanan, 'The Restraint of Criminal Law or Restraint of Penalty Power – Clarifying the Concept of Restraint in the Field of Criminal Law', *Criminal Law Review 13(1)*, 2008, 156-170.（另见时延安："刑法的谦抑还是刑罚权的谦抑？——谦抑观念在刑法学场域内的厘清与扬弃"，载《刑法论丛》2008 年 1 期。）

[1083] See Tian Hongjie, 'The Positioning, Function and Application Scope of the Proportionality Principle in Criminal Law', *Journal of Renmin University of China 33(4)*, 2019, 55-67, pp. 57-58.（参见田宏杰："比例原则在刑法中的功能、 定位与适用范围"，载《中国人民大学学报》2019 年 4 期，第 57-58 页。）

[1084] See Joel Goh, 'Proportionality - An Unattainable Ideal in the Criminal Justice System', *Manchester Student Law Review 2(4)*, 2013, 41-72, p. 47.

[1085] See Article 67 of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.

[1086] See Article 74 of the Criminal Procedure Law.

[1087] See Article 75 of the Criminal Procedure Law.

[1088] See Article 82 of the Criminal Procedure Law.

[1089] See Article 81 of the Criminal Procedure Law.

[1090] See Wan Zhenhui, 'The Basic Category of Criminal Coercive Measures – Comments on the Relevant Provisions of the New "Criminal Procedure Law"', *Tribune of Political Science and Law (3)*, 2012, 62-73.（参见王贞会："刑事强制措施的基本范畴——兼评新《刑事诉讼法》相关规定"，载《政法论坛》2012 年 3 期。）See also Wan Yi, 'How to Improve China's Criminal Coercive Measures System', *Criminal Science (5)*, 2006, 70-76.（万毅："论我国刑事强制措施体系的技术改良"，载《中国刑事法杂志》2006 年 5 期。）

arrangement for regulating the extent of liberty deprivation on a case-by-case basis. If a suspect satisfies the conditions for being released on bail, a pre-trial detention (arrest) would be deemed an excessive measure. However, as discussed in Section 4.3.2.1, the police sometimes attach more weight to the ease of their investigation than on whether the suspect is subject to excessive deprivation of liberty. Given the lack of detailed and practical norms, along with an ineffective remedy mechanism, the arrangements fail to adequately restrict government interference with the exercising of rights and freedoms.

The final group of attempts to avoid conferring unfettered discretion serve more to legalise rather than limit interference. Some provisions contain a requirement determining the purpose for which a measure can be imposed. For instance, Article 37 of the Counterespionage Law stipulates that a technical reconnaissance measure may be taken 'as needed for the counterespionage work'.[1091] Technically speaking, setting a specific purpose as a precondition for imposing a measure can restrict the exercising of power; in this regard, the establishing of a means-end relationship appears to be demanded. However, such purposes are described too broadly and vaguely to play that role. The provisions in question use terms such as 'in executing a task (of counterespionage)', [1092] 'for the prevention and investigation of terrorist activities',[1093] 'as required by the work (of intelligence gathering)'[1094] and 'as needed for criminal investigation'.[1095] As it is quite easy to satisfy them, these terms put barely any limitations on government authorities' exercising of power. Instead, they serve to endorse government authorities' interference,[1096] rather than playing a part in human rights protections.

In summary, although the Constitution does not place any explicit limitations on state authorities' interference with rights by referring to a human rights discourse, the legal system provides some limitations from the perspective of protecting national security. As such, I conclude that the proportionality requirement remains mostly a principle at best, and far from a judicial analytical structure cognate with the vertical three-tier test.

[1091] Article 37 of the Counterespionage Law. The English version is available at https://www.pkulaw.com/en_law/6329ea125eca430bbdfb.html, last visited 25 July 2023.
[1092] For example, see Articles 24-26 of the Counterespionage Law.
[1093] See Article 18 of the Counterterrorism Law.
[1094] See Article 15 of the National Intelligence Law. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=eae461be038ae511bdfb&lib=law, last visited 7 April 2021.
[1095] See Article 150(1) of the Criminal Procedure Law. The English version is available at https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html, last visited 11 March 2021.
[1096] See Li Qing, 'Application of the Principle of Proportionality in the Police Law of China', *Journal of Criminal Investigation Police University of China (6)*, 2019, 5-13, p. 7.（参见李晴："我国警察法比例原则的适用"，载《中国刑警学院学报》2019 年 6 期，第 7 页。）

4.4.2 Importing the Principle of Proportionality

The principle of proportionality generally consists of a three-tiered test: the suitability test, the necessity test, and proportionality in the narrow sense *(stricto sensu)*.[1097] When being applied to review a case, it follows a step-by-step analysis pattern in order to decide on whether government authorities' interference is justified. Before applying the proportionality tests to a controversial case of human rights in China, I will briefly explain the advantages of using proportionality analysis and explain why China may do well to accept this evaluative framework when balancing national security and human rights.

4.4.2.1 Why to adopt the principle of proportionality

The first reason for adopting the principle of proportionality is that it was established specifically to avoid excessive use of discretion by state authorities. We may find versions of it in the English Magna Carta and 1789 French *Déclaration des droits de l'homme et du citoyen*;[1098] it was also codified in German administrative law, where it was later developed by the Federal Constitutional Court when reviewing cases related to fundamental rights.[1099] It has been accepted in human rights adjudications by several countries, as well as by international human rights bodies.[1100] The second reason is that the basic theory to which the principle of proportionality relates is the optimisation of rights. The aim of applying the principle is to uphold the highest possible standards when protecting constitutional rights.[1101] In the context of China, optimisation of rights could serve to dilute the tradition of utilitarianism, which strongly prefers collective interests over individual ones.

Last but not the least, the proportionality principle provides an analytical structure that is both clear and logical. Under the suitability test, the impugned

---

[1097] See Robert Alexy, 'Constitutional Rights and Proportionality', *Journal for Constitutional Theory and Philosophy of Law (22)*, 2014, 51-65.

[1098] Section 20 of the Magna Carta; and Article 8 of the *Déclaration des droits de l'homme et du citoyen*. See Richard S. Frase, 'Excessive Relative to What? Defining Constitutional Proportionality Principles', in Michael H. Tonry (ed.), *Why Punish? How Much?: A Reader on Punishment*, Oxford: Oxford University Press, 2011, 263-267, p. 267 at footnote 22. Moshe Cohen-Eliya and Iddo Porat, 'History', in *Proportionality and Constitutional Culture*, Cambridge: Cambridge University Press, 2013, 24-43, p. 24 at footnote 1. The idea of proportionality can be traced back to antiquity. See Eric Engle, 'The General Principle of Proportionality and Aristotle', in Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho (eds.), *Aristotle and the Philosophy of Law: Theory, Practice and Justice*, Dordrecht: Springer, 2013, 265-276.

[1099] See Fan Jizeng, 'Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights', *The Journal of Human Rights 15(1)*, 2016, 47-86, pp. 48-49.

[1100] See Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism', *Columbia Journal of Transnational Law 47*, 2008, 68-149, p. 74.

[1101] See Robert Alexy, 'Constitutional Rights and Proportionality', *Journal for Constitutional Theory and Philosophy of Law (22)*, 2014, 51-65, p. 52. See also Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15*, 2015, 139-168, pp. 141-142.

measure should be able to achieve the intended purpose, while under the necessity test an alternative that is less intrusive but equally effective should be sought, and proportionality in the narrow sense (*stricto sensu*) means the cost of the intervention should not be too high or the benefit too low. The principle formulates a step-by-step analysis, with failure to satisfy any one of the tests making the interference 'disproportionate'.

In my observation, China has practical needs for importing the principle of proportionality. Firstly, it has signed the ICCPR but is yet to ratify it. The treaty body, the Human Rights Committee, [1102] has developed a three-tiered proportionality test that is similar to the one adopted by the ECtHR.[1103] I argue that if China ratifies the Covenant, this analytical structure will inevitably be used, at least whenever the country attempts to defend an interference with civil and political rights before the Committee.

More importantly, in my reading, the principle can prevent human rights from being systematically deterred to null through the National Security Priority Approach. As discussed in Section 4.1.3, from a broad categorical perspective, the governing authorities have recognised performance legitimacy as one of the regime's essential features. In this regard, I indicated that national security has a direct and close connection with these features, while civil and political rights do not. Consequently, China prioritises national security over human rights by adopting the National Security Priority Approach. While this approach is defensible in the context of China, I find the problem to be that China focuses on the formal legality, rather than substantive control, of interventions. I hold that including the proportionality analysis in judicial and quasi-judicial reviews,[1104] even in a low-intensity form, will increase human rights protections. While the notion that 'the exercise of rights shall not impair national security'[1105] as the general limitation norm in the Constitution could serve as a legal basis for drafting a national security law or introducing a policy, this notion certainly does not legitimise giving up substantive control over authorities' discretionary powers.

[1102] See the Homepage for the Human Rights Committee, available at https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx, lase visited 3 June 2020.
[1103] See Mao Junxiang, *Study on Limitation Clauses of the International Conventions on Human Rights*, Law Press, 2011. （参见毛俊响：《国际人权条约中的权利限制条款研究》，法律出版社 2011 年。）
[1104] See Geng Baojian, 'Several Basic Issues in the Amendment of the Administrative Reconsideration Law', *Shandong Judges Training Institute Journal (5)*, 2018, 1-13.（参见耿宝建："行政复议法修改的几个基本问题"，载《山东法官培训学院学报》2018 年 5 期。）
[1105] Article 51 of the Constitution law. The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

4.4.2.2 An example: Applying the proportionality tests to a controversial measure

Here, I apply the proportionality analysis to one of counterterrorism measures used by China in Xinjiang, the Vocational Education and Training Programme (VETP). From the case-specific perspective, this serves as an example to illustrate defects in China's attempts to balance national security and human rights.

Suitability

The VETP is designed to counter extremism (de-extremisation) in Xinjiang through education. With regard to Xinjiang, state authorities have held that extremism incites violence or hatred against Chinese authorities and non-Muslims and constitutes an ideology comprising intolerance, the rejecting of secularism and an ends-justify-means philosophy.[1106] While, on a macro-level, extremism can be countered by disseminating moderate and mainstream messages, the educational intervention is seen as a means *prima facie* capable of increasing tolerance, understanding and citizenship of a specific individual, thus establishing a means-and-ends connection.[1107]

It is noteworthy that the VETP is independent of the national education system. Instead, it is a re-education and correction method targeting extremists and, therefore, constitutes an interference with, *inter alia*, one's right to private life, freedom of thought and religion, freedom of expression and right to liberty. Why does a person with extremist thoughts need intervention by means of education or even correction? A major justification used by Chinese authorities is that extremism in Xinjiang, especially religious extremism, often serves as a motivation, promotion or 'precursor' of terrorism.[1108] Sometimes extremism also overlaps with terrorism. In this regard, countering extremism is a pre-

[1106] See Xinhua, "Full Text: Vocational Education and Training in Xinjiang", *Xinhua*, 16 August 2019, retrieved 20 May 2020, from http://www.xinhuanet.com/english/2019-08/16/c_138313359.htm. See also Alex P. Schmid, 'Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review', *The International Centre for Counter-Terrorism*, March 2013, p. 9, retrieved 8 June 2020, from https://icct.nl/app/uploads/2013/03/ICCT-Schmid-Radicalisation-De-Radicalisation-Counter-Radicalisation-March-2013_2.pdf.

[1107] See Anne Aly, Elisabeth Taylor, and Saul Karnovsky, 'Moral Disengagement and Building Resilience to Violent Extremism: An Education Intervention', *Studies in Conflict & Terrorism 37(4)*, 2014, 369-385, p. 371

[1108] See Xinhua, "Full Text: Vocational Education and Training in Xinjiang", *Xinhua*, 16 August 2019, retrieved 20 May 2020, from http://www.xinhuanet.com/english/2019-08/16/c_138313359.htm. See also United Nations Office on Drugs and Crime (UNODC), "Terrorism and Violent Extremism", *UNODC*, retrieved 8 June 2020, from https://www.unodc.org/e4j/en/secondary/terrorism.html. Alex P. Schmid, 'Countering Violent Extremism: A Promising Response to Terrorism', *The International Centre for Counter-Terrorism*, 12 June 2012, retrieved 8 June 2020, from https://icct.nl/publication/countering-violent-extremism-a-promising-response-to-terrorism/.

emptive measure to fight terrorism. The VETP should therefore be defined as a pre-emptive measure against terrorism. However, extremist thoughts, as well as their impact on a person, vary in terms of degree, ranging from severe to slight.

The main question then is how the state can identify a person holding or impacted by extremist thoughts to the extent that this needs to be addressed in the name of national security. This question consists of two interrelated sub-questions: first, where should the threshold for extremism be set, i.e. when does it reach an extent that needs to be addressed?[1109] Second, how can these thoughts or impacts be detected by Chinese authorities? One solution to the latter question is to make this judgment on the basis of an individual's actions, not only because 'mind reading' is impractical, but because thoughts *per se* are not punishable and should be free from government interference, as long as they remain in a person's own mind. In this regard, those who participate in 'terrorist or extremist activities' or commit 'terrorist or extremist crimes' are presumed to hold extremist thoughts. As to the threshold, the Chinese government classifies those individuals meeting this threshold into three categories, depending on the severity of the offence:

> (a) People who were incited, coerced or induced into participating in *terrorist or extremist activities*, or people who participated in *terrorist or extremist activities* in circumstances that were not serious enough to constitute a crime;
>
> (b) People who were incited, coerced or induced into participating in *terrorist or extremist activities*, or people who participated in *terrorist or extremist activities* that posed a real danger but did not cause actual harm, whose subjective culpability was not deep, who acknowledged their offences and were contrite about their past actions and thus *do not need to be sentenced to or can be exempted from punishment*, and who have demonstrated the willingness to receive training;
>
> (c) People who were convicted and received prison sentences for *terrorist or extremist crimes* and, after serving their sentences, have been assessed as *still posing a potential threat* to society, and who have been ordered by people's courts in accordance with the law to receive education at the centres[1110] [emphasis added].

[1109] See Commission for Countering Extremism, 'Study into Extremism – Terms of Reference', *Commission for Countering Extremism*, September 2018, retrieved 8 June 2020, from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742176/Terms_of_Reference_into_Extremism_Study.pdf.

[1110] See Xinhua, "Full Text: Vocational Education and Training in Xinjiang", *Xinhua*, 16 August 2019, retrieved 20 May 2020, from http://www.xinhuanet.com/english/2019-08/16/c_138313359.htm.

This classification shows the different extents, in ascending order, to which a person may have been impacted by extremism. Regarding the last two groups, the fact that one's actions constitute a criminal offence implies that the offender has been impacted to a rather great extent and needs to be educated. When extremism reaches such an extent that it drives a person to commit a crime, the last two groups establish a direct link with extremism-related and terrorist-related offences prescribed by the Criminal Law. A person who commits these offences has presumably been impacted by extremism to such a grave extent that educational intervention is required. It should be added that there is a missing puzzle piece in between these two categories: someone who is serving a prison sentence, given that detainees are also subject to educational intervention.[1111] Although not part of the VETP, this form of intervention is based on the same presumption: those committing a terrorist crime have been impacted by extremism. In this respect, then, the educational intervention in the third category, which targets those '*still posing a potential threat* to society', can be seen as a successive or supplementary intervention.

In the first group of cases, the threshold appears not only lower but more ambiguous than for the assessment of the other two groups. The legitimacy of the VETP relies on a close connection between extremist thoughts, which show themselves through behaviour, and acts of terrorism.[1112] In terms of suitability, the end is to address those extremist thoughts that are closely linked with acts of terrorism rather than eliminating extremism, no matter the degree of it. In the case of the second and third groups, such a connection is reflected in the fact that the individuals have committed terrorist or extremist offences. With regard to the first group, the connection should not be too weak or remote, even in the event of a low-intensity review standard. This requirement is further supported by the fact that VETP is already a counterterrorism measure of a pre-emptive nature; in my view, it would not be sensible to move another step down

[1111] Article 40 of the Xinjiang Implementing Measures for the Counterterrorism Law reads:
'Prisons, detention centres, and community corrections organizations and so forth shall separately carry out education, reform, and corrections of those committing the following terrorist activity crimes, or extremism crimes:
(1) those sentenced to fixed-term imprisonment or more;
(2) those sentenced to short-term detention;
(3) Those sentenced to controlled release, suspended sentences, parole rulings, or temporary service of sentence outside of prison.'
The Xinjiang Implementing Measures for the Counterterrorism Law is available at http://www.pkulaw.cn/fulltext_form.aspx?Db=lar&Gid=4c1fcbf89bb321df1d5584c41d22ba73bdfb&keyword=%e5%8f%8d%e6%81%90%e6%80%96%e4%b8%bb%e4%b9%89%e6%b3%95&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited 8 April 2021.

[1112] Article 7(1) of the Xinjiang Implementing Measures for the Counterterrorism Law reads:
'Extremism is the ideological foundation of terrorism, preventing and punishing extremist activities is an important strategy for countering the roots of terrorism.'

the line by, in effect, taking a 'pre-pre-emptive' approach to addressing extremist thoughts that are yet to develop a close link with terrorism. In other words, a person should not be targeted if he or she has been only slightly influenced by extremism.

So, what does this connection look like for the first group, or where is the threshold set? The connection is dependent on 'terrorist or extremist activities' as defined by the government. In the case of 'terrorist activities', a list is prescribed by law and the activities concerned can be divided into three categories: first, preparatory acts for terrorism;[1113] second, acts advocating terrorism;[1114] and third, a catch-all clause.[1115] These acts' close link with terrorism means intervening in the extremist thoughts that lie behind them is suitable. When it comes to 'extremism activities', however, the link is not so direct or strong. Xinjiang authorities provide a list that describes 'extremism activities' in the XUAR Regulation on De-extremification (the Regulation on De-extremification),[1116] but some of these activities would not necessarily appear

[1113] Article 6(a)-(e) of the Xinjiang Implementing Measures for the Counterterrorism Law reads:
'Based on Article 3 of the "Counter-Terrorism Law of the People's Republic of China", carrying out the following acts for a terrorist goal will be found to be terrorist activities:
(a) Colluding with domestic or foreign terrorist organizations or individuals, or accepting incitement, detachments or funding from foreign terrorist organizations or individuals, to carry out or prepare to carry out terrorist activities;
(b) Organizing or bringing together others to advocate, distribute or transmit terrorism or extremism so as to form a terrorist activity organization, develop membership, or organize, plot or carry out terrorist activities;
(c) Establishing training venues, or organizing and gathering others to for fitness and skills training, to carry out terrorist activities;
(d) Recruiting or transporting personnel for terrorist organizations or to carry out terrorist activities or terrorist activity trainings;
(e) Organizing or inciting others to cross national (territorial) borders, to participate in terrorist activities, receive terrorist activity training, or carry out terrorist activities;
…'

[1114] Article 6(f) of the Xinjiang Implementing Measures for the Counterterrorism Law reads:
'Based on Article 3 of the "Counter-Terrorism Law of the People's Republic of China", carrying out the following acts for a terrorist goal will be found to be terrorist activities:
…
(f) Using mobile phone, the internet, mobile storage media or audio and video materials, electronic documents, a/v products, or printed materials, to advocate or disseminate terrorism or extremism, or transmit methods for terrorist crimes;
…'

[1115] Article 6(g) of the Xinjiang Implementing Measures for the Counterterrorism Law reads:
'Based on Article 3 of the "Counter-Terrorism Law of the People's Republic of China", carrying out the following acts for a terrorist goal will be found to be terrorist activities:
…
(g) Other terrorist activities.'

[1116] Article 9 of the Xinjiang Uyghur Autonomous Region Regulation on De-extremification reads:
'The following words and actions under the influence of extremism are extremification, and are to be prohibited:
(a) advocating or spreading extremist thinking;

to be motivated by extremism, and some reflect only a weak and remote link with terrorism. For instance, the list includes not observing family planning policies.[1117] Even though this could be interpreted as being motivated by extremism, whether such behaviour indicates a link with an actual risk of terrorism can certainly be questioned. While the list can serve as a legal basis, it cannot be used to justify suitability in the absence of a clear connection with terrorism. My analysis could have gone deeper if the government had disclosed detailed standards on which cases are judged in practice, or published case law pertaining to the first group. Publishing those norms could also help the government to counter misinformation surrounding the matter.

Although some cases were covered by Chinese media, the media reports provide insufficient information to assess the suitability of a case.[1118] Take the

(b) Interfering with others' freedom of religion by forcing others to participate in religious activities, forcing others to supply properties or labour services to religious activity sites or religious professionals;
(c) Interfering with activities such as others' weddings and funerals or inheritance;
(d) Interfering with others from having communication, exchanges, mixing with, or living together, with persons of other ethnicities or other faiths; or driving persons of other ethnicities or faiths to leave their residences;
(e) Interfering with cultural and recreational activities, rejecting or refusing public goods and services such as radio and television;
(f) Generalizing the concept of Halal, to make Halal expand into areas other beyond Halal foods, and using the idea of something being not-halal to reject or interfere with others secular lives;
(g) wearing, or compelling others to wear, burqas with face coverings, or to bear symbols of extremification;
(h) spreading religious fanaticism through irregular beards or name selection;
(i) failing to perform the legal formalities in marrying or divorcing by religious methods;
(j) not allowing children to receive public education, obstructing the implementation of the national education system;
(k) Intimidating or inducing others to boycott national policies; to intentionally destroy state documents prescribed for by law, such as resident identity cards, household registration books; or to deface currency;
(l) intentionally damaging or destroying public or private property;
(m) publishing, printing, distributing, selling, producing, downloading, storing, reproducing, accessing, copying, or possessing articles, publications, audio or video with extremification content;
(n) Deliberately interfering with or undermining the implementation of family planning policies;
(o) Other speech and acts of extremification.'

The Xinjiang Uyghur Autonomous Region Regulation on De-extremification is available at http://www.pkulaw.cn/fulltext_form.aspx?Db=lar&Gid=eae02fd07f0b8438ceb49bc261f47a9abdfb&keyword=%e6%96%b0%e7%96%86%e7%bb%b4%e5%90%be%e5%b0%94%e8%87%aa%e6%b2%bb%e5%8c%ba%e5%8e%bb%e6%9e%81%e7%ab%af%e5%8c%96%e6%9d%a1%e4%be%8b&EncodingName=&Search_Mode=accurate&Search_IsTitle=0, last visited 8 April 2021.

[1117] Article 9(n) of the Xinjiang Uyghur Autonomous Region Regulation on De-extremification.

[1118] For instances, see Shaya County People's Government. "I Want to Use My Story to Rectify the Name of the Vocational Education and Training Centres", *Government Website*, 12 December 2019, retrieved 10 June 2020, from https://www.xjsy.gov.cn/xwdt/jnyw/20191212/i487843.html. Ye Xinyi, "Stories Reflecting the New Path of Lawfully Governing Xinjiang, Vocational Education and Training Centres Protect the Legitimate Rights and Interests of People of All Ethnic Groups in

media report on the case of Murat Emet. Back in 2015, Murat Emet watched some videos advocating terrorism and extremism, which he had received from friends. He later asserted that these movies had inspired him to refuse to go shopping in stores run by *kafirs* (infidels). He also suggested that his business partners should avoid any contact with *kafirs*, and forbade his mother to receive benefit payments from the local government. He was admitted to the VETP in June 2018.[1119] At the outset, his deeds involved three kinds of actions listed by the Regulation on De-extremification: advocating extremist thinking; interfering to prevent others from having communications and exchanges with persons of other ethnicities or other faiths; and encouraging others to boycott national policies.[1120] Reviewing the suitability of the case results in more questions than answers about his admission to the VETP. How many people, for example, did he make the suggestions to? Was the manner he adopted of a coercive nature and, if so, what was the extent of the coerciveness? What was the manner in which he persuaded his mother? Could his actions incite others' hatred towards non-Muslims? More importantly, did the preceding questions play a role in his admission to the VETP? Which elements were more decisive than others? It also remains unclear as to how government authorities found out about his case, thus raising concerns over the due process of law.

Although some leaked documents allegedly related to the VETP are available,[1121] their authenticity cannot be verified and Chinese authorities deny the credibility of their contents. They include the 'Karakax List', a document allegedly recording the reasons for more than 300 people being admitted to the VETP. In this study, I do not intend to discuss whether this document is authentic. Instead, I will continue analysing the suitability by taking the data in the document as hypothetical examples, given that the list contains allegedly decisive reasons for people being admitted to the VETP on a case-by-case basis. These alleged reasons include 'used to wear a veil', 'violating family planning

Xinjiang", *Sohu*, 9 December 2019, retrieved 10 June 2020, from https://www.sohu.com/a/359225280_119038.

[1119] See Yili News Network, "We Know Best about Whether Vocational Education and Training Centres are Good", *Yili News Network,* 8 December 2019, retrieved 10 June 2020, from http://www.ylxw.com.cn/2019/1208/205053.shtml.（伊犁新闻网："职业技能教育培训中心好不好，我们最清楚"，伊犁新闻网 2019 年 12 月 8 日报道。）

[1120] Article 9(a), (d), and (k) of the Xinjiang Uyghur Autonomous Region Regulation on De-extremification.

[1121] The documents include so called 'China Cables', and 'The Karakax List'. Austin Ramzy and Chris Buckley, "'Absolutely No Mercy': Leaked Files Expose How China Organized Mass Detentions of Muslims", *New York Times*, 16 November 2019, retrieved 11 June 2020, from https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html. Christian Shepherd and Laura Pitel, "The Karakax List: How China Targets Uighurs in Xinjiang", *Financial Times*, 17 February 2020, retrieved 11 June 2020, from https://www.ft.com/content/e0224416-4e77-11ea-95a0-43d18ec715f5.

policies', 'having a complicated network of relationships', 'disassociating from society' and 'having contact with persons abroad'.[1122] These reasons establish only a remote relationship with a real risk. The differences are substantial in terms of the VETP's suitability for an individual vulnerable to developing extremist thoughts to a greater degree and an individual already having extremist thoughts that amount to a real risk. Distinctions should also be drawn between those who merely run more risk than others of being impacted by extremism, and those whose actions already demonstrate the existence of an impact. Bearing in mind that the VETP serves as a pre-emptive measure against terrorism rather than extremism, I argue that the standards and case law based on a weak and remote link between extremist thoughts and terrorism contribute only to a vicious cycle of suspicion.

Less intrusive means

The right to liberty is at the centre of disputes between China and Western countries over the legitimacy of the VETP. On one side are the Western countries, which believe that the programme is being executed by detaining participants in Vocational Education and Training Centres, thus raising concerns over arbitrary detention.[1123] Human rights organisations and foreign media have made the same assertions, based on interviews, video clips, satellite pictures and official documents.[1124] On the other side is China, which tells a totally different story. The Chinese government strongly denies that these centres are internment camps and compares them to schools, arguing that participants are allowed to 'go back home on a regular basis' and 'ask for leave

[1122] See Christian Shepherd and Laura Pitel, "The Karakax List: How China Targets Uighurs in Xinjiang", *Financial Times*, 17 February 2020, retrieved 11 June 2020, from https://www.ft.com/content/e0224416-4e77-11ea-95a0-43d18ec715f5.

[1123] See UN General Assembly, Letter Dated 8 July 2019 from the Permanent Representatives of Australia, Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Japan, Latvia, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland to the United Nations Office at Geneva Addressed to the President of the Human Rights Council, A/HRC/41/G/11(2019). See also Karen Pierce, "Joint Statement on Xinjiang, Delivered by Ambassador Karen Pierce, UK Permanent Representative to the UN During the Third Committee Interactive Dialogue with the Chair of the Committee for the Elimination of Racial Discrimination", *United States Mission to the UN*, 29 October 2019, retrieved 11 June 2020, from https://usun.usmission.gov/joint-statement-delivered-by-uk-rep-to-un-on-xinjiang-at-the-third-committee-dialogue-of-the-committee-for-the-elimination-of-racial-discrimination/.

[1124] See John Sudworth, "China's Hidden Camps – What's Happened to the Vanished Uighurs of Xinjiang?", *BBC*, 24 October 2018, retrieved 11 June 2020, from https://www.bbc.co.uk/news/resources/idt-sh/China_hidden_camps. See also Human Rights Watch, '"Eradicating Ideological Viruses": China's Campaign of Repression Against Xinjiang's Muslims', *Human Rights Watch*, 9 September 2018, retrieved 1 May 2020, from https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs#c6a416.

to tackle personal affairs'.[1125] However, the information from the government is far from sufficient to make any meaningful assessment of the necessity of the VETP.

Where a person falls into one of the three categories for enrolment on the VETP, imposing restrictions on their right to liberty is a guarantee for the process of education. The main questions, then, concern the severity of the restrictions, on which government authorities do not provide any detailed information: How long does a session last? What is the frequency of visiting home? How long can such a visit last? How many times can one ask for leave? Are there any prerequisites for leaving the centre? Is a day-off an entitlement or a reward? On what grounds, if any, could a day-off be denied? And, more importantly, are these issues decided on a case-by-case basis? The notable lack of transparency in the centres' day-to-day regulations makes it impossible to conclude whether the restrictions on the right to liberty could be less severe, while nevertheless ensuring the effectiveness of the programme.

Another aspect of the necessity test concerns the effectiveness of any possible alternatives. When reviewing a case, government authorities should consider whether means other than the VETP could be equally effective for promoting tolerance, understanding and citizenship. Alternative measures could, for example, be to disseminate such values through media and to refute extremist interpretations of Islam with the assistance of imams.[1126] The point is that a person impacted slightly by the extremism propaganda is not necessarily bound to become a terrorist, and the VETP is never the only measure available to counter extremist propaganda.[1127]

Proportionality in the narrow sense (stricto sensu)

The two types of interests to be balanced in the case in question are the preventing of terrorism via de-extremisation, on the one hand, and protecting people's right to liberty, the freedom to hold their own thoughts and the freedom to manifest their beliefs in practice and observance, on the other hand. As discussed in Section 3.4.1.8, these two groups of interests are incommensurable and can in no way be weighed against each other in a

[1125] See Xinhua, "Full Text: Vocational Education and Training in Xinjiang", *Xinhua*, 16 August 2019, retrieved 20 May 2020, from http://www.xinhuanet.com/english/2019-08/16/c_138313359.htm.
[1126] See Dina Al Raffie, 'The Identity-Extremism Nexus: Countering Islamist Extremism in the West', *Programme on Extremism*, October 2015, p. 14, retrieved 20 June 2020, from https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/Al%20Raffie.pdf.
[1127] See Milo Comerford and Rachel Bryson, 'Struggle Over Scripture: Charting the Rift Between Islamist Extremism and Mainstream Islam', *Tony Blair Institute for Global Change*, 2017, retrieved 20 June 2020, from https://institute.global/sites/default/files/inline-files/TBI_Struggle-over-Scripture_0.pdf.

mathematical sense. Instead, the result of any attempt to balance them is linked directly to the approach adopted; this determines the intensity of scrutiny of the first two tests – the suitability test and the less-intrusive-means test. As China has adopted the National Security Priority Approach, this scrutiny would be of low intensity. Implementation of the VETP, for example, is deemed proportionate if the following conditions are met: firstly, the link between extremist thoughts and terrorism, as demonstrated by an individual's behaviour, must not be too weak or remote. Secondly, there must be no vital factors indicating that the programme would be largely ineffective in the given case. Lastly, the restrictions on a participant's liberty must be imposed only to the extent that they ensure the process of education. Conversely, interference is considered disproportionate if the person is subject merely to a slight impact of extremism or is just vulnerable to its impact. It also does not satisfy the proportionality test if a person's liberty is greatly restricted or the person is even totally deprived of this.

In conclusion, when reframing the row over the VETP between China and some Western countries and human rights groups, we can see that the two sides' arguments are somehow not on the same page. On the one hand, Chinese authorities justify the VETP based mainly on its political objectives, legality and social performance. Their arguments are all made from a broad categorical perspective, in which there is a notable lack of information concerning proportionality. On the other hand, most of the criticism, save that concerning the total number of admissions to the programme, are made from a narrow case-specific perspective, questioning whether implementing the programme in the current manner is proportionate. The problem is that this criticism relies heavily on information that is difficult to verify. As a result, each side's assertions appear to be well-supported, but are not suitable for refuting the other. A workable solution, in line with international human rights norms, would be to disclose the detailed standards for admission to the programme and its case law or, at the very least, the decision procedures that may show that the Chinese government takes suitability and necessity into account.

4.4.3 Summary

Regarding the balance between national security and human rights, China's national security law system provides various requirements parallel with the principle of proportionality. Such requirements can be seen as restricting the government authorities' discretion to limit citizens' rights. First, administrative coercive measures and administrative sanctions are required to be appropriate or no more intrusive than required by the circumstances. In judicial practice, domestic courts normally conduct a low-intensity review and find an impugned

measure to be inappropriate only if it is clearly or manifestly so. The courts do not base their reasoning on the principle of proportionality in a consistent manner. The second group of requirements that may help to prevent abuse of discretion are the provisions listing multiple measures of interfering with people's rights, differentiated in their stringency, in different circumstances. The problem is that most of these provisions lack detailed or practical norms explicitly defining the circumstances in which they may be applied. The third group of requirements include some provisions that stipulate the purposes for which the measure can be imposed by government authorities. On some occasions, the purposes are described so broadly or vaguely that they put barely any limitations on government authorities exercising their powers. Based on the above, I argue that the proportionality requirement remains, at best, mostly a principle, and far from a judicial analytical structure cognate with the vertical three-tier test.

In this section, we have also seen the advantages of adopting the proportionality analysis in the context of China. I have applied the proportionality analysis to the Vocational Education and Training Programme to illustrate the extent to which this counterterrorism measure satisfies the principle of proportionality. Under the suitability test, an educational intervention is a means *prima facie* capable of increasing a specific individual's tolerance, understanding and citizenship, thereby establishing a means-and-ends connection. The VETP, tasked with countering extremism, should be defined as a pre-emptive measure against terrorism. The question is how to set the threshold for imposing this educational intervention on an individual. The threshold set by the Chinese government defines three groups of people who may be admitted to the VETP. In the case of one of these groups – people who were incited, coerced or induced into participating in terrorist or *extremist activities*, or people who participated in terrorist or *extremist activities* in circumstances not serious enough to constitute a crime – serious concerns can be raised over the suitability requirement. The VETP's aim is supposed to be addressing extremist thoughts that are closely linked with acts of terrorism, rather than eliminating any extremism regardless of its degree. However, the Chinese authorities have not disclosed any specific norms for measuring the link between extremist activities and an actual risk of terrorism, and nor have they published any informative case law on this matter.

Under the less-intrusive-means test, I have tried to shine light on the right to liberty. But there are more questions than answers. The notable lack of transparency in the centres' day-to-day regulations means we cannot ascertain the severity of the restrictions, or the norms for deciding which kind of liberty restriction measures should be imposed in a specific case. When it comes to

proportionality *stricto sensu*, preventing terrorism via de-extremisation is balanced against people's right to liberty, the freedom to hold their own thoughts and the freedom to manifest their beliefs in practice and observance. I indicate that three conditions should be met to satisfy the test. First, the link between extremist thoughts and terrorism should not be too weak or remote. Second, there should be no vital factors indicating that the Programme would be largely ineffective in a given case. Third, the restrictions on a participant's liberty should be imposed only to the extent that they ensure the process of education.

CHAPTER 5 A COMPARISON

China and European countries are usually regarded as two entirely different civilisations: Sinic civilisation and Western civilisation. The distinctions between the two are found in several fundamental elements, including the beliefs, traditional customs, languages, and social and political institutions. Nevertheless, all civilisations in the contemporary world are at a certain stage of modernisation.[1128] European countries, especially those who are in the leading position of the process of modernisation, view certain principles as prerequisites, as essential and as outcomes of the process, and thus define these as universal values.[1129] China, by contrast, is still on its way. Around the end of the Cold War, Francis Fukuyama in his 'the end of history' thesis marked it as the end point of mankind's ideological evolution, and held that Western liberal democracy would be the final form of human government.[1130] He gave two main reasons to support this argument. One is that liberal democracy correlates strongly with a certain level of development.[1131] The second reason lies in human desire for recognition: liberal democracy satisfies the desire by recognising the equal status of all people, as well as by establishing a right to participate in politics.[1132] However, in spite of having achieved remarkable economic growth in recent decades, China as the world's second largest economy shows no sign of transitioning to liberal democracy. China has demonstrated by its own experience that Western liberal democracy is not necessarily the only way for modernisation.[1133] But China does not really propose any specific alternative to the liberal democracy as a universal model

[1128] See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, 1996, pp. 72-78.
[1129] See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, 1996, pp. 56-57.
[1130] See Francis Fukuyama, 'The End of History?', in Richard K. Betts (ed.), *Conflict After the Cold War: Arguments on Causes of War and Peace*, 5th edition, New York: Routledge, 2017, 4-15, p. 4. Original publication, Francis Fukuyama, 'The End of History?', *The National Interest (16)*, 1989, 3-18.
[1131] See Francis Fukuyama, 'Reflections on the End of History, Five Years Later', *History and Theory 34(2)*, 1995, 27-43, p. 33.
[1132] See Francis Fukuyama, *The End of History and the Last Man*, New York: The Free Press, 1992, pp. 201-203.
[1133] See Marc F. Plattner, 'Democracy Embattled', *Journal of Democracy 31(1)*, 2020, 5-10, p. 8.

for the world, being either its own model or any other model.[1134] This is mainly due to the fact that Chinese authorities always link their governance and policies with national conditions, which thereby are not ready to be 'sold' directly to other countries. As China is increasingly challenging the universality of Western values, [1135] it seeks to provide different interpretations and approaches of some of the concepts that have been born out of those values. These concepts include 'human rights', for which China is attempting to develop another discourse.[1136]

In this thesis, I have sought to focus on a problem that both China and Europe have encountered in recent decades, namely, that human rights are increasingly being impacted by state authorities' interference in the name of national security. I intend to show how China can benefit from the European approach to reconciling these seemingly opposing realities. Before, however, I can propose any arrangement that China might benefit from, it is imperative to explore the rationales for China and Europe taking their current approaches. Importing an arrangement contrary to a country's rationale will inevitably invoke genuine resistance.[1137] In this chapter, I first compare how the two parties characterise national security and position human rights, and then move to comparing their approaches, and identifying the rationale behind each. After locating the deficiencies in China's approach, I will make recommendations for importing some arrangements from its European counterparts.

5.1 NATIONAL SECURITY

[1134] See Andrew J. Nathan, 'China's Challenge', *Journal of Democracy 26(1)*, 2015, 156-170, p. 161. Lee Jones, 'Does China's Belt and Road Initiative Challenge the Liberal, Rules-Based Order?', *Fudan Journal of the Humanities and Social Sciences 13*, 2020, 113-133, p. 124. More about China's political model, see Daniel Bell, *The China Model: Political Meritocracy and the Limits of Democracy*, Princeton: Princeton University Press, 2015, pp. 179-180.

[1135] See Lutgard Lams, 'Examining Strategic Narratives in Chinese Official Discourse under Xi Jinping', *Journal of Chinese Political Science 23*, 2018, 387-411, pp. 395-397. Zhao Suisheng, 'The Ideological Campaign in Xi's China: Rebuilding Regime Legitimacy', *Asian Survey 56(6)*, 2016, 1168-1193, pp. 1174-1176. See also Tang Aijun, 'Ideological Security in the Framework of the Overall National Security Outlook', *Socialism Studies (5)*, 2019, 49-55.

[1136] See Shuresh Moradi, 'The Chinese Approach to the Liberal Concept of Human Rights', *Open Journal of Social Sciences 7(9)*, 2019, 249-258, pp. 253-257. Chen Yujie, 'China's Challenge to the International Human Rights Regime', *New York University Journal of International Law and Politics 51(4)*, 2019, 1179-1222, pp. 1208-1212. Pitman B. Potter, 'China's Challenge to International Human Rights Standards: From Qualified Acceptance to Active Revision', in *Exporting Virtue?: China's International Human Rights Activism in the Age of Xi Jinping*, Vancouver: University of British Columbia Press, 2021, 37-65, pp. 37-45.

[1137] See Fan Jizeng, 'The Success and Failure of Human Rights Law Transplantation', *Nanjing University Law Journal (1)*, 2015, 46-70.（参见范继增："人权法的移植的成功与挫折"，载《南京大学法律评论》2015 年 1 期。）

In terms of a legal definition of national security, neither China nor any European country has formulated a definition that is so clear-cut that it could meet the standards of legal certainty. China provides a comprehensive definition in its National Security Law:

> 'National security' means a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status.[1138]

A definition is normally used to differentiate a legal concept from other concepts with a closely related meaning. In the context of human rights protection, the definition of 'national security' is expected to restrict the capacity of the state to abuse the concept in less acute circumstances. In the above definition, however, this purpose cannot be fulfilled by including such words as 'regime', 'welfare of the people', 'sustainable economic' and 'social development', or by adding a catch-all term like 'other major interests'. These terms are not helpful for delimiting the scope. What makes it worse is that, instead of clarifying the issue, Chinese authorities' policies further extend its scope. The 'holistic national security concept' proposed by the Chinese government covers, for instance, the areas of culture, society, technology and information, as well as ecology and resources.[1139] This conceptualisation of national security consequently appears to be at government authorities' disposal to be abused.

When it comes to European countries, not all of them provide a definition of national security in their domestic law. In my observation, their answers to defining national security can be categorised into three groups: using the term without defining it, defining it in a general sense, and defining it in specific areas. The first group has a legal concept of national security, but lacks a

[1138] Article 2 of the National Security Law, available at http://en.pkulaw.cn/display.aspx?cgid=8e9746e69cf66f9cbdfb&lib=law, last visited 10 February 2021.

[1139] Xinhua, "Xi Jinping Presided over the First Meeting of CNSC, Emphasized the Holistic Security Concept and the Path of National Security with Chinese Characteristics", *Xinhua*, 15 April 2014, retrieved 18 May 2020, from http://www.xinhuanet.com//politics/2014-04/15/c_1110253910.htm. （新华网："习近平主持召开中央国家安全委员会第一次会议强调 坚持总体国家安全观 走中国特色国家安全道路 李克强张德江出席"，新华网 2014 年 4 月 15 日报道，网址 http://www.xinhuanet.com//politics/2014-04/15/c_1110253910.htm，最后访问日期 2020 年 5 月 18 日。）

straightforward definition.[1140] Dutch law, for instance, does not define national security,[1141] but the concept is nevertheless used in Articles 8 and 10 of the country's Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten*), indicating that these services are charged with tasks in the interests of 'national security' (*nationale veiligheid*).[1142] In the context of the Act, the concept mainly contains elements pertaining to a democratic legal order,[1143] and to the security or readiness of the armed forces.[1144] Russia is another country in which the concept is written into legislation without being defined.[1145] For example, Russian law enforcement agencies are allowed to intercept communications following the receipt of information about events endangering 'the state, military, economic, or ecological security' of Russia.[1146]

The second group of countries have defined the concept in law, but their definitions are equally unclear as the definition provided by China's National Security Law. Spain is one of few countries that provides a general definition of national security (*Seguridad Nacional*):

> For the purposes of this law, national security shall be understood as the State action aimed at protecting the liberty, rights and welfare of citizens, ensuring the defence of the State, its principles and constitutional value, and

[1140] See Council of Bars & Law Societies of Europe, 'CCBE Recommendations on the Protection of Fundamental Rights in the Context of "National Security" 2019', *Council of Bars & Law Societies of Europe*, p. 10, retrieved 9 September 2020, from https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Guides_recommendations/EN_SVL_20190329_CCBE-Recommendations-on-the-protection-of-fundamental-rights-in-the-context-of-national-security.pdf.

[1141] See Annex A: National Questionnaire concerning the Netherlands, in Amanda Jacobsen, 'National Security and the Right to Information in Europe - April 2013', *University of Copenhagen*, 2013, retrieved 10 September 2020, from https://www.right2info.org/archived-content/exceptions-to-access/national-security/global-principles.

[1142] Wet op de inlichtingen- en veiligheidsdiensten 2017, available at https://wetten.overheid.nl/BWBR0039896/2020-01-01, last visited 9 September 2020.

[1143] See Article 19(1)(a) of Wet op de inlichtingen- en veiligheidsdiensten 2017, available at https://wetten.overheid.nl/BWBR0039896/2020-01-01, last visited 9 September 2020.

[1144] Article 19(2)(a) of Wet op de inlichtingen- en veiligheidsdiensten 2017, available at https://wetten.overheid.nl/BWBR0039896/2020-01-01, last visited 9 September 2020.

[1145] See Annex A: National Questionnaire concerning Russia, in Amanda Jacobsen, 'National Security and the Right to Information in Europe - April 2013', *University of Copenhagen*, 2013, retrieved 10 September 2020, from https://www.right2info.org/archived-content/exceptions-to-access/national-security/global-principles.

[1146] See Article 7(2)(b) of Federal Law No. 144-FZ on Operational - Search Activities (1995, lastly amended 2004), available at https://www.imolin.org/doc/amlid/RussianFederation_Federal_Law_No_144-FZ_on_Operational_Search_Activities.pdf, last visited 2 October 2020.

> contributing together with the State's allies and partners to guaranteeing international security in compliance with commitments made.[1147]

Several terms in this definition are vague and need further explanation, such as 'liberty, rights and welfare of citizens' and 'principles and constitutional value'. This does not help to reduce the uncertainty in the concept, nor prevent government authorities from overly exploiting the concept on their own terms. The third group of countries, lacking such a comprehensive definition, describe it with regard to specific areas that conventionally involve issues related to national security, such as military defence and intelligence services. But where the contents of national security are addressed for the purposes of a specific security aspect, the description could differ to varying degrees as to the quality of details or, on some occasions, the contents with regard to other aspects. Laws addressing specific security aspects may refer to different definitions. In, for instance, France's Code of Defence (*Code de la Défense*), national security includes protection of the population, integrity of the territory, and the permanence of institutions of the Republic,[1148] while the Internal Security Code (*Code de la Sécurité Intérieure*) lists the nation's fundamental interests:

> (1) National independence, territorial integrity and national defence;
> (2) The major interests of foreign policy, execution of France's European and international commitments, and prevention of any form of foreign interference;
> (3) France's major economic, industrial and scientific interests;
> (4) Prevention of terrorism;
> (5) Prevention of:
> (a) Attacks on the republican form of institutions;

[1147] Article 3 of the National Security Act of Spain (Act 36/2015 of 28 September). The official text reads:

> 'A los efectos de esta ley se entenderá por Seguridad Nacional la acción del Estado dirigida a proteger la libertad, los derechos y bienestar de los ciudadanos, a garantizar la defensa de España y sus principios y valores constitucionales, así como a contribuir junto a nuestros socios y aliados a la seguridad internacional en el cumplimiento de los compromisos asumidos.'

The Act is available at https://www.boe.es/boe/dias/2015/09/29/pdfs/BOE-A-2015-10389.pdf, last visited 2 September 2020. More about the Act, see Departamento De Seguridad Nacional (DSN), 'Executive Summary: Annual Report on National Security 2015', *DSN*, p. 1, retrieved 2 September 2020, from https://www.dsn.gob.es/es/file/975/download?token=YG4D6rCt.

[1148] Article L1111-1 of the Code of Defence of France. The official text reads:

> 'La stratégie de sécurité nationale a pour objet d'identifier l'ensemble des menaces et des risques susceptibles d'affecter la vie de la Nation, notamment en ce qui concerne la protection de la population, l'intégrité du territoire et la permanence des institutions de la République, et de déterminer les réponses que les pouvoirs publics doivent y apporter.'

The law is available at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071307/LEGISCTA000006137700/2015-09-01/#LEGISCTA000006137700, last visited 3 September 2020.

(b) Actions aimed at maintaining or reconstituting groups dissolved in application of Article L. 212-1;

(c) Collective violence likely to seriously undermine public peace;

(6) Prevention of organised crime and delinquency;

(7) Prevention of the proliferation of weapons of mass destruction.[1149]

Germany is also in this third group of countries; in other words, countries whose legislation engages with matters of national security sporadically.[1150] In the German Constitution (*Grundgesetz*), concerning the armed forces, Article 87a suggests national security's meaning in the context of the exceptional use of armed forces at home: 'the existence or free democratic basic order of the Federation or a state'.[1151] A more specific definition is provided in the context of the domestic secret service, whereby national security is regarded as the unity and integrity of territory, proper functioning of the Republic, states and their institutions, and constant application of certain constitutional principles.[1152]

[1149] Article L811-3 of the Internal Security Code of France. The official text reads:

'Pour le seul exercice de leurs missions respectives, les services spécialisés de renseignement peuvent recourir aux techniques mentionnées au titre V du présent livre pour le recueil des renseignements relatifs à la défense et à la promotion des intérêts fondamentaux de la Nation suivants :

1° L'indépendance nationale, l'intégrité du territoire et la défense nationale;

2° Les intérêts majeurs de la politique étrangère, l'exécution des engagements européens et internationaux de la France et la prévention de toute forme d'ingérence étrangère;

3° Les intérêts économiques, industriels et scientifiques majeurs de la France;

4° La prévention du terrorisme;

5° La prévention:

a) Des atteintes à la forme républicaine des institutions;

b) Des actions tendant au maintien ou à la reconstitution de groupements dissous en application de l'article L. 212-1;

c) Des violences collectives de nature à porter gravement atteinte à la paix publique;

6° La prévention de la criminalité et de la délinquance organisées;

7° La prévention de la prolifération des armes de destruction massive.'

The law is available at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000025503132/LEGISCTA000030935034?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF#LEGISCTA000030935034, last visited 3 September 2020.

[1150] See Annex A: National Questionnaire concerning Germany, in Amanda Jacobsen, 'National Security and the Right to Information in Europe - April 2013', *University of Copenhagen*, 2013, p. 2, retrieved 10 September 2020, from https://www.right2info.org/archived-content/exceptions-to-access/national-security/global-principles.

[1151] See Article 87a of the Basic Law for the Federal Republic of Germany, available at https://www.gesetze-im-internet.de/gg/BJNR000010949.html, last visited 5 September 2020. The English version is available at https://www.btg-bestellservice.de/pdf/80201000.pdf, last visited 5 September 2020.

[1152] See paragraph 1 of the Section 4 in the Federal Act on the Protection of the Constitution. The official text reads:

'Im Sinne dieses Gesetzes sind

a) Bestrebungen gegen den Bestand des Bundes oder eines Landes solche politisch bestimmten, ziel- und zweckgerichteten Verhaltensweisen in einem oder für einen Personenzusammenschluß,

At an international level, the ECtHR does not seek to give a comprehensive definition of the concept,[1153] and neither does it consider such a definition imperative in practice.[1154] Giving a clear-cut definition is not necessarily the sole manner of preventing unfettered power from being conferred on state authorities. Indeed, although a considerable number of cases concern allegations relating to national security, the Court has focused on the justification given for the interference, rather than relying on a fixed definition.[1155] This pragmatic approach is taken by most European countries, which explains why they do not indulge in defining the concept.

Nevertheless, I argue that we still need a simplified paradigm of national security in order to clarify what a government is attempting to convey when using this term. This paradigm should not be so exclusive and detailed that it is incapable of embracing change. But neither should it be too broad or vague, thus having little practical effect. Although every paradigm is an abstraction, its usefulness rests in the context, as well as in the purpose of its use.[1156] Given the matters discussed in this thesis, the primary objective of a paradigm for portraying national security is to include those elements that have been commonly accepted, and at the same time to preclude any abrupt developments or, more precisely, any arbitrary and self-interested interpretations. Based on how the concept has been deployed in law and case law by China and Europe, national security is set out in this thesis as 'an objective situation that a State is

der darauf gerichtet ist, die Freiheit des Bundes oder eines Landes von fremder Herrschaft aufzuheben, ihre staatliche Einheit zu beseitigen oder ein zu ihm gehörendes Gebiet abzutrennen;
b) Bestrebungen gegen die Sicherheit des Bundes oder eines Landes solche politisch bestimmten, ziel- und zweckgerichteten Verhaltensweisen in einem oder für einen Personenzusammenschluß, der darauf gerichtet ist, den Bund, Länder oder deren Einrichtungen in ihrer Funktionsfähigkeit erheblich zu beeinträchtigen;
c) Bestrebungen gegen die freiheitliche demokratische Grundordnung solche politisch bestimmten, ziel- und zweckgerichteten Verhaltensweisen in einem oder für einen Personenzusammenschluß, der darauf gerichtet ist, einen der in Absatz 2 genannten Verfassungsgrundsätze zu beseitigen oder außer Geltung zu setzen.'

The Act is available at https://www.gesetze-im-internet.de/bverfschg/__4.html, last visited 10 September 2020.

[1153] See Council of Bars & Law Societies of Europe, 'CCBE Recommendations on the Protection of Fundamental Rights in the Context of "National Security" 2019', *Council of Bars & Law Societies of Europe*, p. 6, retrieved 9 September 2020, from https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Guides_recommendations/EN_SVL_20190329_CCBE-Recommendations-on-the-protection-of-fundamental-rights-in-the-context-of-national-security.pdf.

[1154] See *Esbester v. the United Kingdom*, no. 18601/91, 2 April 1993.

[1155] See European Committee on Crime Problems (CDPC), Report on the Feasibility of Recommendations on Internal Security Services, CM(2003)109-Add. 4 (2003), p. 4, retrieved 10 September 2020, from https://rm.coe.int/09000016805df323.

[1156] See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon and Schuster, 1996, pp. 30-31.

free from internal and external dangers or harms'.[1157] This paradigm, therefore, has two distinct dimensions: one is to eliminate dangers or harms, and the other is to maintain the ability to detect and respond to them.

Comparing the practices of European countries with those of China, we can see that divergences in how countries deal with national security do not lie in the nature of threats, but rather in the extent to which government authorities are sensitive to them. In the case of the first dimension, the elimination of dangers or harms, the threats to national security have not been asserted by government authorities with regard to peculiar circumstances. Instead, governments normally confine these threats to several circumstances: foreign invasions, sedition or subversion against political institutions, secession, espionage, undermining state secrets, and terrorism. Between China and Europe, the scope of the contents may be larger or smaller, while the timing for intervening may be more or less proactive, the responding methods tougher or less tough, and the procedural arrangements easier or less easy for law enforcers, but these are simply differences of scale, of degree, not of kind. The other dimension, being the preservation of a state's capacity to respond to threats, is usually incorporated into the operational efficacy of intelligence services and the armed forces. One of the most notable differences between China and Europe in this regard is the degree of exclusiveness of external supervision.

Some notable differences can be attributed to the basic features of the two regimes: on the one hand, the fundamental values of a democratic regime and, on the other, the performance legitimacy and political monopoly of a socialist regime. China, for example, uses subversion-related offences to target attempts to overthrow the CCP's rule, no matter what means are employed to achieve that replacement, whereas European countries normally target only attempts made by means of violence, or those who seek to undermine democracy. In both cases, however, the nature of the subversion is the same: an attempt to replace the regime in power. The notable difference here is the degree of tolerance each side has for acts of such kind. Perhaps we can best envision this tolerance as a spectrum ranging from refusing any reshuffle whatsoever, at one end, to allowing all kinds of attempts at regime change, at the other. While European countries' tolerance is somewhere between these ends, and closer to the latter than to the former, China is far closer to the former, with quite a low tolerance.

5.2 HUMAN RIGHTS

[1157] Liu Yuejin (ed.), *National Security Studies,* China University of Political Science and Law Press, 2004. p. 51.

Civil and political rights are guaranteed by law both in European countries and in China. Among those rights generally interfered with by the national security discourse are the right to privacy, the freedom of expression, the freedom of assembly and association, the right to liberty, and the right to a fair trial. When it comes to the concrete contents of these rights, there are indeed several discrepancies between Europe and China. In the case, for instance, of the right to liberty, China has no procedural arrangements in place to ensure prompt and automatic judicial control of detention,[1158] or *habeas corpus* reviews.[1159] With regard to the right to a fair trial, meanwhile, the right to remain silent is notably lacking, [1160] and there is still academic controversy as to whether the presumption of innocence and the right against self-incrimination are guaranteed in law.[1161] Another notable difference concerns the right to privacy: China's domestic law does not guarantee a specific right of this nature that the individual may assert against government authorities' interfering in his or her personal life.

Nevertheless, based on its rhetoric and practice at an international human rights level, China has no intention to entirely exclude any of the civil and political rights listed in the ICCPR by resorting to factors derived from 'Chinese characteristics'. Neither has it conveyed any fundamentally different understanding of the major contents of rights. This point is also reflected in the fact that both China and Europe restrict civil and political rights for similar purposes under the heading of national security: surveillance, political dissent, terrorism and state secrets. In this regard, I argue that it is not the substance of rights that China is trying to or dares to contest, but rather the approach to preserving them.

China's course of protecting civil and political rights distinguishes itself from European countries in two respects. The first of these concerns the relationship

---

[1158] See Wang Minyuan, 'Judicial Control over China's Criminal Detention', *Global Law Review (4)*, 2003, 403-407, pp. 403-404.（参见王敏远："中国刑事羁押的司法控制"，载《环球法律评论》2003 年 4 期，第 403-404 页。）

[1159] See Deng Zhihui, '*Habeas Corpus* and Human Rights Protections – From the Perspective of Criminal Litigation', *China Legal Science (4)*, 2004, 10.（参见邓智慧："人身保护令与人权保障——以刑事诉讼为主视角"，载《中国法学》2004 年 4 期。）

[1160] See Jiang Na and Han Rong, 'Definitions of the Right to Remain Silent in China', *Arts and Humanities Open Access Journal 3(2)*, 2019, 106-108, pp. 106-107.

[1161] See Gu Yongzhong, 'An Analysis of the Principle of Presumption of Innocence in the Draft Amendment of Criminal Procedure Law', *Law Science (12)*, 2011, 35-39, pp. 37 & 39.（参见顾永忠："《刑事诉讼法修正案草案》中无罪推定原则的名实辨析"，载《法学》2011 年 12 期，第 37、39 页。）Chen Xuequan, 'Interpretation on the Right against Self-incrimination in China: From a Comparative Perspective', *Journal of Comparative Law (5)*, 2013, 29-40, pp. 35-36.（另见陈学权："比较法视野下我国不被强迫自证其罪之解释"，载《比较法研究》2013 年 5 期，第 35-36 页。）

between civil and political rights, on the one hand, and rights to subsistence and development, on the other. While European countries attach importance to people's welfare and economic development, they do not place much emphasis on these aspects in their human rights discourse. In orthodox doctrine, these elements are not necessarily an essential prerequisite for protecting civil and political rights, which protection rests more often than not with government authorities' abstention rather than with their intervention. Indeed, allowing civil and political rights is believed to contribute to economic growth and people's welfare. The reason for European nations' appreciating of civil and political rights is because these rights are inextricably intertwined with the fundamental values of a democratic regime. China, by contrast, has prioritised the rights to subsistence and development, putting these rights before civil and political rights. The justification for this prioritisation is mainly based on large empirical trends, as China argues that the implementation of human rights demands financial resources. As discussed in Section 4.1.2.1, apart from serving as a separate human rights doctrine from that applied in Western countries, the prioritisation of the rights to subsistence and development reflects the importance of performance legitimacy for the CCP, China's ruling party. In practice, these rights are used to integrate Chinese authorities' economic and social development plans and policies into the language of 'human rights'. This positioning does not get in the way of some progress being made towards China's upholding of international standards for civil and political rights, with this progress mainly being made in ways that contribute to, or at least do not impede, the country's economic growth or the CCP's dominance.

The second way in which China and Europe differ in protecting civil and political rights lies in the basic philosophy behind restrictions on rights. The limitation clauses accommodated in the ECHR play a dual role of legalising government authorities' interference on grounds of public interest, and of deterring abuse of these clauses by state authorities. The experience of the ECtHR shows the latter role to be dominant, as confirmed by the fact that, when before the Court, governments never seek to justify their interference simply by invoking the limitation clause, but instead have to argue their compliance with a series of qualifications prescribed by the clause. In the case of China, as particularly illustrated by Article 51 of the Constitution,[1162] the limitation

[1162] Article 51 of the Constitution Law reads:
'Citizens of the People's Republic of China, in exercising their freedoms and rights, shall not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.'
The English version is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

provisions perform the single role of legalising state authorities' interference, thus indicating that rights are not absolute. In this regard, state authorities appear to be given the 'benefit of the doubt' at the outset because of a lack of elaborate precautions against unfettered power. When justifying interference, China's emphasis has usually been on the public interests: what public interests are at stake, and why are they at stake? Providing sufficient answers to such questions is not normally too complicated for the authorities.

Regarding the philosophy behind restrictions on rights, European countries highlight tensions between individuals and state authorities, while China focuses on those between individuals and the public. This distinction can be attributed to traditions and cultural characteristics. Historically, China has long been a country of collectivism, as well as a country of paternalistic features, underlining the idea that the ruler is not necessarily the adversary of the ruled. Despite this cultural context, I argue that the notable absence of arrangements to avert abuse of power should still be seen as a deficiency for two main reasons. Firstly, the expectation that governing authorities will always act in good faith is simply too idealistic. History has repeatedly taught us that power is open for manipulation by people or blocs for various self-interests. Governing authorities do not deserve the 'benefit of the doubt' unconditionally. Even if they do act in good faith, they may still abuse power at their convenience to achieve an objective that they believe to be optimal for the common good. Secondly, reality does not show a deliberate intention by Chinese authorities to maintain an absence of safeguards against abuse of power to be a 'Chinese characteristic'. Indeed, we have seen people in China advocating increased government transparency, thus illustrating their concerns over the rationale behind government decisions. These concerns are often more conspicuous in the case of those whose personal interests could be affected by the decisions. No intelligent ruler would want to exhaust people's confidence. Chinese authorities' recent practice shows that they are attempting to embrace the principle of rule of law, even though these attempts are a little cautious and could be motivated by their wish to maintain their ruling position.[1163]

In summary, China does not display an understanding radically different from that of Europe with regard to the major contents of civil and political rights. In both cases, the rights regularly involved in national security cases are the same. The differences are in the two sides' positioning on and restricting of civil and political rights. With regard to positioning, the relationship between civil and political rights, on the one hand, and rights to subsistence and development,

[1163] See Zhang Qianfan, 'The Communist Party Leadership and Rule of Law: A Tale of Two Reforms', *Journal of Contemporary China 30(130)*, 2021, 578-595.

on the other, depends on the nature of the regime. As for the philosophy of imposing limitations on rights, China's approach shows a deficiency in its lack of concerns over abuse of power, and I argue that this deficiency should not be justified by invoking 'Chinese characteristics'.

5.3 Matching the European Approach against the Chinese Approach

Based on the preceding comparative analysis, I conclude that China and European countries share basic apprehensions about the contents of national security and the rights which are often interfered with in the name of national security. This convergence means that they are addressing similar problems under the same heading and that this can be used as a foundation for further comparisons. It can also help China to take European countries' arrangements as a reference for addressing similar issues. At the same time, this study found divergences in the degree of sensitivity about the same kinds of national security threats, and that Europe's philosophy on restricting rights is not the same as China's. Do these divergences affect their approaches to reconciling national security and human rights? In this section I will compare the two parties' approaches, and their reasons for these approaches. Finally, I will conclude by indicating the arrangements that have been put in place on the basis of what are regarded as essential features of Europe and China, whereby any radical change to these arrangements will invoke genuine resistance.

5.3.1 European Approach

Before imposing any restriction on human rights, the government must first find legal grounds. The ECtHR has introduced flexible standards on the forms and legal hierarchies of the law, but also evaluates the quality of law, meaning that the provisions invoked by a state must be both accessible and foreseeable. In terms of foreseeability, the provisions need to be clear, such that people can perceive which acts and omissions will make them liable, and what the adverse consequence of their actions will be.[1164] When giving powers to law enforcement agencies, provisions must clarify the scope of discretion and the manner in which it is to be exercised. The law should also outline formalities and provide judicial remedies for the persons concerned.

As for reconciling national security with human rights, Europe takes a two-layered approach to examining proportionality: the broad categorical layer and the case-specific layer. In the first of these layers, the approach establishes the

[1164] See, for instance, *Novikova and Others v. Russia*, nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, §125, ECHR 2016; *Protopapa v. Turkey*, no. 16084/90, § 97, ECHR 2009.

analytical structure for scrutiny, and then, under this structure, develops two models of norms distinguished by their stringency or focus, each with its respective priorities. On the case-specific layer, it seeks mainly to mitigate the established tendency arising from the model applied, i.e. the National Security Priority Model or the Human Rights Priority Model.

5.3.1.1 The decision-making pattern at the broad categorical level

Generally speaking, the scrutiny of the Court unfolds in two tests. The first test, the 'suitability test', involves checking whether the government measure in question is suitable to achieve its intended goal.[1165] It first evaluates the alleged threat to national security, and then the efficacy of the measure. Under the second test, 'the less-intrusive-means test' or 'necessity test', the means adopted by the government must be specifically and narrowly framed to accomplish its alleged purpose.[1166] The Court deems an interference to be disproportional if it finds an alternative measure that places fewer restrictions on the right. There are multiple forms of this test. The Court may seek an alternative that differs from the contested measure either in sort or just in its stringency. The test can also be applied in a procedural or in a substantive sense. In the case of a substantive test, the Court assesses whether the interference in question is unduly restrictive.[1167] On some occasions the Court applies a procedural test by concentrating on how the government explored alternative measures.[1168]

At the outset of this study, I highlighted that the two kinds of interests – national security and human rights – are incommensurable and cannot be quantitatively measured in an attempt to seek a balance. Instead, 'balance' has to be interpreted as underlying the reasoning involved in assigning priorities to one party instead of the other.[1169] In line with this interpretation, the ECtHR has based its reasoning on the nature of governance in Europe – democracy. In a general sense, democracy is the shared value among European countries and contributes, in turn, to preserving fundamental freedoms.[1170] More specifically,

[1165] See Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *International Journal of Constitutional Law 7(3)*, 2009, 468-493, p. 474.
[1166] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, p. 142.
[1167] See Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights', *Human Rights Law Review 15(1)*, 2015, 139-168, p. 150.
[1168] See Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights', *International Journal of Constitutional Law 11(2)*, 2013, 466-490, p. 487.
[1169] See Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', *International Journal of Constitutional Law 7(3)*, 2009, 468-493, p. 473.
[1170] See third paragraph of preamble of the ECHR.

rights in national security cases can be categorised into two groups. The first group comprises rights accommodating essential features of a democratic society; their value thus outweighs, at a general level, the interests of national security. The chief reason for this prioritisation is that once such essential features are set aside, a democratic society would be more nominal than substantial. To date, national security case law has defined these essential features as 'pluralism, tolerance, and broadmindedness'.[1171] The second group encompasses the remaining rights, which are not directly relevant to a democratic society. In these cases, protecting national security will prevail over some human rights obligations as the state is the entity in which democracy is vested, and democracy will only survive if the authorities can preserve the security of the state to some extent.

The above interpretation of 'balance' determines how the ECtHR examines the proportionality of government interference in human rights. Depending on the nature of the right interfered with, I argue that there are two basic models for depicting the Court's examination pattern: the Human Rights Priority Model and the National Security Priority Model. The 'priority' is reflected in the intensity of scrutiny, as well as in its major concerns, and each model therefore shows an identifiable tendency to prioritise national security over human rights, or the other way around.

Decision-making pattern

The first model, the Human Right Priority Model, is at work in cases concerning rights underlying the democratic values of 'pluralism, tolerance, and broadmindedness'. In these cases, the Court intensely scrutinises the contested interference, thus raising the threshold for justifying restrictions of these rights. Under the suitability test, the Court substantively reviews the arguments and evidence provided by the government to examine whether:

- the alleged danger is real; and
- the government measure in question is highly capable of achieving its purpose.

Regarding the less-intrusive-means test, the Court often evaluates the scope of the government measure's implementation or the severity of imposed sanctions. This usually involves the following:

- the Court reviews the substantive merits of the measure rather than deferring it to the respondent government; and

[1171] Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case Law of the European Court of Human Rights', *European Constitutional Law Review 3(3)*, 2007, 367-384, p. 370.

- the Court considers the contested measure's chilling effect on the exercising of human rights.

The intensity of the Court's scrutiny, by contrast, is substantially less under the National Security Priority Model. This model is applied where the right being interfered with by the government is not directly relevant to the essential features of a democratic society. Under the suitability test, the Court is generally ready to accept the government's arguments; as such, therefore, the threshold for the contested measure to survive the test is relatively low and includes situations when:

- the alleged danger to national security is not yet imminent, but only of a potential, cumulative or distant nature; and
- no severe deficiency has been identified in the efficacy of the government measure.

Under the less-intrusive-means test, the Court more often concentrates on tailoring the measure in question rather than on proposing a substitute for it. The decision-making pattern in such situations involves the following:

- the Court either reviews the substantive merits of the measure or scrutinises the national decision-making process; it does not show a clear preference for one over the other; and
- the Court focuses on how to prevent government authorities from abusing their discretion when implementing the contested measure.

Application scenarios

Among the Court's case law, three specific rights usually carry the values of 'pluralism, tolerance, and broadmindedness' of a democratic society: the freedom of speech, the freedom of assembly and association and the right to respect for private life. Although each of these rights has multiple aspects,[1172] not all these aspects carry those key democratic values. There are generally four scenarios in which the Human Rights Priority Model is applied:

[1172] See European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf. European Court of Human Rights, 'Guide sur L'article 10 de la Convention Européenne des Droits de L'homme: Liberté D'expression', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_10_FRA.pdf. European Court of Human Rights, 'Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association', *ECtHR*, 2020, retrieved 7 October 2020, from www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf. See also Pieter van Dijk, Fried van Hoof, Arjen van Rijn, and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (5th edn.), Intersentia, 2018, pp. 770-776, 814-819, 822-829 & 668-669. David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn.), Oxford University Press, 2018, pp. 503-510, 593-596 & 684.

(a) Bans or sanctions on political speech (in conflict with the freedom of speech and the freedom of assembly);

(b) Dissolution of a political organisation (in conflict with the freedom of association);

(c) Bans on imparting classified information on public interests (in conflict with the freedom of speech);

(d) Discharge of individuals from the armed forces on the grounds of homosexuality (in conflict with the right to respect for private life).

Having identified the circumstances falling into the Human Rights Priority Model, we can assign the remaining ones to what can be categorised as National Security Priority Model. The circumstances falling under this model vary, but some typical scenarios can be identified from the Court's case law:

(a) Secret surveillance, including intercepting the contents of communication, intercepting communication data, and intelligence sharing (in conflict with the right to private life);

(b) Personal information stored in secret registers (in conflict with the right to private life);

(c) International travel bans on retired personnel who used to have access to classified information (in conflict with the freedom of movement);

(d) *In camera* trials (in conflict with the right to a public hearing);

(e) Non-disclosure of sensitive material and information supporting the reasonableness of the suspect's apprehension (in conflict with the right against arbitrary arrest and detention);

(f) The use of secret evidence in a trial (in conflict with the equality of arms, the right to an adversarial hearing, the right to a fair trial and the right to prepare a defence);

(g) Prolonged pre-trial detention of terrorist suspects (in conflict with the right to trial within a reasonable time or to be released pending trial);

(h) Delayed access to the lawyer in terrorist cases (in conflict with the right of access to a lawyer).

5.3.1.2 Redressing the systematic tendency at the case-specific level

Due to differences in the intensity of scrutiny and in the major concerns, each model shows an identifiable tendency, based on justifiable reasons, for the Court to lean either towards protecting human rights or towards preserving national security. However, case law shows that the Court does not always consider contested measures to be necessary for protecting national security under the National Security Priority Model; likewise, reviewing the proportionality of a government's interference under the Human Rights Priority Model does not guarantee that the Court's decision will be in favour of

the applicant. The Court's review of a case considers specific features of that case; some case-specific considerations have played a similar role in the Court's decision-making progress: mitigating the identifiable tendency to protect human rights or preserve national security in line with the model adopted.

Under the Human Rights Priority Model, there are two ways in which the Court mitigates the tendency in its decision-making on the suitability test. One is to take a proactive approach to evaluating whether the alleged dangers are real, which is usually applied in cases involving political speeches and parties (scenarios (a) and (b) under this model). The second way is to limit the application scope of the model by specifying the circumstances in which it is appropriate. This method is commonly used in cases concerning the divulgence of information related to public interests, and government policy on homosexuality in the armed forces (scenarios (c) and (d) under this model).

When the Court applies the less-intrusive-means test (necessity test), there is no evidence of any substantial tendency for it to ignore the need to protect national security. This is mainly because the Court has already recognised, under the suitability test, that national security is in danger and that the government consequently needs to take action. In other words, the Court acknowledges that some sort of action is needed to protect national security. Although the case law shows that the Court tends to find a violation of the applicant's rights, this is often due to the severity of the punishment, and not to the mere fact of the applicant being held accountable for his or her acts.

Under the National Security Priority Model, the tendency to be mitigated is the model's tendency to be in favour of the government interference on the grounds of protecting national security. In some cases, however, the Court finds the interference to violate the Convention after examining its suitability. To be specific, the Court may find that the contested measure fails the suitability test if the special features of a case show that:

- the alleged danger has been radically reduced;
- the impugned measure seriously lacks efficacy; or,
- in the case of certain limited rights, the danger is described by the government in only a general way.

I found that when reviewing a specific case, the Court compensates for protecting human rights more often under the heading of the less-intrusive-means test than under the suitability test. As the latter test applies low-intensity scrutiny, the Court often comes to the conclusion that the government interference is an effective way to tackle the alleged threat to state security. Under the less-intrusive-means test, I found that the Court does not always recognise the necessity of protecting national security. In certain cases, specifically when the Court finds that government authorities enjoy too much

leeway to decide how a measure is to be imposed, the government interference will not survive the test. In order to deter the abuse of power, the Court requires the government to reduce the margin of discretion by:

- specifying in domestic law the conditions and procedures of the contested measure;
- tailoring the scope and limiting the duration of the implementation of the measure; or,
- adopting an alternative measure.

5.3.2 China's Approach

The government must have a statutory basis to take action against national security threats. Over the years, China has introduced a series of parliamentary laws and administrative regulations related to the subject of national security, especially since the 2015 National Security Law. Chinese authorities seem in this way to be honouring their commitment to the principle of the rule of law. The government's interference with human rights is subject to some statutory constraints. On some occasions, however, the low quality of the law means it does not provide an effective or practicable curb on the abuse of power. Some provisions are used to legalise the government's actions rather than to circumscribe powers by due process of law. Some are set out in vague and fluid terms, making elements of offences unclear and unforeseeable. With regard to accessibility, the government mainly lays out procedural arrangements and formalities of national security measures in internal manuals and codes of conduct rather than prescribing them in accessible laws or regulations.

China adopts a kindred National Security Priority Model, whereby national security outweighs civil and political rights. Chinese authorities attribute their reasoning for adopting this model to essential features of their regime. As a socialist regime led by the CCP, China has two major concerns: economic growth and the CCP's rule. In my reading, Chinese authorities believe the security of the state to be a prerequisite for economic development, and the CCP's rule to be part of national security. China holds that civil and political rights do not contribute directly to either of these two concerns, or may even endanger them. When, therefore, the Chinese authorities defend their approach on the ground of 'Chinese characteristics', I argue that it is in fact referring to essential features of the regime, rather than to some remote cultural or, for example, historical features.

I will now compare China's approach with the European approach. From the broad categorical perspective, Chinese authorities restrict human rights in order to protect national security under the guidance of two underlying ideas: that it is better to be safe than sorry, and that the individual should not be

allowed to exploit individual rights in a manner that jeopardises the collective's state security. In the case of China, preventing abuse of power is notably absent from these underlying ideas in comparison with the European approach. China does not systematically apply the proportionality analysis when restricting rights. However, Chinese authorities do take account of some elements that resemble analyses performed when Europe applies the National Security Priority Model. By analogy with the suitability test, China requires the contested measure to serve to protect national security. To decide whether this is the case, it applies the following set of not very strict criteria:

- the danger alleged by the government may be a potential, cumulative or remote threat to China's security;
- Chinese courts rarely question the efficacy of the measure taken;
- Chinese courts are usually ready to accept arguments from the law enforcement agencies and intelligence services and do not substantively scrutinise these arguments.

By analogy with the less-intrusive-means test (necessity test), China, at least on paper, arranges different measures according to the urgency of the incidents to be handled. Yet the government tends to select the easiest measure available for achieving its purpose, which is not necessarily the one imposing the fewest restrictions on an individual's rights. This is a deficiency in China's approach compared to the European approach. For the following reasons, China has also not established an effective less-intrusive-means test:

- Its legislation does not specify clear conditions for taking the measure, or at least not clearly enough to significantly reduce the government's discretion. The provisions therefore end up as a legal basis for endorsing the government's actions.
- Chinese courts frequently refrain from looking for a substitute or tailoring the measure. They prefer to defer to law enforcement agencies to take the appropriate action.

Compared with the European approach, China takes an approach that shows a strong tendency towards protecting national security, and does not make much effort to mitigate this tendency on a case-by-case basis. Instead, the government becomes even more protective towards security when a case touches on the sensitive domain. Chinese government authorities are often more proactive and less tolerant in dealing with cases in which an individual or group is seen to:

- challenge the CCP's ruling position;
- undermine communist and nationalist ideologies; or
- disrupt social stability.

5.3.3 Conclusion: 'No-Go' Changes for China

China and European countries have developed approaches that contain both similarities and divergences. As far as the similarities are concerned, China has concluded that the interests of national security outweigh civil and political rights, while Europe's conclusion is that national security interests outweigh some of these rights. They follow the same, or at least an analogous, analytical structure to justify national security measures that are in conflict with human rights. Firstly, they both start by finding legal grounds for their interference with human rights. Secondly, they both have to be convinced that the impugned measures are necessary. The divergences are found in how the two parties unfold their analyses.

Some of the divergences cannot offer lessons for China because some of the underlying norms have been established primarily in light of the nature of the regime. For example, China will not assign extra value, as Europe does under the Human Rights Priority Model, to the freedom of speech, the freedom of assembly and association and the right to respect for private life. Whereas European nations deem the values behind those rights to be intertwined with the nature of a democratic regime, China holds them, together with other civil and political rights, to be only secondary concerns for a socialist regime. Another respect in which China will continue to diverge and stick to its own norms is where governing authorities set the threshold for a case to be categorised as a national security case. China generally adopts a much more proactive strategy in defining, identifying and addressing national security threats, especially those that endanger the CCP's ruling position, challenge dominant political ideologies or disrupt social stability. This strategy corresponds to the major concerns of the governing authorities in this socialist country.

CHAPTER 6

CONCLUSION: HOW TO IMPROVE CHINA'S PRACTICES?

This chapter discusses the arrangements that could be imported as remedies from the European approach. Comparing the approaches adopted by Europe and China shows a highly evident problem in China's approach to be the lack of effective arrangement against the abuse of power. European practices have instructive lessons for China to resolve this issue in terms of checking administrative agencies' discretion. The probable lessons to be learned involve improving the foreseeability of national security law, limiting permissible restrictions of constitutional rights, importing and applying the proportionality analysis to government interference with human rights, and guaranteeing a free flow of information concerning public interests. I will now look at these lessons in more detail.

6.1 IMPROVING FORESEEABILITY

There can be various reasons why a government leaves uncertainties in its legislation, such as a wish to allow some discretion or to create prudence or fear, and other practical concerns. However, government authorities do not automatically enjoy the benefit of the doubt with regard to their people. Redundant uncertainties deliberately left in law often give more room for critics to interpret ambiguities on their own terms. At worst, an isolated incident could be depicted as systematic suppression. Additionally, ambiguities in their mandates do not help to prevent officials from wielding unfettered power. To address these issues, China should, in my reading, start by improving the quality of its laws.

While, on some matters, Chinese legislation provides clear and fixed instructions, the provisions on other matters are vague and fluid. This latter case includes Article 105(2) of the Criminal Law, which deals with the offence of 'inciting subversion of state power'. This offence is caught between state authorities' need to protect the regime from being overthrown and the government's obligation to guarantee freedom of speech. The relevant

provision falls short of foreseeability because it is impossible for a person to estimate whether they are committing the offence by publishing articles or making comments in public. As the line between criticising the government and inciting subversion is very unclear, I argue that a judicial interpretation is needed to illustrate how domestic courts should draw that line in practice.

In terms of the contents of a dissenting voice, I hold that a general argument is in principle more dangerous than a concrete one. An argument could be general as regards its target, such as the CCP as a whole rather than a named official, or the entire socialist system rather than specific implementation of a policy, or all political institutions of its kind rather than those of a specific municipality. Conversely, an argument could be concrete when the author is telling his or her own story. The judicial interpretation should also highlight some aggravating factors that would play a role in determining the court's conclusion, such as where the accused tries to maximise his or her impact in an illegal manner by, for example, organising demonstrations without permission, or running a website devoted to circulating unconfirmed information. Other factors could include the involvement of hostile foreign agencies.

Some other provisions calling for improvements in foreseeability are those in specialised laws providing for measures against threats to national security. These measures include searching, secret surveillance, obtaining technical interface and support from telecom operators, collecting biometric identification information and issuing restraining orders.[1173] The underlying problem in these provisions is that legislators have not imposed effective statutory constraints on the powers described. They trade external checks for operational effectiveness, but the applicable operational norms are prescribed only in internal manuals and policy papers that are not accessible to the public. As a result, those provisions in specialised laws seem to be used more to legalise rather than regulate government action. This approach naturally creates public suspicions about the government, and has a chilling effect on rights and freedoms. In order to curtail government authorities' discretion, legislation should specify conditions for implementing these measures. Without endangering the measure's efficacy, a provision should specify the decision-making formalities the authorities have to follow, the options the law enforcement agencies have at their disposal, and the scope and period for

[1173] Regarding searching, Article 28 of the Counterespionage Law, and Article 50(1) of the Counterterrorism Law. Regarding secret surveillance, Article 15 of the National Intelligence Law, Article 37 of the Counterespionage Law, and Article 45 of the Counterterrorism Law. Regarding getting technical cooperation from telecom operators, Article 18 of the Counterterrorism Law, and Article 28 of the Cybersecurity Law. Regarding collecting biometric identification information, Article 50(1) of the Counterterrorism Law. Regarding issuing restrain orders, Article 53 of the Counterterrorism Law. The laws are available at https://www.pkulaw.com/english/.

implementing each measure. Although the formalities may be simple, the options may be various, and the scope and period for implementation may be flexible, disclosing these due process requirements will make a big difference, even if they are compromised for the sake of efficiency. Judicial remedies are also indispensable. The laws concerned should state that the person involved is entitled to challenge the decision-making process before the court, either in separate proceedings or along with the substantive merits of the case.

Here I take as an example Article 15 of the National Intelligence Law in connection with secret surveillance measures. This states that the 'National intelligence department may, as required by the work, take technical reconnaissance and identity protection measures in accordance with the relevant provisions issued by the state, upon satisfaction of rigorous approval formalities.'[1174] There is clearly a serious lack of foreseeability in Article 15 as the provision, which is of a declarative nature, is far from enough to reduce suspicions against the government, or the chilling effect.

To address this problem, I argue that Article 15 must further clarify at least four circumstances. First, it must include an adequate description of an agency's work that may give rise to a technical intelligence-gathering order. Article 11 of this Law, which currently delineates the scope of such agency's work, reads:

> A national intelligence department shall collect and handle in accordance with the law the intelligence in relation to any act *which is detrimental to the national security and interests* of the People's Republic of China, performed by *an overseas institution, organization or individual*, or by any other person as instigated or funded thereby, or by collusion between domestic and *overseas institutions, organizations or individuals*, so as to provide an intelligence basis or reference for preventing, putting an end to or punishing the aforesaid act[1175] [emphasis added].

However, this article provides a less than adequate description of the kind of acts that are of a nature that would be 'detrimental to national security and interests'. Second, the definition of the categories of people liable to be subject to technical surveillance must be clarified. Is the participation of an 'overseas institution, organisation or individual' an essential condition for giving an order to gather intelligence via technical measures? Third, the technical measures that may be used for gathering intelligence should be enumerated and, when

[1174] The English version is available at http://en.pkulaw.cn/display.aspx?cgid=eae461be038ae511bdfb&lib=law, last visited 7 April 2021.
[1175] The English version is available at http://en.pkulaw.cn/display.aspx?cgid=eae461be038ae511bdfb&lib=law, last visited 7 April 2021.

applicable, a clear limit set on the permitted duration of each measure. Such measures may include intercepting communications, electronic monitoring, postal inspection and secret photography.[1176] If measures are regulated by other statutes, the legislation should name and locate the specific provisions. Fourth, the legislation should outline the procedure to be followed for obtaining approval for certain measures.

Legislators may also counter the chilling effect created by secret surveillance by detailing the following:

- the procedure to be followed for using and storing information gathered;
- the precautions to be taken when sharing intelligence with other government agencies;
- the circumstances in which recordings may or must be erased or destroyed.

The secret surveillance provided for in Article 15 of the National Intelligence Law has its counterparts in the Counterespionage Law and the Counterterrorism Law.[1177] These share the same problems of using vague words and excluding external supervision. When it comes to their 'arsenal' of national security measures, Chinese authorities are cautious about what information can be disclosed. This example shows that the foreseeability of the national security legislation can be improved without compromising the government's operational effectiveness.

6.2 LIMITING PERMISSIBLE LIMITATIONS

China's approach conspicuously neglects the risk that government authorities may impose unjustified restraints on human rights in the name of public interests or in the name of the rights and freedoms of others. The legal basis for this omission can be found in Article 51 of the Constitution: 'Citizens of the People's Republic of China, in exercising their freedoms and rights, shall not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.'[1178] This establishes a principle that restrictions on rights are legitimate insofar as exercising these rights may

[1176] See Lang Sheng and Wang Shangxin, *Interpretation of the National Security Law of the People's Republic of China*, Law Press, 1993, p. 72.（参见郎胜、王尚新：《中华人民共和国国家安全法释义》，法律出版社，1993 年，第 72 页。）Lang Sheng, *Analysis on Practical Issues of People's Police Law*, China Democracy Legal System Publishing House, 1995, p. 80.（郎胜：《中华人民共和国人民警察法实用问题解析》，中国民主法制出版社，1995 年，第 80 页。）

[1177] The English version of the laws are available at http://en.pkulaw.cn/.

[1178] The English version of the Constitution of the People's Republic of China (2018 Amendment) is available at http://www.lawinfochina.com/display.aspx?id=27574&lib=law&SearchKeyword=&SearchCKeyword=, last visited 10 February 2021.

impair public interests or rights and freedoms of others. Article 51, as the general limitation article, omits any requirement for these restrictions to be necessary. To remedy this matter, an amendment in the form of a second paragraph may be added to Article 51, to the effect that: 'Any restrictions on Constitutional freedoms and rights shall be necessary for protecting the interests mentioned above, or the lawful freedoms and rights of other citizens.'

China's regimes for restricting rights also run into another problem: the law at a lower level in the legal hierarchy often imposes more restrictions on constitutional rights than the one at the higher level, from which the former derives its authority.[1179] To address this problem, I argue that another two criteria should be added to the regimes. The first of these is to stipulate that any restriction on constitutional rights must not impair the very essence of the rights. This is because once the substance of a right is deterred to null, especially by regulations and policy papers, the fundamental right exists only on paper but not in practice. The other legislative solution is to establish the principle of legal reservation (*Gesetzesvorbehalt*), whereby any exercising of freedoms and rights guaranteed by the Constitution shall be restricted only in accordance with the law passed by the NPC or its Standing Committee. To avoid these criteria becoming mere lip-service, a constitutional review or a cognate form of review is needed. This mechanism does not have to be delivered by establishing a Constitutional Court. Instead, the key point is to ensure that individuals have access to courts or institutions where they are entitled to challenge the legitimacy of regulations and policy papers.

6.3 IMPORTING THE PROPORTIONALITY ANALYSIS

Chinese authorities tend to be satisfied by the formal legality of the government's national security measures. In the logic of the Chinese state, a lack of legal authority is unacceptable and therefore illegal. Abuses of discretion, however, get scant attention. At a case level, the proportionality of an impugned measure is not a decisive factor for the executive's decision-making or the court's judicial review. The principle of proportionality represents a substantive control over the government's actions and policies. China's National Security Law does not preclude substantive control over decision-making, which may be subject to political control by the CCP, internal control

[1179] See Xia Xinhua and Wu Qingshan, 'The Reconstruction of Restrictive Clauses of the Constitutional Right in China – Take the Article 51 of the Constitution as the Centre', *Journal of Xiangtan University (Philosophy and Social Sciences) (1)*, 2017, 25-29, p. 27.（参见夏新华、吴青山："我国宪法权利限制性条款的重构——以宪法第 51 条为中心"，载《湘潭大学学报（哲学社会科学版）》2017 年 7 期，第 27 页。）

by the bureaucratic hierarchy and judicial review by the court.[1180] The problem is that these controls do not amount to a systematic and coherent analytical structure. The fact that substantive control is already present in the system means that importing the proportionality analysis would not invoke resistance attributed to China's local circumstances. Instead, it would provide a formula for substantive review while simultaneously preserving the flexibility that would allow adaptation to China's particular circumstances.[1181] I will now outline how the Chinese government could include the principle of proportionality in its national security law system.

First, China needs to introduce the necessity test into its approach. Law enforcement agencies, in particular public security organs and state security organs,[1182] should be asked to evaluate all measures available for dealing with national security threats. The agencies concerned should tailor their actions to the specific needs of a case, particularly regarding the scope of implementation and the duration of the measure. The necessity test prevents government authorities from taking action in an easy way that results in excessive restrictions being imposed on human rights. Chinese domestic courts should incorporate the necessity test into their judicial review of national security cases. Drawing from the lessons of the European approach, judges should scrutinise whether the government is abusing its discretion. This may include the court assessing the intrusiveness of the measure in question as part of its evaluation of the substantive merits of the case. The court may also carry out the review by probing into whether the government completed certain formalities for tailoring the measure before putting it into action.

Second, China needs to work, on the case-specific level, to mitigate the tendency in favour of protecting national security. From a broad categorical perspective, the National Security Priority Approach adopted by China is justified by the essential features of the regime. When reviewing a specific case, however, domestic courts ought not to turn a blind eye to context and specific circumstances. A modest expansion of judicial powers in national security cases will compel the government to drop its sometimes overly proactive approach when deciding whether to interfere with human rights. The domestic court should hold a government measure to be disproportional when, for example:

[1180] See Huang Chengyi and David S. Law, 'Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China', in Francesca Bignami and David Zaring (eds.), *Comparative Law and Regulation Understanding the Global Regulatory Process*, Edward Elgar, 2016, 305-334, p. 305.
[1181] See Huang Chengyi and David S. Law, 'Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China', in Francesca Bignami, and David Zaring (eds.), *Comparative Law and Regulation Understanding the Global Regulatory Process*, Edward Elgar, 2016, 305-334, p. 329.
[1182] In China, 'public security organs' include the Ministry of Public Security, and its local levels branches. 'State security organs' refer to the Ministry of State, and its local levels branches.

- the government has imposed the same kind of measure to deal with both a real danger and a threat still in its infancy;
- the impugned measure seriously lacks efficacy;
- the warrant authorising the contested measure is vague and unclear;
- the law enforcement agencies have not evaluated potential alternatives during the decision-making process, or the court finds the evaluation to be completely ineffective;
- a much less intrusive measure is clearly available, or the scope of interference can be considerably narrowed down, but law enforcement agencies cannot give any reasons for rejecting such a measure.

Regrettably, Chinese authorities may still give greater weight to national security interests, and remain intolerant when it comes to: (a) challenging the CCP's ruling position, (b) undermining communist and nationalist ideologies, and (c) disrupting social stability. In these cases, the government is inclined to nip threats in the bud and not allow external scrutiny of its decisions. The tendency in favour of protecting national security is attributable to the case being closely connected to the nature of the regime. In the near future, therefore, executive agencies might continue to focus on an action's formal legality, without evaluating its proportionality, and domestic courts might continue to be unable to exercise any substantive control over the government's decisions. Be that as it may, and in accordance with the principle of *nulla poena sine lege*, government authorities should at least be required to clearly demonstrate the elements of offences. Those elements can be pinpointed by statutes, judicial interpretations and case law, with their primary purpose being to mark the perimeters of what government authorities consider to be intolerable and to reduce the chilling effect.

6.4 Guaranteeing A Free Flow of Information Concerning Public Interests

Open government and a free flow of information contribute to gaining people's trust instead of undermining it.[1183] In my observation, people are better at dealing with the truth than with their imagination. By ensuring that the public gets access to information they are concerned about, the government is more able to debunk conspiracy theories, dismiss some criticisms and reduce political opponents' credibility. Embarrassment to authorities may be caused if a government official follows standard procedures under inappropriate

[1183] See G. Shabbir Cheema, 'Building Trust in Government: An Introduction', in G. Shabbir Cheema and Vesselin Popovski (eds.), *Building Trust in Government: Innovations in Governance Reform in Asia*, United Nations University Press, 2010, 1-21, p. 4.

circumstances, with unintended consequences, or by accident. In the long term, it is not wise for a government to seek to protect itself from embarrassment every time by simply classifying the information concerned. Owing to the differing nature of their regimes, China does not attach such importance to the freedom of expression as European nations do. Nevertheless, circulating information that may embarrass governing authorities does not necessarily endanger China's national security. The motives behind government interference with the freedom of expression would seem very doubtful when the impugned information is about misconduct and abuse of power by the government or its officials.

In the case of China, there are two ways in which embarrassing information may endanger national security. First, a scandal, once made public, could cause severe damage to the regime's reputation. It may spark violent riots, or could be taken advantage of by internal and external opposition. This sort of information may reveal the exact role played by the government, and therefore its accountability, in, for example, pollution accidents and public health outbreaks. It can also be related to political events and power struggles. Second, such information can disclose details of law enforcement agencies' operations, procedure manuals and common practices, all of which may impair their functioning and efficacy.

However, excessive government secrecy often raises concerns over the suppressing of dissent, with two kinds of criminal offences frequently being associated with excessive secrecy of information on government misconduct. First, professional and citizen journalists sometimes find themselves committing offences related to state secrets when investigating and reporting on matters of public interest, and can end up being charged with gathering, possessing or imparting state secrets.[1184] Second, and more frequently, Chinese authorities may hold a person accountable for circulating misinformation. Without effective access to official documents, people experiencing government misconduct can only tell stories and make assumptions based on their own experience. Intentionally or otherwise, these speculations could encompass inaccurate information, with the result that, in the gravest case, individuals may be accused of inciting subversion of state power,[1185] advocating terrorism or

[1184] See Articles 111 and 282 of the Criminal Law. The English version is available at https://www.pkulaw.com/en_law/39c1b78830b970eabdfb.html, last visited 16 April 2021. Article 48 of the State Secrets Law. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=64aaf242e65550f4bdfb&lib=law, last visited 19 March 2021. Article 61 of the Counterespionage Law. The English version is available at https://www.pkulaw.com/en_law/6329ea125eca430bbdfb.html, last visited 25 July 2023.
[1185] Article 105(2) of the Criminal Law.

extremism[1186] or inciting secession.[1187] Less severe charges include the broadly defined offence of picking quarrels and provoking trouble, [1188] or the administrative offence of spreading rumours.[1189] A person wanting to get the attention of the general public in China is therefore exposed to the additional risk of sanctions.

When it comes to classifying embarrassing information, there is a gap between the natural tendency of bureaucrats to cover up malfeasance and the real need to preserve national security. Officials have a strong incentive to portray themselves favourably and to remain in power.[1190] Yet, in the long term, by stifling criticism and supervision by the public, the government loses credibility and encourages conspiracy theories. Therefore, a pragmatic solution is to deal with embarrassing information in a way that is proportional to the threat it may pose. Based on the findings of this study, I recommend that information on government misconduct should not be classified unless it poses threats to national security. Moreover, the government should not impede the free flow of that sort of information unless it is seriously misleading.

Governed by this general rule, some specific norms for a proportionality analysis then need to be established on a case-by-case basis. Firstly, the government must be required to substantiate its claims by showing how the information and remarks concerned, once circulated, would pose a danger to national security. A one-size-fits-all or stereotyped account is no longer justifiable under a proportionality analysis. Instead, the government should be expected to specify the grounds supporting its allegations about the danger to national security in more detail, with the alleged danger being explained through an individual and case-specific assessment. Secondly, with regard to excessive secrecy, government authorities should tailor the scope of confidentiality, classifying only the documents or parts of documents that genuinely threaten the security of the state. Moreover, this period of secrecy should not be indefinite. The confidential information should be able to be disclosed after the alleged danger becomes evidently too slight or no longer applicable. This can be evaluated at regular intervals or at stakeholders' request. In the case of biased remarks or assumptions made in a person's own stories, a

[1186] Article 120(III) of the Criminal Law.
[1187] Article 103(2) of the Criminal Law.
[1188] Article 293 of the Criminal Law.
[1189] Article 25 of the Public Security Administration Punishments Law. The English version is available at http://en.pkulaw.cn/display.aspx?cgid=1095cd22312af2f3bdfb&lib=law, last visited 16 April 2021.
[1190] See Human Rights in China (HRIC), 'State Secrets: China's Legal Labyrinth', *HRIC*, 2013, p. 37, retrieved 24 May 2020, from https://www.hrichina.org/en/publications/hric-report/state-secrets-chinas-legal-labyrinth.

relatively small degree of inaccuracy does not necessarily mean that the remarks or story can be defined as rumours, and thus not be protected by law.

CONCLUSION

'Chinese characteristics' should not be used as a convenient excuse for rejecting any international oversight of China's human rights records or for rejecting instructive lessons from Europe. The term is usually attached to appeals to use local resources to respond to local needs in a manner reflecting the culture of the nation, the moral law of the public and the custom of the people. Although Chinese authorities often compare the country's modernisation approach to 'crossing the river by groping for the stones',[1191] crossing a river in that way would be inadvisable while there is a bridge available. 'Chinese characteristics' should not, therefore, serve as an obstacle preventing the country from profiting from others' example.

In this study I have compared the approaches adopted by Europe and China to reconciling national security with human rights. With respect to the reasons for the two sides' differing approaches, I have confined my attention to immediate but major causes rather than probing too far into deep-seated traditions. Based on this premise, I conclude that their approaches rest on the same rationale: the essential features of the regime. I also find that both Europe and China apply low-intensity scrutiny to justifications given in national security cases, which I summarise as the National Security Priority Model. Under this model, the government takes action against national security threats that are potential, distant and cumulative. Substantive control, both internal and external, focuses mainly on preventing the impugned power from being abused.

I do not suggest that China should import wholesale the political and legal institutions of Europe. Instead, the practical objective is to draw lessons that would not invoke genuine resistance in China's existing political system. The lessons I suggest are therefore subject to three conditions: (a) they are intended to address deficiencies, not just to reduce divergences between the approaches of China and Europe; (b) the identified deficiencies are not directly attributed to essential features of the socialist regime; and (c) arrangements and practice from Europe can remedy those deficiencies.

The identified deficiencies in China's approach to interfering with human rights in national security cases include a lack of foreseeability of law, a lack of control over abuse of power, a porous patchwork of a proportionality analysis,

[1191] See Peter Nolan, 'The China Puzzle: "Touching Stones to Cross the River"', *Challenge 37(1)*, 1994, 25-33.

and low transparency of information, especially information that could embarrass government authorities. In response, I propose that China should work on the following four aspects: (a) improving foreseeability; (b) limiting permissible limitations; (c) importing the proportionality analysis; and (d) guaranteeing a free flow of information on matters of public interest.

Finally, I would like to end by quoting from an article, with some modifications. Insofar as the states that have weak democratic institutions are concerned, judiciary and public authorities are still poorly exposed to the concept of proportionality and its ramifications for the exercise of state power. Perception that any state action is in itself legitimate insofar as it has a basis in law still runs deep in those societies. As a result, the 'rule of law' often turns into 'rule by law'.[1192]

[1192] Dragan Golubovic, 'Freedom of Association in the Case Law of the European Court of Human Rights', *The International Journal of Human Rights 17(7-8)*, 2013, 758-771, p. 765.

SAMENVATTING

Het onderhavige proefschrift onderzoekt de relatie tussen nationale veiligheid en mensenrechten. Het onderzoekt hoe nationale veiligheid en mensenrechten met elkaar in verband staan in Europa en China, en hoe beide grootmachten proberen om de ene te beschermen zonder de andere te schaden. Door de twee benaderingen met elkaar te vergelijken, beoogt het proefschrift inzicht te bieden in de legitimiteit van de aanname dat China de voorkeur geeft aan veiligheid, terwijl Europese landen kiezen voor vrijheid.

Het proefschrift kan worden opgedeeld in drie hoofdonderdelen, aangezien het een vergelijkende studie betreft: het gedeelte over Europa, het gedeelte over China, en het vergelijkende deel. Na het inleidende hoofdstuk analyseert het proefschrift hoe de overheidsbeperking van mensenrechten wordt gerechtvaardigd door vanuit zorg voor nationale veiligheid te redeneren, zowel onder het EVRM (hoofdstukken 2 en 3), als in China (hoofdstuk 4). Vervolgens vergelijkt het proefschrift de benaderingen (hoofdstuk 5) en zet een aantal verbeteringen uiteen die China kan overnemen uit de praktijken van Europa (hoofdstuk 6).

Het inleidende hoofdstuk behandelt onder andere de definitie van 'nationale veiligheid', een begrip dat eerder ambigu is dan expliciet. Desalniettemin poogt het proefschrift te verduidelijken wat de overheid normaal gesproken bedoelt wanneer zij de term 'nationale veiligheid' gebruikt. Het wordt zodanig gedefinieerd als "een objectieve situatie waarin een staat verkeert, wanneer het vrij is van interne en externe bedreigingen en risico's". In deze context beschermen staatsautoriteiten doorgaans nationale veiligheid door geïdentificeerde bedreigingen te elimineren, of door het opzetten en/of het verbeteren van de mogelijkheden om deze bedreigingen het hoofd te bieden.

Het gedeelte over Europa heeft als doel om de balans tussen nationale veiligheid en mensenrechten in de benadering van het EHRM uiteen te zetten. Door eerst te focussen op de tekst van het EVRM en de interpretatieleer biedt het een volledig beeld van nationale veiligheid in het Verdrag – inclusief de oorspronkelijke denkbeelden over het concept, en de manier waarop het EHRM het over het algemeen toepast. Het valt op dat de beperkingsclausules – waarin nationale veiligheid als een legitieme reden voor beperking van mensenrechten wordt erkend – dienen om autoriteiten ervan te weerhouden misbruik te

maken van hun discretionaire bevoegdheid bij de implementatie van mensenrechten.

Vervolgens bestudeert dit deel de relevante jurisprudentie, waarbij de impact van nationale veiligheid op mensenrechten wordt geanalyseerd met betrekking tot de juridische grondslag van de mensenrechtenbeperking, de omvang, de middelen, en de mate van impact. Het proefschrift voert een diepgaande analyse uit van de mate van impact, aangezien dit het onderdeel is waar het EHRM de meeste inspanningen levert om een balans tussen nationale veiligheid en mensenrechten vast te stellen. De bevindingen in dit deel suggereren dat het Hof de proportionaliteit van overheidsinmenging in mensenrechten op een consistente en voorspelbare manier beoordeelt wanneer we het besluitvormingsproces lezen vanuit twee verschillende maar nauw verwante perspectieven: het brede categorische perspectief en het zaakspecifieke perspectief.

Vanuit het brede categorische perspectief stelt het proefschrift voor dat er twee modellen zijn, namelijk het Mensenrechtenprioriteitsmodel en het Nationale Veiligheidsprioriteitsmodel. Deze twee modellen verschillen waar het betreft de toetsingsintensiteit en belangrijkste aandachtspunten van de beoordeling van het Hof. De reden voor de ontwikkeling van deze twee verschillende modellen ligt in de aard van de betrokken rechten. Sommige rechten worden geïdentificeerd als basis voor de democratische waarden 'pluralisme, tolerantie en ruimdenkendheid', waarden die worden gezien als essentiële kenmerken van het Europese systeem. Daarom zal het Hof intensiever toetsen in zaken die deze rechten betreffen. Andere rechten worden niet beschouwd als direct verbonden met de voorgenoemde waarden, wat ertoe leidt dat nationale veiligheid zwaarder weegt. Concreet betekent dit dat het Hof vaak soepelere normen hanteert bij het beoordelen van deze kwesties. Vanuit het zaakspecifieke perspectief probeert het Hof de tendens van elk model om voorrang te geven aan mensenrechten of nationale veiligheid te corrigeren, door de concrete feiten en specifieke omstandigheden van elke zaak mee te nemen in de beoordeling.

Het gedeelte over China behandelt eerst de vraag hoe China de betekenis van zowel nationale veiligheid als mensenrechten interpreteert, en in hoeverre 'Chinese kenmerken' een rol spelen bij deze interpretaties. Wat betreft nationale veiligheid constateert het proefschrift dat de overheidsautoriteiten vooral gevoelig zijn voor drie soorten nationale veiligheidsbedreigingen: de ondermijning van de heersende positie van de CCP, de betwisting van dominante politieke ideologieën, en in sommige gevallen het veroorzaken van grootschalige maatschappelijke onrust. 'Gevoeligheid' betekent in deze context dat de overheidsautoriteiten minder tolerant zijn wanneer het incidenten

betreft die zij in deze categorieën plaatsen. Wat betreft mensenrechten betoogt het proefschrift dat het restrictieve regime van rechten in China zich meer richt op het beschermen van het algemeen belang en het voorkomen van misbruik van rechten door individuen, dan op het tegengaan van onnodige overheidsinmenging in mensenrechten.

Vervolgens betoogt dit deel dat China vanuit het brede categorische perspectief een aanpak hanteert waarbij nationale veiligheid prioriteit heeft, boven burgerlijke en politieke rechten. Dit is het gevolg van de essentiële kenmerken van het CCP-regime. Op basis van deze bevinding gaat het proefschrift over tot een analyse van de impact die het principe van nationale veiligheid heeft op de bescherming van mensenrechten in China, door in te gaan op de omvang, de middelen, en de mate van de impact. Wat betreft de mate van de impact stelt het proefschrift vast dat China vanuit praktische overwegingen genoodzaakt is om het proportionaliteitsbeginsel te importeren. Het beginsel, in combinatie met de juridische analytische structuur ervan, kan namelijk voorkomen dat mensenrechten systematisch teniet worden gedaan door de prioritering van nationale veiligheid. Hoewel deze prioritering verdedigbaar is in de context van China, is het problematisch te noemen dat China zich vooral richt op de formele wettigheid van de ingrepen die mensenrechten beperken in naam van nationale veiligheid, en niet voldoende aandacht besteedt aan het inhoudelijk toetsen van de ingrepen. Het proefschrift merkt op dat het toepassen van de proportionaliteitsanalyse in de rechterlijke en quasi-rechterlijke toetsing, zelfs wanneer deze wordt toegepast met een lage intensiteit, de bescherming van mensenrechten in China zal vergroten.

Het laatste deel vergelijkt de benaderingen die Europa en China hebben gekozen en zet enkele waardevolle lessen voor China uiteen. Zowel Europa als China hebben te maken met een steeds omvangrijkere overheidsinmenging die mensenrechten beperkt in naam van nationale veiligheid. Bij het vergelijken van de praktijken van Europese landen met die van China liggen de verschillen in hoe landen omgaan met nationale veiligheid niet zozeer in de aard van de bedreigingen, maar in de mate waarin overheidsautoriteiten gevoelig zijn voor deze bedreigingen. Enkele opmerkelijke verschillen kunnen worden toegeschreven aan de basiskenmerken van de twee regimes, namelijk enerzijds de fundamentele waarden van een democratisch regime (Europa) en anderzijds de prestatielegitimiteit en politieke monopolie van een socialistisch regime (China).

Wat betreft mensenrechten vertoont China geen radicaal andere opvatting dan Europa over veel van de inhoud van burgerlijke en politieke rechten. De verschillen liggen in hun positionering ten opzichte van, en hun beperking van, burgerlijke en politieke rechten. Wat betreft het opleggen van beperkingen aan

rechten schiet de benadering van China tekort, gezien het zich weinig zorgen maakt over machtsmisbruik. Dit tekort mag niet worden gerechtvaardigd door 'Chinese kenmerken'.

Wanneer het aankomt op het treffen van een balans tussen nationale veiligheid en mensenrechten, komen Europa en China tot vergelijkbare conclusies. Het proefschrift constateert dat hun benaderingen gebaseerd zijn op dezelfde rationele grondslag: de essentiële kenmerken van hun respectievelijke regimes. Beide partijen passen in sommige zaken een laag-intensieve toetsing toe op beperkingen op grond van nationale veiligheid, wat samengevat wordt als het Nationale Veiligheidsprioriteitsmodel. Onder deze benadering treedt de overheid op tegen potentiële, verafgelegen, en cumulatieve bedreigingen die de nationale veiligheid raken. De inhoudelijke toets van de beperkingen op mensenrechten, zowel intern als extern, richt zich voornamelijk op het voorkomen van machtsmisbruik.

Er zijn echter verschillen te vinden in hoe de twee partijen hun benaderingen uitwerken. Ten eerste past China geen systematische proportionaliteitsanalyse toe bij het beperken van rechten. Ten tweede heeft het geen effectieve test voor minder ingrijpende middelen vastgesteld. Ten derde hanteert China een benadering die duidelijk de voorkeur geeft aan de bescherming van nationale veiligheid, maar maakt niet veel inspanningen om deze prioritering te matigen aan de hand van de specifieke karakteristieken van elke casus.

Door de benaderingen die Europa en China hebben gekozen te vergelijken stelt het proefschrift dat er een evident gebrek is in de benadering van China, gezien een effectieve regeling tegen machtsmisbruik ontbreekt. In deze context stelt het proefschrift voor dat China werkt aan de volgende vier aspecten: (a) het verbeteren van de voorzienbaarheid; (b) het beperken van de toegestane beperkingen; (c) het toepassen van de proportionaliteitsanalyse; en (d) het garanderen van een vrije stroom van informatie waar het zaken betreft die publieke belangen raken.

BIBLIOGRAPHY

Agamben, Giorgio. *The State of Exception*. Translated by Kevin Attell. Chicago: University of Chicago Press, 2005.

Alati, Daniel, Ronnie Dennis, Ryan Goss, Alecia Johns, Esther Kuforiji, Paul Troop, and Keiran Hardy. "The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey." *Oxford Pro Bono Publico*, 2011. Accessed March 16, 2018. http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2011/10/2011-Secret-Evidence.pdf.

Alexy, Robert. "Constitutional Rights and Proportionality." *Journal for Constitutional Theory and Philosophy of Law*, no. 22 (2014): 51-65.

Alexy, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers. Oxford: Oxford University Press, 2010.

Alfreðsson, Guðmundur, and Asbjørn Eide, eds. *The Universal Declaration of Human Rights: A Common Standard of Achievement*. The Hague: Martinus Nijhoff Publishers, 1999.

Al Jazeera. "China's TV Confessions." *Al Jazeera*, February 21, 2019. https://www.aljazeera.com/program/101-east/2019/2/21/chinas-tv-confessions.

Al Jazeera. "More Countries Criticise China at UN for Repression of Uighurs." *Al Jazeera*. Accessed October 22, 2021. https://www.aljazeera.com/news/2021/10/22/43-countries-criticize-china-at-un-for-repression-of-uyghurs.

Al Jazeera. "Xinjiang: The Story China Wants the World to Forget." *Al Jazeera*, September 7, 2019. from https://www.aljazeera.com/programmes/listeningpost/2019/09/xinjiang-story-china-world-forget-190907080927464.html.

Alter, Karen J. "Delegation to International Courts and the Limits of Re-contracting Political Power." In *Delegation and Agency in International Organizations*, edited by Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney, 312-338. Cambridge: Cambridge University Press, 2006.

Aly, Anne, Elisabeth Taylor, and Saul Karnovsky. "Moral Disengagement and Building Resilience to Violent Extremism: An Education Intervention." *Studies in Conflict & Terrorism 37*, no. 4 (2014): 369-385.

Amnesty International. *Briefing on China's Criminal Procedure Law: In Line with International Standards?* Amnesty International, 2013. Accessed May 20, 2020. https://www.amnesty.org/download/Documents/12000/asa170212013en.pdf.

Amnesty International. "China: Abolition of Labour Camps must Lead to Wider Detention Reform." *Amnesty International*, November 15, 2013. https://www.amnesty.org/en/latest/news/2013/11/china-re-education-through-labour-camps/.

Amnesty International. *China: Human Rights Violations in the Name of "National Security": Amnesty International Submission for the UN Universal Periodic Review,*

31st Session of the UPR Working Group. Amnesty International, 2018. Updated March 1, 2018. https://www.amnesty.org/en/documents/asa17/8373/2018/en/.

Amnesty International. "China: Scrap Foreign NGO Law Aimed at Choking Civil Society." *Amnesty International*, April 28, 2016. https://www.amnesty.org/en/latest/news/2016/04/chinascrap-foreign-ngo-law-aimed-at-choking-civil-society/.

Amnesty International. *China: Submission to the NPC Standing Committee's Legislative Affairs Commission on the Criminal Law Amendments (9) (Second Draft).* Amnesty International, 2015. Updated August 5, 2015. https://www.amnesty.org/en/documents/asa17/2205/2015/en/.

Amnesty International. "China: Trial of Lawyer Wang Quanzhang a 'Cruel Charade'." *Amnesty International*, December 26, 2018. https://www.amnesty.org/en/latest/news/2018/12/china-lawyer-wang-quanzhang-trial-cruel-charade/.

Amnesty International. *Left in the Dark: The Use of Secret Evidence in the United Kingdom*. Amnesty International, 2012. Accessed January 24, 2020. https://www.amnesty.org/en/documents/EUR45/014/2012/en/.

Anderson, Benedict. *Imagined Communities: Reflections on The Origin and Spread of Nationalism*. London: Verso, 1991.

Angelis, Theo J., and Jonathan H. Harrison. "History and Importance of the Rule of Law." *World Justice Project*, 2003. Accessed February 10, 2018. https://worldjusticeproject.org/our-work/publications/working-papers/history-and-importance-rule-law.

Arnardóttir, Oddný Mjöll. "Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights." *The European Journal of International Law 28*, no. 3 (2017): 819-843.

Attinà, Fulvio. "Traditional Security Issues." In *China, The European Union, and The International Politics of Global Governance*, edited by Jianwei Wang and Weiqing Song, 175-193. Hampshire: Palgrave Macmillan, 2016.

Aydın-Aitchison, Andy, and Ceren Mermutluoğlu. "Mapping Human Rights to Democratic Policing through the ECHR." *Security and Human Rights 30*, nos. 1-4 (2019): 72-99.

Bajpaiformat, Kanti. "The Idea of Human Security." *International Studies 40*, no. 3 (2003): 195-295.

Ban, Wenzhan. "2019 National Human Rights Legislation Analysis Report." In *Annual Report on China's Human Rights No.10 (2020)*, edited by Junru Li. Beijing: Social Sciences Academic Press, 2020.

Ban, Wenzhan. "Human Rights Legislation Analysis Report." In *Annual Report on China's Human Rights No.1 (2011)*, edited by Junru Li, 465-484. Beijing: Social Sciences Academic Press, 2011.

Bates, Ed. "A 'Public Emergency Threatening the Life of the Nation'? The United Kingdom's Derogation from the European Convention on Human Rights of 18 December 2001 and the 'A' Case." *The British Year Book of International Law 76*, no. 1 (2006): 245-336.

Bauch, Jeffrey A. "The Margin of Appreciation and Jurisprudence of the European Court of Human Rights." *Columbia Journal of European Law,* no. 11 (2004): 113-150.

BBC. "China Ends Forced Labour for Sex Workers." *BBC*, December 28, 2019. https://www.bbc.com/news/world-asia-china-50934305.

BBC. "China Uighurs: Xinjiang Legalises 'Re-education' Camps." *BBC*, October 10, 2018. https://www.bbc.com/news/world-asia-45812419?ocid=socialflow_twitter.

BBC. "Guide to Nationalist Parties Challenging Europe." *BBC*, May 23, 2016. http://www.bbc.com/news.

BBC. "Security Crackdown on Petitioners in China." *BBC*, March 6, 2014. https://www.bbc.com/news/av/world-asia-26477849/security-crackdown-on-petitioners-in-china.

BBC. "Qin Yongmin: Prominent Chinese Dissident Jailed for 13 Years." *BBC*, July 11, 2018. https://www.bbc.com/news/world-asia-china-44789492.

Beebe, Shannon D., and Mary H. Kaldor. *The Ultimate Weapon is No Weapon: Human Security and the New Rules of War and Peace*. New York: PublicAffairs, 2010.

Bell, Christine, and Johanna Keenan. "Lost on the Way Home? The Right to Life in Northern Ireland." *Journal of Law and Society 32*, no. 1 (2005): 68-89.

Bell, Daniel. *The China Model: Political Meritocracy and the Limits of Democracy*. Princeton: Princeton University Press, 2015.

Benedek, Wolfgang. "Human Security and Prevention of Terrorism." In *Anti-Terrorist Measures and Human Rights*, edited by Wolfgang Benedek and Alice Yotopoulos-Marangopoulos, 171-183. Boston: Brill Nijhoff, 2004.

Benner, Thorsten, Jan Weidenfeld, Mareike Ohlberg, Lucrezia Poggetti, and Kristin Shi-Kupfer. "Authoritarian advance: Responding to China's Growing Political Influence in Europe." MERICS, February 2018. Accessed January 9, 2020. https://merics.org/en/report/authoritarian-advance-responding-chinas-growing-political-influence-europe.

Bennett, Huw. "The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan." *The British Journal of Politics and International Relations 16*, no. 2 (2014): 211-229.

Biddulph, Sarah. *The Stability Imperative Human Rights and Law in China*. Vancouver: UBC Press, 2015.

Bigo, Didier, Sergio Carrera, Nicholas Hernanz, and Amandine Scherrer. *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges*. European Parliament, 2014. Accessed January 23, 2020. https://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU%282014%29509991_EN.pdf.

Bits of Freedom. "New Dutch Law for Intelligence Services Challenged in Court." *European Digital Rights (EDRi)*, May 16, 2018. https://edri.org/new-dutch-law-for-intelligence-services-challenged-in-court/.

Bock, P. G., and Morton Berkowitz. "The Emerging Field of National Security." *World Politics 19*, no. 1 (1966): 122-136.

Bodnar, Adam. "Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States than Those Which Were Party to the Proceedings." In *Human Rights and Civil Liberties in the 21st Century*, edited by Yves Haeck and Eva Brems, 223-262. New York: Springer, 2014.

Boxun. "The Army and Police from All Parts of China are Dispatched: Xinjiang Becomes an Anti-terrorist Training Base. *Boxun*, July 14, 2009. https://www.boxun.com/news/gb/china/2009/07/200907140509.shtml.

Boxun. "How the Freedom to Assembly Falls into Disuse: A Report on the Freedom to Assembly." *Boxun*, January 5, 2010. https://boxun.com/news/gb/pubvp/2010/01/201001051252.shtml.

Boxun. "Joint Statement of Four Lawyers for 'Qing'an Shooting Case'." *Boxun*, May 12, 2015. https://boxun.com/news/gb/china/2015/05/201505122057.shtml.

Boxun. "Lawyers Representing Xu's Case Protested at Public Security Department of Heilongjiang." *Boxun*, May 14, 2015. https://boxun.com/news/gb/china/2015/05/201505140141.shtml.

Brady, Natalia. "Evidence, Special Investigative Techniques and the Right to a Fair Hearing." *ERA Forum 15*, (2014): 37-49.

Braun, Dietmar, and David H. Guston. "Principal-agent Theory and Research Policy: An Introduction." *Science and Public Policy 30*, no. 5 (2003): 302-308.

Brems, Eva, and Jogchum Vrielink. "Floors or Ceilings: European Supranational Courts and Their Authority in Human Rights Matters." In *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens*, edited by Koen Lemmens, Stephan Parmentier, and Louise Reyntjens, 271-302. Cambridge: Intersentia, 2019.

Brems, Eva, and Laurens Lavrysen. "'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights." *Human Rights Law Review 15*, no. 1 (2015): 139-168.

Brown, Kerry, and Una Aleksandra Bērziņa-Čerenkova. "Ideology in the Era of Xi Jinping." *Journal of Chinese Political Science 23*, no. 3 (2018): 323-339.

Bufacchi, Vittorio, and Jean Maria Arrigo. "Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument." *Journal of Applied Philosophy 23*, no. 3 (2006): 355-373.

Bulak, Begum, and Alain Zysset. "'Personal Autonomy' and 'Democratic Society' at the European Court of Human Rights: Friends or Foes?" *Journal of Law and Jurisprudence 2*, (2013): 230-254.

Buyse, Antoine. "Dangerous Expressions: The ECHR, Violence and Free Speech." *International & Comparative Law Quarterly 63*, no. 2 (2014): 491-503.

Buyse, Antoine. "Words of Violence: 'Fear Speech', or How Violent Conflict Escalation Relates to the Freedom of Expression." *Human Rights Quarterly 36*, no. 4 (2014): 779-797.

Buzan, Barry, and Lene Hansen. *The Evolution of International Security Studies.* Cambridge: Cambridge University Press, 2009.

Cai, Congyan. "Enforcing a New National Security – China's National Security Law and International Law." *Journal of East Asia and International* Law *10*, no. 1 (2017): 65-90.

Cai, Fang. "Perceiving Truth and Ceasing Doubts: What Can We Learn from 40 Years of China's Reform and Opening up?" *China & World Economy 26*, no. 2 (2018): 1-22.

Cai, Yutai, and Weien Tan. "From 'State' to 'People': In Light of Human Security." *Issues & Studies 47*, no. 1 (2008): 151-188.

Callewaert, Johan. "Quel Avenir pour la Marge D'appréciation?" In *Protection des Droits de L'homme: La Perspective Européenne: Mélanges à la Mémoire de Rolv Ryssdal*, edited by Rolv Einar Rasmussen Ryssdal, Rolv Ryssdal and Paul Mahoney. Köln: Carl Heymanns, 2000.

Cartland, Rachel. "Enacting Article 23 National Security Laws in Hong Kong would be Better than the Current Legal Uncertainties." *South China Morning Post*, September 4, 2018. https://www.scmp.com/comment/insight-opinion/hong-kong/article/2162654/enacting-article-23-national-security-laws-hong.

Caster, Michael, ed. *The People's Republic of the Disappeared.* Safeguard Defenders, 2017.

Caudle, Sharon L. "National Security Strategies: Security from What, for Whom, and by What Means." *Journal of Homeland Security and Emergency Management 6*, no. 1 (2009).

Cavanaugh, Kathleen. "On Torture: The Case of the 'Hooded Men'." *Human Rights Quarterly 42*, no. 3 (2020): 519-544.

Chandra, Satish, and Rahul Bhonsle. "National Security: Concept, Measurement and Management." *Strategic Analysis 39*, no. 4 (2015): 337-359.

Cheema G. Shabbir. "Building Trust in Government: An Introduction." In *Building Trust in Government: Innovations in Governance Reform in Asia*, edited by G. Shabbir Cheema and Vesselin Popovski, 1-21. New York: United Nations University Press, 2010.

Chen, Frederick Tse-shyang. "The Meaning of States in the Membership Provisions of the United Nations Charter." *Indiana International & Comparative Law Review 12*, no, 1 (2001): 25-51.

Chen, Lan, and Sha Li. "The Properties of Criminal Evidence in the Appraisal Conclusion of State Secrets." *Journal of Guangxi University for Nationalities (Philosophy and Social Science Edition)*, no. 6 (2017): 187-192.

Chen, Lincoln, and Vasant Narasimhan. "Human Security and Global Health." *Journal of Human Development 4*, no. 2 (2003): 181-190.

Chen, Ming. "The Strategic Role of Xinjiang Production and Construction Corps." 21st Century (online), August 2005. Accessed May 1, 2020. http://www.cuhk.edu.hk/ics/21c/media/online/0502033.pdf.

Chen, Ruihua. "Theoretical Reflection on Pretrial Detention." *Chinese Journal of Law*, no. 2 (2005): 60-83.

Chen, Sheyin, and Zhidong Hao. "Gender, Ethnicity, Labor, and the Environment as Social Issues and Public Policy Challenges." In *Social Issues in China: Gender, Ethnicity, Labor, and the Environment*, edited by Sheyin Chen and Zhidong Hao, 1-20. New York: Springer, 2014.

Chen, Titus C. "China's Reaction to the Color Revolutions: Adaptive Authoritarianism in Full Swing." *Asian Perspective 34*, no. 2 (2010): 5-51.

Chen, Xiaochun, and Yige Yan. "Managing Overseas NGOs in China: From the Perspective of National Security." *Guihai Tribune 31*, no. 2 (2015): 21-26.

Chen, Xingliang. "On Relation between Administrative Sanction and Criminal Sanction." *China Legal Science*, no. 4 (1992): 25-32.

Chen, Xuequan. "Interpretation on the Right against Self-incrimination in China: From a Comparative Perspective." *Journal of Comparative Law*, no. 5 (2013): 29-40.

Chen, Yujie. "China's Challenge to the International Human Rights Regime." *New York University Journal of International Law and Politics 51*, no. 4 (2019): 1179-1222.

Cheng, Lei. "The Use of Evidence Collected by Taking Technical Investigation Measures." *Chinese Journal of Law 40*, no. 5 (2018): 153-170.

Cheng, Lei. "The Use of Materials Obtained by Technical Investigation." *Evidence Science*, no. 5 (2012): 557-564.

Cheng, Xiezhong. "Reshape the Relationship between Confidentiality and Openness through Objections to Confidentiality and Judicial Review." *Constitution and Administrative Law Research Centre of Peking University (CALC)*. Accessed May 24, 2020. http://www.publiclaw.cn/?c=news&m=view&id=1763.

Chevalier-Watts, Juliet. "Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?" *The European Journal of International Law 21*, no. 3 (2010): 701-721.

Chevalier-Watts, Juliet. "A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in their Scrutiny of Right to Life Cases?" *The International Journal of Human Rights 14*, no. 2 (2010): 300-318.

China Daily. "China Abolishes Re-education through Labor." *China Daily*, December 28, 2013. https://www.chinadaily.com.cn/china/2013-12/28/content_17202294.htm.

China Daily. "Police and Prosecutors Investigate the Qing'an Incident and Found the Police Fired in Accordance with the Regulations." *China Daily*, May 24, 2015. http://www.chinadaily.com.cn/interface/toutiao/1138561/2015-5-24/cd_20800962.html.

China Human Rights Lawyer Concern Group (CHRLCG). "'709 Crackdown' Latest Data and Development of Cases as of 8 July 2019". CHRLCG, July 24, 2019. Accessed May 24, 2020. https://www.chrlawyers.hk/zh-hant/content/%E3%80%8C709%E5%A4%A7%E6%8A%93%E6%8D%95%E3%80%8D%E9%80%B2%E5%B1%95%E9%80%9A%E5%A0%B1.

China Judgement Online. (accessed April 6, 2021). https://wenshu.court.gov.cn/.

Chinanews. "China Uncovers a Case of Endangering National Security and Arrests a Foreign Criminal Suspect." *Chinanews*, June 19, 2016. http://www.chinanews.com/gn/2016/01-19/7723653.shtml.

Chinese Human Rights Defenders. *A Review of the Implications of 'Residential Surveillance in a Designated Location' on the Fulfilment by China of its International Human Rights Obligations and Commitments*. Chinese Human Rights Defenders, 2018. Updated May 16, 2018. https://www.nchrd.org/2018/05/rsdl-submission-un/.

Christoffersen, Jonas. *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights.* Leiden: Brill, 2009.

Cohen-Eliya, Moshe, and Iddo Porat. "History." In *Proportionality and Constitutional Culture*, 24-43. Cambridge: Cambridge University Press, 2013.

Coliver, Sandra. "Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information." *Human Rights Quarterly 20*, no. 1 (1998): 12-80.

Comerford, Milo, and Rachel Bryson. "Struggle Over Scripture: Charting the Rift Between Islamist Extremism and Mainstream Islam." *Tony Blair Institute for Global Change*, 2017. Accessed June 20, 2020. https://institute.global/sites/default/files/inline-files/TBI_Struggle-over-Scripture_0.pdf.

Commission for Countering Extremism. "Study into Extremism – Terms of Reference." Commission for Countering Extremism, September 2018. Accessed June 8, 2020. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742176/Terms_of_Reference_into_Extremism_Study.pdf.

Committee on the Elimination of Racial Discrimination (CERD). Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China and Macao, China). CERD/C/CHN/CO/14-17(September 19, 2018).

Communication Report and Search of OHCHR. (accessed April 6, 2021). https://spcommreports.ohchr.org/Tmsearch/TMDocuments.

"Communiqué of the Third Plenary Session of the Eleventh Central Committee of the CCP." people.cn. Updated December 22, 1978. http://cpc.people.com.cn/GB/64162/64168/64563/65371/4441902.html.

"Communiqué of the Fifth Plenary Session of the Sixteenth Central Committee of the CCP." www.gov.cn. Updated October 11, 2005. http://www.gov.cn/test/2008-08/20/content_1075344.htm.

Congressional-Executive Commission on China. *2019 Annual Report*. Congressional-Executive Commission on China, 2019. Accessed February 12, 2020. https://www.cecc.gov/publications/annual-reports/2019-annual-report.

Conte, Alex. *Human Rights in the Prevention and Punishment of Terrorism*. Heidelberg: Springer, 2010.

Council of Bars & Law Societies of Europe. *CCBE Recommendations on the Protection of Fundamental Rights in the Context of "National Security" 2019*. Council of Bars & Law Societies of Europe. Accessed September 9, 2020. https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Guides_recommendations/EN_SVL_20190329_CCBE-Recommendations-on-the-protection-of-fundamental-rights-in-the-context-of-national-security.pdf.

Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*. Vol. 1. The Hague: Martinus Nijhoff Publishers, 1975.

Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*. Vol. 2. The Hague: Martinus Nijhoff Publishers, 1975.

Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights.* Vol. 3. The Hague: Martinus Nijhoff Publishers, 1976.

Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights.* Vol. 4. The Hague: Martinus Nijhoff Publishers, 1977.

Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*. Vol. 5. The Hague: Martinus Nijhoff Publishers, 1979.

Council of Europe. *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights.* Vol. 7. The Hague: Martinus Nijhoff Publishers, 1985.

Council of Europe. Committee of Ministers, Recommendation No. R(97)20 on "Hate Speech". Rec(97)20 30/10/1997(October 30, 1997).

Council of Europe. "Declaration from the Permanent Representative of France, Dated 22 July 2016, Registered at the Secretariat General on 22 July 2016." Council of Europe. Accessed December 15, 2016.

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW.

Council of Europe. "Draft European Convention on Human Rights." In *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*. Vol. 1. Appendix. The Hague: Martinus Nijhoff Publishers, 1975.

Council of Europe. Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedom. Strasbourg, 22.XI.1984.

Council of Europe. Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, Council of Europe. H (2002) 4 (July 2002). Accessed June 30, 2023. https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf.

Council of Europe. Guidelines on Human Rights and the Fight against Terrorism. H(2002)4 (July 2002). Accessed January 7, 2018. https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf.

Council of Europe. *Guide to the Case-law of the European Court of Human Rights: Terrorism*. ECHR, 2022. Updated June 23, 2023. https://www.echr.coe.int/Documents/Guide_Terrorism_ENG.pdf.

Council of Europe. "Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms." Council of Europe. Accessed January 29, 2022. https://www.coe.int/en/web/conventions/concerning-a-given-treaty?module=declarations-by-treaty&territoires=&codeNature=0&codePays=&numSte=005&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=01-29-2022.

Council of Europe. "Russia Ceases to be a Party to the European Convention on Human Rights on 16 September 2022." Council of Europe. Updated March 23, 2022. https://coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022.

Council of Europe. "Some Definitions." Council of Europe. Accessed May 1, 2020. https://www.coe.int/en/web/echr-toolkit/definitions.

Council of the European Union. Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism. 2001/931/CFSP (December 27, 2001). Accessed January 7, 2018. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001E0931.

Craig, Paul P. "Proportionality, Rationality and Review." *New Zealand Law Review*, no. 2 (2010): 265-301.

Criminal Law Office of the Legislative Affairs Commission of the Standing Committee of the National People's Congress. *The Interpretation and Practical Guide of Counterespionage Law of the People's Republic of China*. Beijing: China Democracy Legal System Publishing House, 2015.

Cui, Hong. "Reflection and Way out for China's Constitutional Review System." *Social Science Journal*, no. 5 (2008): 81-83.

Dahlberg, Maija. "It is not Its Task to Act as a Court of Fourth Instance: The Case of the European Court of Human Rights." *European Journal of Legal Studies 7*, (2014): 77-108.

David, Raphaël Viana. *Strategies of Silence: Repression of Chinese Human Rights Defenders*. International Service for Human Rights, 2021. Updated November 30,

2021. https://ishr.ch/latest-updates/three-years-after-un-review-china-failing-to-uphold-commitments-on-human-rights-defenders-and-civil-society-space/.

De Hert, Paul. "Balancing Security and Liberty within the European Human Rights Framework. A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11." *Utrecht Law Review 1*, no. 1 (2005): 68-96.

deLisle, Jacques. "Security First - Patterns and Lessons from China's Use of Law to Address National Security Threats." *Journal of National Security Law & Policy 4*, no. 2 (2010): 397-436.

Deng, Zhihui. "*Habeas Corpus* and Human Rights Protections – From the Perspective of Criminal Litigation." *China Legal Science*, no. 4 (2004).

Departamento De Seguridad Nacional (DSN). *Executive Summary: Annual Report on National Security 2015*. DSN. Accessed September 2, 2020. https://www.dsn.gob.es/es/file/975/download?token=YG4D6rCt.

de Schutter, Olivier. *International Human Rights Law: Cases, Materials, Commentary*. Cambridge: Cambridge University Press, 2010.

Dias, Talita de Souza. "Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?" *Human Rights Law Review 19*, no. 4 (2019): 649-674.

Dicey, Albert Venn. "The True Nature of Constitutional Law" In *Introduction to the Study of the Law of the Constitution*, cxxv-cxlvii. Carmel: Liberty Fund, 1982.

Doing, Xin. "Why are the Newly Established National Leading Groups Composed of these Eight Government Departments." *Sina News*, June 28, 2019. https://news.sina.com.cn/c/2019-06-28/doc-ihytcerm0002544.shtml#:~:text=%E4%B8%AD%E5%A4%AE%E5%AE%A3%E4%BC%A0%E6%80%9D%E6%83%B3%E5%B7%A5%E4%BD%9C,%E5%88%B6%E6%94%B9%E9%9D%A9%E9%A2%86%E5%AF%BC%E5%B0%8F%E7%BB%84%E3%80%82.

Drent, Margriet, Rosa Dinnissen, Bibi van Ginkel, Hans Hogeboom, and Kees Homan. "The Relationship between External and Internal Security." *Clingendael Strategic Monitor Project*, 2014. Accessed January 11, 2022. https://www.clingendael.org/sites/default/files/pdfs/The%20relationship%20between%20external%20and%20internal%20security.pdf.

Du, Guodong. "Highlights of China's Guiding Case System – Guiding Cases & Similar Cases Series (1)." China Justice Observer, October 11, 2020. Accessed May 23, 2017. https://www.chinajusticeobserver.com/a/highlights-of-chinas-guiding-case-system-guiding-cases-similar-cases-series-1#:~:text=China's%20Guiding%20Cases%20(%E6%8C%87%E5%AF%BC%E6%80%A7,levels%20when%20hearing%20similar%20cases.&text=Local%20courts%20have%20no%20power%20to%20issue%20such%20cases.

Du, Guodong, and Meng Yu. "You Can View Almost All the Chinese Court Judgments Online for Free." China Justice Observer, June 8, 2018. https://www.chinajusticeobserver.com/a/you-can-view-almost-all-the-chinese-court-judgments-online-for-free.

Duchâtel, Mathieu and Alice Ekman. "Countering Terrorism: An Área for EU-China Cooperation?" *European Union Institute for Security Studies*, no, 14 (2015). Accessed 9 January 2020.

https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_14_China_counter-terrorism.pdf.
Dworkin, Ronald. "Terror & the Attack on Civil Liberties." *New York Review of Books 50*, no. 17 (2003): 37-41.
Eckstein, Alexander. "Economic Development and Political Change in Communist Systems." *World Politics 22*, no. 4 (1970): 475-495.
Economic and Social Council. Report of the Fifth Session of the Commission on Human Rights to the Economic and Social Council. E/1371(June 23, 1949), Annex 1.
Economic Times. "Switzerland Latest European Country to Ban Islamic Full-face Veils." *Economic Times*, March 8, 2021. Accessed October 25, 2021. https://economictimes.indiatimes.com/news/international/world-news/european-bans-on-islamic-full-face-veils/articleshow/81393603.cms.
Edara, Dileep. *Biography of a Blunder: Base and Superstructure in Marx and Later*. England: Cambridge Scholars Publishing, 2016.
Edney, Kingsley. "Building National Cohesion and Domestic Legitimacy: A Regime Security Approach to Soft Power in China." *Politics 35*, nos. 3-4 (2015): 259-272.
Edwards, Lilian, and Lachlan Urquhart. "Privacy in Public Spaces: What Expectations of Privacy do We Have in Social Media Intelligence?" *International Journal of Law and Information Technology 24*, no. 3 (2016): 279-310.
The Eighteenth Central Committee of the Communist Party of China. CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward. Accessed May 18, 2020. http://www.eu-asiacentre.eu/documents/uploads/news_134_ccp_central_committee_decision_concerning_some_major_questions_in_comprehensively_moving_governing_the_country_according_to_the_law.pdf.
Eijkman, Quirine, and Bart Schuurman. "Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation." *The International Centre for Counter-Terrorism – The Hague 2*, no. 5 (2011).
Eltayeb, Mohamed Saeed M. "The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and its Relation to Freedom of Expression." *Religion and Human Rights 5*, (2010): 119-135.
Emmerson, Ben, Andrew Ashworth, and Alison Macdonald. *Human Rights and Criminal Justice*. London: Sweet & Maxwell, 2007.
Engle, Eric. "The General Principle of Proportionality and Aristotle." In *Aristotle and the Philosophy of Law: Theory, Practice and Justice*, edited by Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho, 265-276. Dordrecht: Springer, 2013.
Erlianhaote Municipal People's Government. "List of Administrative Powers and Responsibilities of the National Security Agency." Accessed May 30, 2020. http://www.elht.gov.cn/qlqd/ganj/201506/t20150629_71923.html.
European Committee on Crime Problems (CDPC). Report on the Feasibility of Recommendations on Internal Security Services. CM(2003)109-Add. 4 (2003). Accessed September 10, 2020. https://rm.coe.int/09000016805df323.
European Court of Human Rights. *Analysis of Statistics 2022*. ECtHR, 2023. Updated January, 2023. http://www.echr.coe.int/Documents/Stats_analysis_2022_ENG.pdf.

European Court of Human Rights. *Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security.* ECtHR, 2020. Updated August 31, 2020. www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

European Court of Human Rights. *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb).* ECtHR, 2020. Updated August 31, 2020. www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

European Court of Human Rights. *Guide on Article 8 of the European Convention on Human Rights – Right to Respect for Private and Family Life, Home and Correspondence.* ECtHR, 2021. Updated August 31, 2021. https://echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

European Court of Human Rights. *Guide on Article 10 of the European Convention on Human Rights*. ECtHR, 2021. Updated April 30, 2021. https://echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

European Court of Human Rights. *Guide sur L'article 10 de la Convention Européenne des Droits de L'homme: Liberté D'expression*. ECtHR, 2020. Accessed October 7, 2020. www.echr.coe.int/Documents/Guide_Art_10_FRA.pdf.

European Court of Human Rights. *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association*. ECtHR, 2020. Accessed October 7, 2020. www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf.

European Court of Human Rights. *Practical Guide on Admissibility Criteria*. ECtHR, 2022. Updated August 31, 2022. https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.

Famularo, Julie. "The China-Russia NGO Crackdown." *The Diplomat*, February 23, 2015. https://thediplomat.com/2015/02/the-china-russia-ngo-crackdown/.

Famularo, Julia. "'Fighting the Enemy with Fists and Daggers': The Chinese Communist Party's Counter-Terrorism Policy in the Xinjiang Uyghur Autonomous Region." In *Terrorism and Counter-Terrorism in China: Domestic and Foreign Policy Dimensions*, edited by Michael Clarke. Oxford: Oxford University Press, 2018.

Fan, Jizeng. "Rethinking the Method and Function of Proportionality Test in the European Court of Human Rights." *The Journal of Human Rights 15*, no. 1 (2016): 46-87.

Fan, Jizeng. "The Success and Failure of Human Rights Law Transplantation." *Nanjing University Law Journal*, no. 1 (2015): 46-70.

Fang, Weihua. "The Relations between 'Privilege against Self-Incrimination' and 'Answer Truthfully'." *China Court*, May 4, 2016. Accessed May 18, 2020. https://www.chinacourt.org/article/detail/2016/05/id/1850496.shtml.

Farrell, Michelle. "The Marks of Civilisation: The Special Stigma of Torture." *Human Rights Law Review 22*, no. 1 (2022): 1-26.

Faur, Guy Olivier. "Negotiating Hostages with Terrorists: Paradoxes and Dilemmas." *International Negotiation 20*, no. 1 (2015): 129-145.

Fei, Xiaotong. *The Pattern of Diversified Integration of Chinese Nation*. Beijing: China Min Zu University Press, 1989.

Fekete, Liz. "Anti-Muslim Racism and the European Security State." *Race & Class 46*, no. 1 (2004): 3-29.

Fenwick, Helen, and Daniel Fenwick. "The Role of Derogations from the ECHR in the Current 'War on Terror'." In *International Human Rights and Counter-Terrorism*, edited by Eran Shor and Stephen Hoadley, 259-290. Singapore: Springer, 2019.

Finnis, John. "Absolute Rights: Some Problems Illustrated." *The American Journal of Jurisprudence 61*, no. 2 (2016): 195-215.

Fjäder, Christian. "The Nation-state, National Security and Resilience in the Age of Globalisation." *International Policies, Practices and Discourses 2*, no. 2 (2014): 114-129.

Fox-Decent, Evan, and Evan J Criddle. "Interest-balancing vs. Fiduciary Duty: Two Models for National Security Law." *German Law Journal 13*, no. 5 (2012): 542-559.

Franceschini, Ivan, and Elisa Nesossi. "State Repression of Chinese Labor NGOs: A Chilling Effect?" *The China Journal 80*, (2018): 111-129.

Frase, Richard S. "Excessive Relative to What? Defining Constitutional Proportionality Principles." In *Why Punish? How Much?: A Reader on Punishment*, edited by Michael H. Tonry, 263-267. Oxford: Oxford University Press, 2011.

Front Line Defenders. "Yu Wensheng Sentenced, and Transferred from the Xuzhou Detention Centre to the Nanjing Prison." *Front Line Defenders*. Accessed May 24, 2020. https://www.frontlinedefenders.org/zh/case/yu-wensheng-detained-and-charged-disrupting-public-service.

Fu, Hualing. "China's Imperatives for National Security Legislation." In *China's National Security: Endangering Hong Kong's Rule of Law?*, edited by Cora Chan and Fiona De Londras, 41-60. Oxford: Hart Publishing, 2020.

Fu, Hualing. "Duality and China's Struggle for Legal Autonomy." *China Perspectives 1*, no. 116 (2019): 3-10.

Fu, Hualing. "The July 9th 709 Crackdown on Human Rights Lawyers Legal Advocacy in an Authoritarian State." *Journal of Contemporary China 27*, no. 112 (2018): 554-568.

Fu, Hualing. "Responses to Terrorism in China." In *Global Anti-terrorism Law and Policy*, edited by Victor V. Ramraj, Michael Hor, Kent Roach, and George Williams. Cambridge: Cambridge University Press, 2012.

Fu, Hualing, and Han Zhu. "After the July 9 (709) Crackdown: The Future of Human Rights Lawyering." *Fordham International Law Journal 41*, no. 5 (2018): 1135-1164.

Fu, Wei. "'Colour Revolutions', 'Cultural Hegemony' and Peaceful Evolution Strategy." *Social Sciences in Guangxi*, no. 8 (2016): 192-195.

Fu, Yang. "Discussions on the Constitution Seventy Years ago." *Shuwu*, no. 2 (2004): 64-69.

Füglistaler, Gabriel. *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence.* IDHEAP, 2016.

Fukuda-Parr, Sakiko, and Carol Messineo. "Human Security: A Critical Review of the Literature." *Centre for Research on Peace and Development Working Paper No. 11*, (2012). Accessed June 27, 2023. http://sakikofukudaparr.net/wp-content/uploads/2013/01/HumanSecurityCriticalReview2012.pdf.

Fukuyama, Francis. "The End of History?" *The National Interest*, no. 16 (1989): 3-18.

Fukuyama, Francis. "The End of History?" In *Conflict After the Cold War: Arguments on Causes of War and Peace*, edited by Richard K. Betts, 4-15. 5th edn. New York: Routledge, 2017.

Fukuyama, Francis. *The End of History and the Last Man*. New York: The Free Press, 1992.

Fukuyama, Francis. "Reflections on the End of History, Five Years Later." *History and Theory 34*, no. 2 (1995): 27-43.

Gaggioli, Gloria, and Robert Kolb. "A Right to Life in Armed Conflicts: The Contribution of the European Court of Human Rights." *Israel Yearbook on Human Rights 37*, (2007): 115-164.

Gallant, Kenneth S. *The Principle of Legality in International and Comparative Criminal Law.* Cambridge: Cambridge University Press, 2008.

Gao, Xujun, and Jie Long. "On the Petition System in China." *University of St. Thomas Law Journal 12*, no. 1 (2015): 34-55.

Gasper, Des. "Climate Change and the Language of Human Security." *International Institute of Social Studies of Erasmus University Working Paper Series/General Series no. 505*, (2010): 1-28. Accessed June 27, 2023. https://repub.eur.nl/pub/19843.

General Intelligence and Security Services of the Netherlands (AIVD). *AVID Annual Report 2018*. AIVD, 2019. Accessed May 22, 2020. https://english.aivd.nl/publications/annual-report/2019/05/14/aivd-annual-report-2018.

General Intelligence and Security Services of the Netherlands (AIVD). "Powers: All of AIVD's Powers are Listed in the Wiv 2017." AVID. Accessed May 22, 2020. https://english.aivd.nl/about-aivd/the-intelligence-and-security-services-act-2017/powers.

Geneva Centre for the Democratic Control of Armed Forces. *DCAF Background Paper on National Security Policy*. DCAF, 2005. Accessed March 16, 2018. https://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/DCAF-Background-Paper-on-National-Security-Policy.

Geng, Baojian. "Several Basic Issues in the Amendment of the Administrative Reconsideration Law." *Shandong Judges Training Institute Journal*, no. 5 (2018): 1-13.

Gerards, Janneke. "The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility'." In *Implementation of the European Convention on Human Rights and of the Judgments of The ECtHR in National Case-Law: A Comparative Analysis*, edited by Janneke Gerards and Joseph Fleuren, 13-94. Antwerp: Intersentia, 2014.

Gerards, Janneke. "How to Improve the Necessity Test of the European Court of Human Rights." *International Journal of Constitutional Law 11*, no. 2 (2013): 466-490.

German Federal Foreign Office. "Statement by a Federal Foreign Office Spokesperson on Today's Video Conference between Foreign Minister Annalena Baerbock and Her Chinese Counterpart, Wang Yi." *Federal Foreign Office*, May 24, 2022. Accessed July 4, 2023. https://www.auswaertiges-amt.de/en/newsroom/news/baeerbock-wang-yi-vtc/2532572.

Giannopoulos, Christos. "The Reception by Domestic Courts of the Res Interpretata Effect of Jurisprudence of the European Court of Human Rights." *Human Rights Law Review 19*, no. 3 (2019): 537-559.

Gilbert, Leah, and Payam Mohseni. "Disabling Dissent: The Colour Revolutions, Autocratic Linkages, and Civil Society Regulations in Hybrid Regimes." *Contemporary Politics 24*, no. 4 (2018): 454-480.

Gilley, Bruce, and Heike Holbig. "The Debate on Party Legitimacy in China: A Mixed Quantitative/Qualitative Analysis." *Journal of Contemporary China 18*, no. 59 (2009): 339-358.

Ginbar, Yuval. *Why not Torture Terrorists?: Moral, Practical, and Legal Aspects of the 'Ticking Bomb' Justification for Torture*. Oxford: Oxford University Press, 2008.

Giorgetti, Chiara, "Balancing Security and Human Rights: Post 9/11 Reactions in the United States and Europe." In *Europe Confronts Terrorism*, edited by Karin von Hippel, 244-262. London: Palgrave Macmillan, 2005.

Global Times. "Great Firewall Father Speaks out." *Global Times*, February 18, 2011. http://english.sina.com/china/p/2011/0217/360409.html.

Goh, Joel. "Proportionality - An Unattainable Ideal in the Criminal Justice System." *Manchester Student Law Review 2*, no. 4 (2013): 41-72.

Goitein, Elizabeth. *The New Era of Secret Law*. Brennan Center for Justice, 2016. Accessed August 13, 2021. https://www.brennancenter.org/our-work/research-reports/new-era-secret-law.

Golubovic, Dragan. "Freedom of Association in the Case Law of the European Court of Human Rights." *The International Journal of Human Rights 17*, nos. 7-8 (2013): 758-771.

Gong, Xianghe. "Critique and Reconstruction of the Concept of the Right to Subsistence." *Study & Exploration*, no. 1 (2011): 102-106 & 239.

Gong, Xiangrui. *Constitution and Administrative Law: Comparative Law*. Beijing: Law Press, 2003.

Goold, Benjamin J. "How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy, and the Political Value of Privacy." In *Overvåkning i en rettsstat – Surveillance in a Constitutional Government*, edited by Dag Wiese Schartum, 38-48. Bergen: Fagbokforlaget, 2010.

GOV.UK. "UN Human Rights Council 47: Joint Statement on the Human Rights Situation in Xinjiang." *GOV.UK*, June 22, 2021. Accessed July 4, 2023. https://www.gov.uk/government/news/un-human-rights-council-47-joint-statement-on-the-human-rights-situation-in-xinjiang.

Green, Marcel A. "China to Abolish Re-Education through Labor." *The Diplomat*, January 5, 2014. https://thediplomat.com/2014/01/china-to-abolish-re-education-through-labor/.

Greene, Alan. "Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights." *German Law Journal 12*, no. 10 (2011): 1764-1785.

Greer, Steven C. *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*. Human Rights Files No 15. Strasbourg: Council of Europe Publishing, 1997.

Greitens, Sheena Chestnut, Myunghee Lee, and Emir Yazici. "Counterterrorism and Preventive Repression: China's Changing Strategy in Xinjiang." *International Security 44*, no. 3 (2020): 9-47.

Griffiths, James. *The Great Firewall of China: How to Build and Control an Alternative Version of the Internet*. London: Zed Books, 2019.

Gross, Oren, and Fionnuala Ní Aoláin. "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights." *Human Rights Quarterly 23*, no. 3 (2001): 625-649.

Gross, Oren, and Fionnuala Ní Aoláin. *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge: Cambridge University Press, 2006.
Gu, Yongzhong. "An Analysis of the Principle of Presumption of Innocence in the Draft Amendment of Criminal Procedure Law." *Law Science*, no. 12 (2011): 35-39.
Guangming. "Accelerate the Establishment of a National Security Legal System." *Guangming*, April 25, 2016.
Guangming Online. "Why do History and People Choose the CCP." *Guangming Online.* Accessed August 8, 2021. https://theory.gmw.cn/2019-01/23/content_32398727.htm.
Hafner-Burton, Emilie M., Laurence R. Helfer, and Christopher J. Fariss. "Emergency and Escape: Explaining Derogations from Human Rights Treaties." *International Organization 65*, no. 4 (2011): 673-707.
Han, Dayuan. "On the Relations between National Security and Human Rights Defined in the Constitution of People's Republic of China." *Human Rights*, no. 5 (2019).
Han, Dayuan. "The System of Basic Rights of the Chinese Constitutional Science." *Journal of Jianghan University (Social Science Edition)*, no. 1 (2008): 58-61.
Hao, Mingjin. "On the Right to Development." *Journal of Shandong University*, no. 1 (1995): 89-95.
Harbo, Tor-Inge. *The Function of Proportionality Analysis in European Law*. Leiden: Brill, 2015.
Harding, Harry. "The Chinese State in Crisis." In *The Cambridge History of China*, Vol. 15 Part 2, edited by Roderick MacFaquhar and John K. Fairbank, 107-217. Cambridge: Cambridge University Press, 1991.
Harman, Chris. "Base and Superstructure." In *Marxism and History*, 7-54. London: Bookmarks, 1998.
Harris, David, Michael O'Boyle, Ed Bates, and Carla Buckley, eds. *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights.* 4th edn. Oxford: Oxford University Press, 2018.
Harutyunyan, Armen. "The Future of the European Court of Human Rights in the Era of Radical Democracy." *European Convention on Human Rights Law Review 2*, no. 1 (2021): 20-26.
Hawkins, Darren G., and Wade Jacoby. "Agent Permeability, Principal Delegation and the European Court of Human Rights." *The Review of International Organizations 3*, (2008): 1-28.
Hawkins, Darren G., David A. Lake, Daniel L. Nielson, and Michael J. Tierney. "Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory." In *Delegation and Agency in International Organizations*, 3-38. Cambridge: Cambridge University Press, 2006.
Hayek, Friedrich. *The Road to Serfdom*. London: G. Routledge & Sons, 1946.
He, Jun, and Yan Wang. "The Impact of Foreign NGOs' Activities on China's Political Security and Countermeasures." *Journal of Yunnan Police College*, no. 3 (2016): 58-63.
Heath, Timothy. "The 'Holistic Security Concept': The Securitization of Policy and Increasing Risk of Militarized Crisis." *China Brief 15*, no. 12 (2015): 7-9.
Held, Virginia. *The Public Interest and Individual Interests*. New York: Basic Books, 1970.
Hélène, Lambert. *The Position of Aliens in Relation to the European Convention on Human Rights.* Strasbourg: Council of Europe, 2006.

Heuer, Richards J. *Psychology of Intelligence Analysis*. Center for the Study of Intelligence, 1999.
Heuvel, William J. Vanden. "The Four Freedoms." In *Norman Rockwell's Four Freedoms: Images that Inspire a Nation*, edited by Stuart Murray and James McCabe. Massachusetts: Berkshire House, 1993.
Hickman, Tom R. "The Reasonableness Principle: Reassessing its Place in the Public Sphere." *The Cambridge Law Journal 63*, no. 1 (2004): 166-198.
Hobbes, Thomas. *Leviathan*. Edited by John Charles Addison. Oxford: Oxford University Press, 1998.
Hoffman, Samantha, and Elsa Kania. "Huawei and the Ambiguity of China's Intelligence and Counter-espionage Laws." *Australian Strategic Policy Institute*, September 13, 2018. Accessed May 17, 2020. https://www.aspistrategist.org.au/huawei-and-the-ambiguity-of-chinas-intelligence-and-counter-espionage-laws/.
Holmes, Kim R. "What is National Security?" Heritage Foundation*, 2015*. Accessed January 11, 2022. https://www.heritage.org/sites/default/files/2019-10/2015_IndexOfUSMilitaryStrength_What%20Is%20National%20Security.pdf.
Hou, Jian. "The Legal Governance of Mass Incidents." *Studies in Law and Business*, no. 3 (2010): 16-22.
Hou, Shuwen. "On the System Reform of China's Administrative Legislation." *Oriental Law*, no. 4 (2012): 90-97.
Hou, Yu. "Options for Constitutional Review in China." J*ournal of Central South University (Social Sciences) 13*, no. 3 (2007): 280-285.
Howard-Hassmann, Rhoda E. "Human Security: Undermining Human Rights?" *Human Rights Quarterly 34*, no. 1 (2012): 88-112.
Howlett, Michael, and Ben Cashore. "Conceptualizing Public Policy." In *Comparative Policy Studies: Conceptual and Methodological Challenges*, edited by Isabelle Engeli and Christine Rothmayr Allison, 17-33. Hampshire: Palgrave Macmillan, 2014.
Hu, Jian. "'Colour Revolutions' – the Second 'Peaceful Evolution' of Post-Socialist Countries?" *Social Sciences Digest*, no. 6 (2006): 26-27.
Hu, Jiangang. "On the Establishment and Improvement of China's Police Security Inspection Mechanism." *Journal of Yunnan Police College*, no. 4 (2008): 81-84.
Hu, Ming. "Procedural Control of Technical Investigation in the UK, France, Germany, the Netherlands and Italy." *Global Law Review*, no. 4 (2013): 6-18.
Hu, Shaofen. "Improve China's Criminal Law against Terrorism." Thesis for Master Degree of Hunan University, 2015.
Hua, Wensheng. "Reflections on the Problems and Countermeasures of the 'Re-education through Labour' System." *Journal of Wuhan Public Security Cadre's College*, no. 1 (2009): 65-67.
Huang, Chengyi, and David S. Law. "Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China." In *Comparative Law and Regulation Understanding the Global Regulatory Process*, edited by Francesca Bignami and David Zaring, 305-334. Cheltenham: Edward Elgar, 2016.
HUDOC Database. (accessed February 1, 2020). www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=#n1355308343285_pointer.
Human Rights Committee. General Comment No. 11 – Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art. 20), 1983.

Human Rights Committee. General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992).
Human Rights Committee. General Comment No. 27 Freedom of Movement (Article 12). CCPR/C/21/Rev.1/Add.9 (November 2, 1999).
Human Rights Committee. General Comment No. 34 – Article 19: Freedoms of Opinion and Expression. CCPR/C/GC/34 (September 12, 2011).
Human Rights Committee. General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life. CCPR/C/GC/36 (September 3, 2019).
Human Rights in China. "Mass Crackdown on Chinese Lawyers, Defenders and International Reactions: A Brief Chronology." HRIC, September 15, 2017. Accessed May 12, 2020. https://www.hrichina.org/en/mass-crackdown-chinese-lawyers-defenders-and-international-reactions-brief-chronology.
Human Rights in China. *State Secrets: China's Legal Labyrinth*. HRIC, 2013. Accessed May 24, 2020. https://www.hrichina.org/en/publications/hric-report/state-secrets-chinas-legal-labyrinth.
Human Rights Watch. "China: Draft Counterterrorism Law a Recipe for Abuses." *Human Rights Watch*, January 20, 2015. https://www.hrw.org/news/2015/01/20/china-draft-counterterrorism-law-recipe-abuses.
Human Rights Watch. *China: Nipped in the Bud – The Suppression of the China Democracy Party*. Human Rights Watch, 2000. Updated September 1, 2000. https://www.hrw.org/report/2000/09/01/china-nipped-bud/suppression-china-democracy-party.
Human Rights Watch. *"Eradicating Ideological Viruses": China's Campaign of Repression Against Xinjiang's Muslims*. Human Rights Watch, 2018. Updated September 9, 2018. https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs#c6a416.
Human Security Centre. *Human Security Report 2005: War and Peace in the 21st Century*. New York: Oxford University Press, 2005.
Huntington, Samuel P. *The Clash of Civilizations and the Remaking of World Order*. New York: Simon & Schuster, 1996.
Husak, Douglas. "The Criminal Law as Last Resort." *Oxford Journal of Legal Studies 24*, no. 2 (2004): 207-235.
Iain, Cameron. *National Security and the European Convention on Human Rights*. The Hague: Martinus Nijhoff Publishers, 2000.
Ibhawoh, Bonny. "The Right to Development: The Politics and Polemics of Power and Resistance." *Human Rights Quarterly 33*, no. 1 (2011): 76-104.
Institute for Human Rights of Southeast University. *The Evaluation Report of the National Human Rights Action Plan of China (2016-2020)*. Institute for Human Rights of Southeast University, 2021. Updated September 30, 2021. https://rqyjy.seu.edu.cn/2021/0930/c27799a385410/page3.htm.
Internet Encyclopedia of Philosophy (IEP). "Social Contract Theory." IEP. Accessed December 19, 2016. https://iep.utm.edu/soc-cont/#H2.
ISHR. *New Chinese-Language Factsheets from UN Expert on Right to Peaceful Assembly and Association Provide Valuable Resource in Face of Major Crackdown.* ISHR, 2016. Updated October 21, 2016. https://www.ishr.ch/news/china-new-chinese-language-factsheets-un-expert-right-peaceful-assembly-and-association-provide.

Jacobsen, Amanda. "National Security and the Right to Information in Europe - April 2013." *University of Copenhagen*, (2013).
Jakobs, Günther. 'What does Criminal Law Protect: Legal interest or Applying of Norm?" Translated by Shizhou Wang. *Journal of Comparative Law*, no. 1 (2004).
Jiang, Bixin, ed. *Decoding and Applicating the 'Supreme People's Court's Interpretation on the Application of the PRC Criminal Procedure Law.* Beijing: China Legal Publishing House, 2013.
Jiang, Chuanguang. "Deng Xiaoping's Thoughts on the Rule of Law and Milestones in China's Rule of Law Construction." *Global Law Review 39*, no. 1 (2017): 5-22.
Jiang, Hui. "Overseas Experience and Inspiration of Foreign Agents Law." *Chinese Review of International Law*, no. 1 (2022): 69-83.
Jiang, Lin. "The National Think Tank Evaluated the Open Government on Police Affaires: The Transparency has been Significantly Increased." *Legal Daily*, March 29, 2019. http://www.legaldaily.com.cn/zt/content/2019-03/29/content_7814895.htm.
Jiang, Na. "Cultural Collectivism in Law." In *Wrongful Convictions in China: Comparative and Empirical Perspectives*, Berlin: Springer, 2016.
Jiang, Na, and Rong Han. 'Definitions of the Right to Remain Silent in China.' *Arts and Humanities Open Access Journal 3*, no. 2 (2019): 106-108.
Jiang, Yong, and Gang Chen. "Dislocation of Public Security Organs' Administrative Power and Investigative Power – Based on the Perspective of Police Power Control." *Science of Law (Journal of Northwest University of Political Science and Law)*, no. 6 (2014): 75-85.
Jiao, Hongchang, and Su Jiang. "The Normative Meaning Concerning the Article 36 of the Constitutional Amendment of China." *Study & Exploration*, no. 1 (2019): 50-57.
Johnson, Ian. "Calls for a 'Jasmine Revolution' in China Persist." *New York Times*, February 23, 2011. https://www.nytimes.com/2011/02/24/world/asia/24china.html.
Jones, Charles. "The Human Right to Subsistence." *Journal of Applied Philosophy 30*, no. 1 (2013): 57-72.
Jordan, Amos A., William J. Taylor, Jr., and Michael J. Mazarr. *American National Security*. 5th edn. Baltimore: Johns Hopkins University Press, 1999.
Joseph, Sarah. "Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36." *Human Rights Law Review 19*, no. 2 (2019): 347-368.
Kang, Junxin, and Wenliang Yu. "The Construction of the National Security Legal System in the Post-'National Security Law' Era." *Journal of Zhengzhou University (Philosophy and Social Sciences Edition) 49*, no. 3 (2016): 35-38.
Kavanagh, Aileen. "Special Advocates, Control Orders and the Right to a Fair Trial." *The Modern Law Review 73*, no. 5 (2010): 836-857.
Kharpal, Arjun. "Huawei Says It would never Hand Data to China's Government. Experts Say It wouldn't Have a Choice." *CNBC*, March 4, 2019. https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html.
Kiestra, Louwrens R. *The Impact of the European Convention on Human Rights on Private International Law*. The Hague: T.M.C. Asser Press, 2014.

Kinzelbach, Katrin. "Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000-2010)." *Netherlands Quarterly of Human Rights 30*, no. 3 (2012): 299-332.

Kiss, Alexandre. "Commentary by the Rapporteur on the Limitation Provisions." *Human Rights Quarterly 7*, no. 1 (1985): 15-22.

Klein, Eckart. "Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended?" In *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdal*, edited by Rolv Ryssdal and Paul Mahoney. Köln: Carl Heymanns, 2000.

Koch, Oliver. *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften.* Berlin: Duncker & Humblot, 2003.

Krieger, Tim, and Daniel Meierrieks. "What Causes Terrorism?" *Public Choice 147*, (2011): 3-27.

Kristof, Nicholas D. "Beijing Hints at Crackdown on Students." *The New York Times*, April 26, 1989. https://www.nytimes.com/1989/04/26/world/beijing-hints-at-crackdown-on-students.

Łącki, Paweł. "Consensus as a Basis for Dynamic Interpretation of the ECHR – A Critical Assessment." *Human Rights Law Review 21*, no. 1 (2021): 186-202.

Lam, Jeffie, Kimmy Chung, Gary Cheung, and Natalie Wong. "Hong Kong Government Unveils National Security Law Details." *South China Morning Post*, July 1, 2020. https://www.scmp.com/news/hong-kong/politics/article/3091286/hong-kong-government-unveils-details-sweeping-national.

Lang, Sheng. *Analysis on Practical Issues of People's Police Law*. Beijing: China Democracy Legal System Publishing House, 1995.

Lang, Sheng, and Shangxin Wang. *Interpretation of the National Security Law of the People's Republic of China*. Beijing: Law Press, 1993.

Lams, Lutgard. "Examining Strategic Narratives in Chinese Official Discourse under Xi Jinping." *Journal of Chinese Political Science 23*, (2018): 387-411.

Lavrysen, Laurens. "On Sledgehammers and Nutcrackers: Recent Developments in the Court's Less Restrictive Means Doctrine." *Strasbourg Observers*, 2018. Updated June 20, 2018. https://strasbourgobservers.com/2018/06/20/on-sledgehammers-and-nutcrackers-recent-developments-in-the-courts-less-restrictive-means-doctrine/.

Lavrysen, Laurens. "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights." In *Human Rights and Civil Liberties in the 21st Century*, edited by Yves Haeck and Eva Brems, 69-129. Dordrecht: Springer, 2014.

Lawrence, Susan V., and Michael F. Martin. *Understanding China's Political System*. Congress Report Service, 2013. Accessed March 7, 2020. https://fas.org/sgp/crs/row/R41007.pdf.

Le, Jie. "Inheritance and Transcendence: The Legislation Connotation of the Police's Power to Stop and Search in a New Era." *Journal of Southwest University of Political Science and Law*, no. 5 (2018): 93-102.

Lee, Jones. "Does China's Belt and Road Initiative Challenge the Liberal, Rules-Based Order?" *Fudan Journal of the Humanities and Social Sciences 13*, (2020): 113-133.

Legg, Andrew. *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality.* Oxford: Oxford University Press, 2012.

Legislative Affairs Commission of the Standing Committee of the National People's Congress. *The Interpretation of Counterterrorism Law of the People's Republic of China*. Beijing: Law Press, 2016.

Legislative Council of the Hong Kong Special Administrative Region of the P.R. China. Bills Committee on National Security (Legislative Provisions) Bill. *LegCo*. Accessed February 25, 2020. https://www.legco.gov.hk/yr02-03/english/bc/bc55/papers/bc55_ppr.htm#c.

Lemmens, Paul. "The Right to a Fair Trial and Its Multiple Manifestations: Article 6(1) ECHR." In *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, edited by Eva Brems and Janneke Gerards, 294-314. Cambridge: Cambridge University Press, 2014.

Letsas, George. *A Theory of Interpretation of the European Convention on Human Rights*. Oxford: Oxford University, 2007.

Li, Buyun. "The Right to Subsistence and the Right to Development are the Priorities." *Beijing Daily*, December 7, 2015.

Li, Chunlin. "Building a Community of Human Destiny and the Functional Positioning of the Right to Development." *Wuhan University International Law Review 2*, no. 5 (2018): 1-24.

Li, David Daokui, ed. *Economic Lessons from China's Forty Years of Reform and Opening-up*. Beijing: Tsinghua University Press, 2021.

Li, Jianglan. "Research on Criminal Detention Conditions." Thesis for Master Degree of Southwest University of Political Science and Law, 2018.

Li, Ling. "'Rule of Law' in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China." *Asian Journal of Law and Society 2*, no. 1 (2015): 93-113.

Li, Qing. "Application of the Principle of Proportionality in the Police Law of China." *Journal of Criminal Investigation Police University of China*, no. 6 (2019): 5-13.

Li, Shishi. "Introduction of the 'Amendment (IX) to the Criminal Law of China' (draft) at the 11th Session of the Standing Committee of the Twelfth National People's Congress, 27 October 2014." The Website of the National People's Congress of the People's Republic of China. Accessed May 18, 2020. http://www.npc.gov.cn/wxzl/gongbao/2015-11/06/content_1951884.htm.

Li, Shishi. "Introduction of the 'National Security Law of the People's Republic of China' (draft) at the 12th Session of the Standing Committee of the Twelfth National People's Congress, 22 December 2014." *The Website of the National People's Congress of the People's Republic of China*. Accessed February 8, 2020. http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content_1945964.htm.

Li, Yanhua. "Privacy Protection Mechanisms for Health Data in Europe and their Implications for China – A Perspective on the Jurisprudence relating to Article 8 of the European Convention on Human Rights." *Journal of Cyber and Information Law*, no. 2 (2021): 181-211& 297.

Li, Yuhua, and Feng Chen. "'Restrictive Measures' in Public Security Organs' Counterterrorism Investigation: Article 53 of the Counterterrorism Law." *Journal of People's Public Security University of China (Social Sciences Edition) 33*, no. 1 (2017): 51-55.

Liang, Hongxia. "Constitutional interpretation of the Right to Development – From the Perspective of Constitutional Text." *Human Rights*, no. 4 (2015): 18-28.

Lin Laifan. *Lectures of Constitutional Law.* Beijing: Tsinghua University Press, 2018.

Lin, Laifan, and Yanmin Ji. "Human Rights Protection: The Role as the Principle." *Studies in Law and Business*, no. 4 (2005): 64-69.
Lin, Xianzuo. "Custody Necessity Censorship and Human rights Protection – In the Perspective of the Criminal Procedure Law Revision." *Hebei Law Science 32*, no. 12 (2014): 196-200.
Lin, Xifen. "China's Practice of Pre-trial Detention: An Empirical Analysis of Comparative Law." *Wuhan University Journal (Philosophy & Social Science) 70*, no. 6 (2017): 83-95.
Lin, Yuxiong. *Criminal Procedure Law (Volume One – General Review)*. Beijing: China Renmin University Press, 2005.
Liotta, Peter H., and Taylor Owen. "Why Human Security?" *Whitehead Journal of Diplomacy and International Relations 7*, no. 2 (2006): 37-54.
Lippmann, Walter. *Us Foreign Policy: Shield of the Republic*. Boston: Little, Brown and Company, 1943.
Liu, Fangquan. "'Two Sides in One': Research on the Relationship between Public Security Administrative Power and Criminal Investigation Power – Analysis Based on their Functions." *Legal Forum*, no. 4 (2008): 82-89.
Liu, Juliana. "Hong Kong Debates 'National Education' Classes." *BBC*, September 1, 2012. https://www.bbc.com/news/world-asia-china-19407425.
Liu, Liantai. "Comparation between International Bill of Human Rights and China's Constitution." *Journal of Zhejiang Provincial Party School*, no. 5 (1999): 84-88.
Liu, Renwen. "The 'Re-education through Labour' System and its Reform." *Administrative Law Review*, no. 4 (2001): 13-21.
Liu, Renwen. "Terrorism and Criminal Law: The 9th Amendment of China's Criminal Law." *China Law Review*, no. 2 (2015): 168-174.
Liu, Songshan. "A Historical Review and New Expectation on the Party's Leadership in the 1982 Constitution." *Journal of Henan University of Economics and Law*, no. 3 (2014): 1-20.
Liu, Songshan. "Several Issues of Constitutional Supervision after the 2018 Constitutional Amendment." *Local Legislation Journal*, no. 2 (2019): 1-13.
Liu, Xiahui. "Structural Changes and Economic Growth in China over the Past 40 Years of Reform and Opening-up." *China Political Economy 3*, no. 1 (2020): 19-38.
Liu, Xiaoxiao. "'East Turkistan Islamic Movement' Terrorism and Chinese Government's Countermeasures.' *Academic Exploration*, no. 10 (2004): 84-89.
Liu, Yang, and Bin Zhang. "The Theoretical Basis of the Connection between Administrative Law Enforcement Evidence and Criminal Evidence." *Journal of Northeastern University (Social Science)*, no. 5 (2017): 518-525.
Liu, Yong, Ruihang Cai, Shusheng Cheng, and Xinyue Ma. "Implementation and Application of Face Recognition System in Xinjiang Public Security Bureau." *Electronic Technology & Software Engineering*, no. 15 (2015): 100-101.
Liu, Yuejin. "How Many Security Elements does National Security Include?" Wechat Official Account, November 20, 2021. Accessed January 11, 2022. https://mp.weixin.qq.com/s/UrrSoL8_SG9YjhfggP5nSQ.
Liu, Yuejin, ed. *National Security Studies*. Beijing: China University of Political Science and Law Press, 2004.
Liu, Yuejin. "On the Basic Meaning of National Security and Its Emergence and Development." *Journal of North China Electric Power University (Social Sciences)*, no. 4 (2001): 62-65.

Liu, Zhengfeng. "Finding a Balance between the Principle of the Best Interests of the Child and the Protection of the Human Rights of Parents – An Examination of Article 8 of the European Convention on Human Rights as the Centrepiece." *Journal of Guangzhou University (Social Science Edition) 14*, no. 7 (2015): 17-24.

Locke, John. "Of the Ends of Political Society and Government." In *Second Treatise of Government*. CreateSpace Independent Publishing Platform, 2016.

Long, Hao. "European Standards on the Grounds for Pre-trial Detention and Their Significance." *Journal of Fujian Police College 35*, no. 6 (2021): 29-40.

Long, Wenmao. "Research on the Identifying State Secrets in the Crimes of Infringement of State Secrets." *Journal of People's Public Security University of China (Social Sciences Edition)*, no. 1 (2008): 55-59.

Loof, Jan-Peter. "Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights. A Threat Analysis." In *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict*, edited by Antoine Buyse, 35-56. Antwerp: Intersentia, 2010.

Loof, Jan-Peter. *Mensenrechten en staatsveiligheid: verenigbare grootheden?: Opschorting en beperking van mensenrechtenbescherming*. Nijmegen: Wolf Legal Publishers, 2005.

Loof, Jan-Peter. "Restricting Free Speech in Times of Terror: An ECHR Perspective." In *Freedom of Speech under Attack*, edited by Afshin Ellian and Gelijn Molier, 185-216. The Hague: Eleven International Publishing, 2015.

Luo, Chuanxian. *Overview of Legislative Procedures and Technique*. Taipei: Wu-Nan Book, 2013.

Ma, Jinghua. "The Investigation To-case System: From Reality to Ideal – A Research on Empirical Viewpoint." *Modern Law Science*, no. 2 (2007): 122-134.

Ma, Jinghua. "Research on the Implementation of Investigative To-case System under the Newly Adopted Criminal Procedure Law." *Modern Law Science*, no. 2 (2015): 117-125.

Ma, Jinghua. "Theoretical Research on Investigative To-case System – From Phase Perspective Point of View." *Nanjing University Law Journal*, no. 2 (2010): 200-217.

Ma, Ling. "The Broad and Narrow Contents of the Right to Subsistence." *Jin Ling Law Review*, no. 2 (2007): 72-85.

Ma, Yide. "The Role of Consultative Democracy under the Constitutional Framework and the Associated Rule of Law." *Social Sciences in China 38*, no. 2 (2017): 21-38.

MacFarlane, S. Neil, and Yuen Foong Khong. *Human Security and the UN: A Critical History*. Bloomington: Indiana University Press, 2006.

Mack, Andrew. "Human Security Report 2005: War and Peace in the 21st Century." *Die Friedens-Warte 80*, no. 1/2 (2005): 177-191.

Magnier, Mark. "US Launches New Mandarin Network as Washington and Beijing Battle for Global Influence." *South China Morning Post*, November 24, 2019. https://www.scmp.com/news/china/diplomacy/article/3039109/us-launches-new-mandarin-network-washington-and-beijing-battle.

Mangold, Peter. *National Security and International Relations*. Routledge, 1990.

Manion, Melanie. "When Communist Party Candidates Can Lose, Who Wins? Assessing the Role of Local People's Congresses in the Selection of Leaders in China." *The China Quarterly 195*, (2008): 607-663.

Mao, Junxiang. *Study on Limitation Clauses of the International Conventions on Human Rights*. Beijing: Law Press, 2011.

Mao, Xinjuan, and Zhanchao Ma. "Stay Alert of 'Colour Revolution' and Maintain Political Security." *Journal of Jiangnan Social University 19*, no. 4 (2017): 16-20.

Marlow, Iain. "Biggest Hong Kong Protest Group Faces Threat of Police Probe." *Bloomberg,* August 13, 2021. https://www.bloomberg.com/news/articles/2021-08-13/biggest-hong-kong-protest-group-faces-threat-of-police-probe.

Marmo, Marinella. "The Execution of Judgments of the European Court of Human Rights – A Political Battle." *Maastricht Journal of European and Comparative Law 15*, no. 2: 235-258.

Marx, Karl, and Friedrich Engels. *Selected Works in Two Volumes*. Vol. 2. Moscow: Foreign Language Publishing House, 1958.

Mavronicola, Natasa. "What is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights." *Human Rights Law Review 12*, no. 4 (2012): 723-758.

Mendel, Toby. *A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Council of Europe. Accessed March 10, 2018. https://rm.coe.int/16806f5bb3.

Menghini, Simona Granata. "Manifest Ill-Foundedness and Absence of a Significant Disadvantage as Criteria of Inadmissibility for the Individual Application to the Court." *The Italian Yearbook of International Law 20*, (2010): 111-123.

Michael, Kofman, Katya Migacheva, Brian Nichiporuk, Andrew Radin, Olesya Tkacheva, and Jenny Oberholtzer. *Lessons from Russia's Operations in Crimea and Eastern Ukraine*. RAND, 2017. Accessed January 28, 2022. https://www.rand.org/pubs/research_reports/RR1498.html.

Miller, Gary J. "The Political Evolution of Principal-Agent Models." *Annual Review of Political Science 8*, (2005): 203-225.

Ming Pao. "Zhao Xiaoming: Failing to Enact Article 23 National Security Laws in Hong Kong would Lead to Hong Kong Independence – It is Urgent to Develop National Security Protection Mechanisms." *Ming Pao*, December 11, 2019. https://news.mingpao.com/ins/%E6%B8%AF%E8%81%9E/article/20191211/s00001/1576039965673/%E5%BC%B5%E6%9B%89%E6%98%8E-23%E6%A2%9D%E6%9C%AA%E7%AB%8B%E6%B3%95%E5%8A%A0%E5%8A%87%E3%80%8C%E6%B8%AF%E7%8D%A8%E3%80%8D-%E5%BB%BA%E7%B6%AD%E8%AD%B7%E5%9C%8B%E5%AE%89%E5%88%B6%E5%BA%A6%E6%88%90%E7%B7%8A%E8%BF%AB%E4%BB%BB%E5%8B%99.

Ministry of Foreign Affairs. *Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022*. Ministry of Foreign Affairs, 2019. Accessed March 13, 2018. https://www.government.nl/binaries/government/documents/reports/2018/05/14/integrated-international-security-strategy-2018-2022/NL_International_Integrated_Security_Strategy_2018_2022.pdf.

Mo, Jihong. "On the Evolution of the Constitutional Status of the Ruling Party." *Legal Forum*, no. 4 (2011).

Moradi, Shuresh. "The Chinese Approach to the Liberal Concept of Human Rights." *Open Journal of Social Sciences 7*, no. 9 (2019): 249-258.

Moravcsik, Andrew. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organization 54*, no. 2 (2000): 217-252.

Mowbray, Alastair. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Oxford: Hart, 2004.

Mowbray, Alastair. "The Role of the European Court of Human Rights in the Promotion of Democracy." *Public Law 44*, (1999): 703-725.

Mozur, Paul. "One Month, 500,000 Face Scans: How China is Using A.I. to Profile a Minority." *New York Times*, April 14, 2019. https://cn.nytimes.com/technology/20190415/china-surveillance-artificial-intelligence-racial-profiling/.

Myers, Steven Lee. "How China Uses Forced Confessions as Propaganda Tool." *New York Times*, April 11, 2018. https://www.nytimes.com/2018/04/11/world/asia/china-forced-confessions-propaganda.html.

Nanopoulos, Eva. "European Human Rights Law and the Normalisation of the 'Closed Material Procedure': Limit or Source?" *The Modern Law Review 78*, no. 6 (2015): 913-944.

Nanwani, Shaira. "The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?" *Emory International Law Review 25*, no. 3 (2011): 1431-1475.

Napel, Hans-Martien ten. "The European Court of Human Rights and Political Rights: The Need for More Guidance." *European Constitutional Law Review 5*, no. 3 (2009): 464-480.

Nathan, Andrew J. "China's Challenge." *Journal of Democracy 26*, no. 1 (2015): 156-170.

Nathan, Andrew J. "China's Changing of the Guard: Authoritarian Resilience." *Journal of Democracy 14*, no. 1 (2003): 6-17.

National Coordinator for Security and Counterterrorism (NCTV). *Cyber Security Assessment Netherlands 2018*. NCTV, 2018. Accessed March 14, 2018. https://www.ncsc.nl/english/current-topics/Cyber+Security+Assessment+Netherlands/cyber-security-assessment-netherlands-2018.html.

National Coordinator for Security and Counterterrorism (NCTV). *National Counterterrorism Strategy for 2016-2020*. NCTV, 2016. Accessed March 14, 2018. https://english.nctv.nl/binaries/LR_100495_rapportage_EN_V3_tcm32-251878.pdf.

National Endowment for Democracy's grants database. (accessed July 4, 2023). https://www.ned.org/wp-content/themes/ned/search/grant-search.php.

National Law Office of the Legislative Affairs Commission of the Standing Committee of the National People's Congress. *Decoding the National Security Law of the People's Republic of China.* Beijing: China Legal Publishing House, 2016.

National People's Congress of People's Republic of China. "Legislative Affairs Commission." NPC. Accessed July 15, 2023. http://www.npc.gov.cn/englishnpc/c2852/201903/939762af24ce48c886e9d175502a878b.shtml.

Newman, Edward. "Exploring the 'Root Causes' of Terrorism." *Studies in Conflict & Terrorism 29*, no. 8 (2006): 749-772.

New York Times. "The First Instance Trial of Chen Pingfu." *New York Times*, September 6, 2012. https://cn.nytimes.com/china/20120906/cc06caixin/.

Nieuwenhuis, Aernout. "The Concept of Pluralism in the Case Law of the European Court of Human Rights." *European Constitutional Law Review 3*, no. 3 (2007): 367-384.

Niu, Aimin, Leiming Wang, and Shufeng Li. "The Truth about the Siege of Zhongnanhai." *China News*, March 8, 2001. http://www.chinanews.com/2001-03-08/26/76782.html.

Nolan, Peter. "The China Puzzle: 'Touching Stones to Cross the River'." *Challenge 37*, no. 1 (1994): 25-33.

Nowak, Manfred. *U.N. Covenant on Civil and Political Rights CCPR Commentary*. Kehl: N.P. Engel, 2005.

O'Connell, Rory. "Theories of Democracy." In *Law, Democracy and the European Court of Human Rights*, 5-32. Cambridge: Cambridge University Press, 2020.

Oehmichen, Anna. *Terrorism and Anti-terror Legislation - the Terrorised Legislator? A Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France*. Antwerp: Intersentia, 2009.

Office of the High Commissioner for Human Rights. "About Human Rights Defenders." OHCHR. Accessed May 12, 2020. https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx#ftn1.

Office of the High Commissioner for Human Rights. *Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*. OHCHR, 2022. Updated August 31, 2022. https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region.

Office of the High Commissioner for Human Rights. "Basic facts about the UPR." OHCHR. Accessed April 7, 2020. https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx.

Office of the High Commissioner for Human Rights. "Closing Keynote/Peter Baehr Lecture at the 2016 AHRI Human Rights Research Conference: 50 Years of the Two UN Human Rights Covenants: Legacies and Prospects." OHCHR, September 3, 2016. Accessed December 19, 2016. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20447&LangID=E.

Office of High Commissioner for Human Rights. "UN Human Rights Chief Says China's New Security Law is Too Broad, Too Vague." *OHCHR*, July 7, 2015. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16210&LangID=E.

Office of the High Commissioner for Human Rights. "What are Communications?". OHCHR. Accessed October 7, 2020. https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx.

Ong, Russell. "'Peaceful Evolution', 'Regime Change' and China's Political Security." *Journal of Contemporary China 16*, no. 53 (2007): 717-727.

Owens, Heather, and Barbara Arneil. "The Human Security Paradigm Shift: A New Lens on Canadian Foreign Policy?" *Canadian Foreign Policy Journal 7*, no. 1 (1999): 1-12.

Paleri, Prabhakaran. "National Security: Definitions and Manifestations." In *Revisiting National Security Prospecting Governance for Human Well-Being*, 109-153. Singapore: Springer, 2022.

Palmer, Stephanie. "A Wrong Turning: Article 3 ECHR and Proportionality." *The Cambridge Law Journal 65*, no. 2 (2006): 438-452.

Pan, Jennifer, and Yiqing Xu. "China's Ideological Spectrum." *The Journal of Politics 80*, no. 1 (2018): 254-273.

The Paper. "Is 'Pre-trial Detention' Getting Better in Recent 5 Years? We Found the Answer from 3 Million Judgements." *Paper*, December 4, 2018. https://m.thepaper.cn/newsDetail_forward_2704356.

Paris, Roland. "Human Security: Paradigm Shift or Hot Air?" *International Security 26*, no. 2 (2001): 87-102.

Parliamentary Assembly of Council of Europe. Measures for the Fulfiment of the Declared Aim of The Council of Europe in Accordance with Article 1 of the Statute in Regard to the Safeguard and Further Realisation of Human Rights and Fundamental Freedoms. Doc. 108(1949). Accessed September 23, 2017. http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD01MSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTUx.

Pati, Roza. "Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective." *Berkeley Journal of International Law 23*, no. 1 (2005): 223-280.

Paulussen, Christophe, and Martin Scheinin. "Introduction." In *Human Dignity and Human Security in Times of Terrorism*, edited by Christophe Paulussen and Martin Scheinin, 3-11. The Hague: Springer, 2020.

Peng, Chen. "Inciting Subversion of State Power under Rule of Law and Freedom of Speech." *Theory Research*, no. 2 (2014): 97-98.

People's Daily. "A Picture to Display the Central Leading Groups." *Peoples.cn*, June 30, 2014. http://politics.people.com.cn/n/2014/0630/c1001-25218379.html.

People's Daily. "We must Take a Clear-cut Stand against Disturbances." *People's Daily,* April 26, 1989. https://web.archive.org/web/20160304090319/http://news.xinhuanet.com/zilliao/2005-02/23/content_2609426.htm.

Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland. "Address by Aiken Tuniyazi, Member of the Standing Committee of CPC Xinjiang Uygur Autonomous Regional Committee and Vice Governor of Xinjiang People's Government, at the 41st Session of UN Human Rights Council." *Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland,* June 25, 2019. http://www.china-un.ch/eng/hom/t1675634.htm.

Perry, Elizabeth J. "Is the Chinese Communist Regime Legitimate?" In *The China Questions: Critical Insights into a Rising Power*, edited by Jennifer Rudolph and Michael Szonyi. Cambridge: Harvard University Press, 2018.

Perry, Elizabeth J. "Studying Chinese Politics: Farewell to Revolution?" *China Journal*, no. 57 (2007): 1-22.

Pesinis, Antonis. "The Regulation of 'Hate Speech': The Meaning of 'Incitement' under the Case-law of the European Court of Human Rights and the Jurisdictions of the

European Union, the United Kingdom and Greece." LL.M Thesis of Human Rights of Central European University, 2015.
Petracca, Mark P., and Xiong Mong. "The Concept of Chinese Neo-Authoritarianism: An Exploration and Democratic Critique." *Asian Survey 30*, no. 11 (1990): 1099-1117.
Phillips, Tom. "China Passes Law Imposing Security Controls on Foreign NGOs." *The Guardian*, April 28, 2016. https://www.theguardian.com/world/2016/apr/28/china-passes-law-imposing-security-controls-on-foreign-ngos.
Pierce, Karen. "Joint Statement on Xinjiang, Delivered by Ambassador Karen Pierce, UK Permanent Representative to the UN During the Third Committee Interactive Dialogue with the Chair of the Committee for the Elimination of Racial Discrimination." United States Mission to the UN, 29 October 2019. Accessed June 11, 2020. https://usun.usmission.gov/joint-statement-delivered-by-uk-rep-to-un-on-xinjiang-at-the-third-committee-dialogue-of-the-committee-for-the-elimination-of-racial-discrimination/.
Pils, Eva. "The Party's Turn to Public Repression: An Analysis of the '709' Crackdown on Human Rights Lawyers in China." *China Law and Society Review 3*, no. 1 (2018): 1-48.
PKULaw. (accessed April 6, 2021). https://www.pkulaw.com/case/.
Plattner, Marc F. "Democracy Embattled." *Journal of Democracy 31*, no. 1 (2020): 5-10.
Pokalova, Elena. "Authoritarian Regimes against Terrorism: Lessons from China." *Critical Studies on Terrorism 6,* no. 2 (2012): 279-298.
Potter, Pitman B. "China's Challenge to International Human Rights Standards: From Qualified Acceptance to Active Revision." In *Exporting Virtue?: China's International Human Rights Activism in the Age of Xi Jinping*, 37-65. Vancouver: University of British Columbia Press, 2021.
Potter, Pitman B. "Selective Adaptation and Institutional Capacity: Perspectives on Human Rights in China." *International Journal 61*, no. 2 (2006): 389-407.
Press Unit of European Court of Human Rights. *Factsheet – Derogation in Time of Emergency*. ECtHR, 2022. Updated January 2022. https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.
Press Unit of European Court of Human Rights. *Sexual Orientation Issues*. ECtHR, 2021. Updated February 2021. www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf.
Press Unit of European Court of Human Rights. *Terrorism and the European Convention on Human Rights.* ECtHR, 2020. Updated September 2020. www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf.
Puig, Santiago Mir. "Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct." *New Criminal Law Review: An International and Interdisciplinary Journal 11*, no. 3 (2008): 409-418.
Qi, Yanping. "On the Mechanism of Protecting Individual's Right to Development." *Study & Exploration*, no. 2 (2008): 99-106.
Raffie, Dina Al. "The Identity-Extremism Nexus: Countering Islamist Extremism in the West." *Programme on Extremism*, October 2015. Accessed June 20, 2020. https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/Al%20Raffie.pdf.

Ramzy, Austin, and Chris Buckley. "'Absolutely No Mercy': Leaked Files Expose How China Organized Mass Detentions of Muslims." *New York Times*, November 16, 2019. https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html.

Reidy, Aisling. *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*. Strasbourg: Council of Europe, 2003.

Research Division of European Court of Human Rights. *National Security and European Case-Law.* ECtHR, 2013. Accessed May 23, 2017. www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf.

Reuters. "Chinese Police Officer Who Killed Man at Station Cleared of Wrongdoing." *Reuters*, May 14, 2015. https://www.reuters.com/article/us-china-police/chinese-police-officer-who-killed-man-at-station-cleared-of-wrongdoing-idUSKBN0NZ11420150514.

RFI. "China Jails Protestant Pastor for 9 Years for 'Inciting' Subversion." *RFI*, December 30, 2019. http://www.rfi.fr/en/wires/20191230-china-jails-protestant-pastor-9-years-inciting-subversion.

Roberts, David. "Review Essay: Human Security or Human Insecurity? Moving the Debate Forward." *Security Dialogue 37*, no. 2 (2006): 249-261.

Rodrik, Dani. "Is Liberal Democracy Feasible in Developing Countries?" *Studies in Comparative International Development 51*, (2016): 50-59.

Romano, Cesare P. R. "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures." In *International Courts and the Development of International Law*, edited by Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, and Chiara Ragni, 561-572. The Hague: T.M.C. Asser Press, 2013.

Rongtong Open Source Data Institute. *Analysis Report on the Activities of Foreign NGOs in China (2017-2021)*. Rongtong Open Source Data Institute, 2022.

Roosevelt, Franklin D. "The Four Freedoms." Voices of Democracy, January 6, 1941. Accessed February 4, 2017. www.voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/.

Roth, Kenneth. *World Report 2020: China's Global Threat to Human Rights*. Human Rights Watch. Accessed February 12, 2020. https://www.hrw.org/world-report/2020/china-global-threat-to-human-rights.

Roxin, Claus. "The Legislation Critical Concept of Goods-in-law under Scrutiny." *European Criminal Law Review 3*, no. 1 (2013): 3-25.

Ryazanskaya, S. ed. *Karl Marx and Frederick Engels: Selected Correspondence*. Translated by I. Lasker. 2nd ed. Moscow: Progress Publishers, 1965.

Saich, Tony. "The Fourteenth Party Congress: A Programme for Authoritarian Rule." *The China Quarterly*, no. 132 (1992): 1136-1160.

Sceats, Sonya, and Shaun Breslin. *China and the International Human Rights System*. Chatham House, 2012. Accessed April 7, 2020. https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/r1012_sceatsbreslin.pdf.

Schachter, Oscar. "Implementing the Right to Development: Programme of Action." *The Right to Development in International Law*, (1992): 27-30.

Scheinin, Martin. Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. A/HRC/13/37 (December 28, 2009).

Scheinin, Martin. "Turkey's Derogation from the ECHR – What to Expect?" *EJIL: Talk!* Updated July 27, 2016. https://www.ejiltalk.org/turkeys-derogation-from-the-echr-what-to-expect/.

Schmid, Alex P. "Countering Violent Extremism: A Promising Response to Terrorism." *The International Centre for Counter-Terrorism*, June 12, 2012. Accessed June 8, 2020. https://icct.nl/publication/countering-violent-extremism-a-promising-response-to-terrorism/.

Schmid, Alex P. "Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review." *The International Centre for Counter-Terrorism – The Hague 4*, no. 2 (2013).

Shang, Xiaoqiang. "The Lessons from the CCP's Maintaining Social Stability over the 40 Years of Reform and Opening Up." *Journal of the Party School of XPCC of CPC*, no. 5 (2018): 90-93.

Shaya County People's Government. "I Want to Use My Story to Rectify the Name of the Vocational Education and Training Centres." *Government Website*, December 12, 2019. https://www.xjsy.gov.cn/xwdt/jnyw/20191212/i487843.html.

Shepherd, Christian, and Laura Pitel. "The Karakax List: How China Targets Uighurs in Xinjiang." *Financial Times*, February 17, 2020. https://www.ft.com/content/e0224416-4e77-11ea-95a0-43d18ec715f5.

Shi, Jingwu. "How the 'Cultural Revolution' Interrupted the Construction of the Rule of Law in China." *Literary Circles of CCP History*, no. 23 (2014): 52-54.

Shi, Wenlong. "On the Development of the Fundamental Right Restraint System in China: The Comparison Analysis between the Article 51 in China's Constitution and the Article 19 in German Basic Law." *Journal of Comparative Law*, no. 5 (2014): 161-174.

Shi, Yafen. "Analysis about the Necessity for Legal Regulations of Technical Reconnaissance Measures." *Law Science Magazine*, no. 7 (2009): 111-113.

Sicilianos, Linos-Alexander. "Preventing Violations of the Right to Life: Positive Obligations under Article 2 of the ECHR." *Cyprus Human Rights Law Review 3*, no. 2 (2014): 117-129.

Sina. "Due to the 7.5 Incident, SWAT Teams for 31 Cities Dispatched to Xinjiang." *Sina*, August 18, 2009. http://news.sina.com.cn/o/2009-08-18/062716140170s.shtml.

Sina. "Prosecutors Dropped the Case of Chen Pingfu, Who was Accused of Inciting Subversion of State Power Due to his Online Comments." *Sina*, December 19, 2012. http://news.sina.com.cn/o/2012-12-19/083925846119.shtml.

The Sixth Plenary Session of the Eleventh Central Committee of the CCP. Resolution on Certain Questions in the History of Our Party since the Founding of the People's Republic of China (June 27, 1981). Accessed July 20, 2023. https://www.gov.cn/test/2008-06/23/content_1024934.htm.

The Sixth Plenary Session of the Nineteenth Central Committee of CCP. Resolution of the Central Committee of the Communist Party of China on the Major Achievements and Historical Experience of the Party over the Past Century (November 11, 2021). Accessed July 20, 2023. https://www.gov.cn/zhengce/2021-11/16/content_5651269.htm.

Smith, Richard. "The Margin of Appreciation and Human Rights Protection in the War on Terror, have the Rules Changed before the ECtHR." *Essex Human Rights Review 8*, no. 1 (2011): 124-153.

Sohu. "Police Personnel from Two Provinces Clashed at the Broder, China Daily: Constraints Hurt the Feelings of People from Hubei." *Sohu*, March 28, 2020. https://www.sohu.com/a/383785569_161795.

Sohu. "Xinjiang Police Raid a Terrorist Training Camp of 'East Turkistan Islamic Movement'." *Sohu*, January 8, 2007. http://news.sohu.com/20070108/n247488217.shtml.

Song, Yuansheng. "Reform of Custody Necessity Censorship." *Oriental Law*, no. 2 (2017): 89-96.

South China Morning Post. "The Article 23 Argument." *South China Morning Post*, July 1, 2003. https://www.scmp.com/article/420333/article-23-argument.

South China Morning Post. "Chinese Policeman Guns Down Unarmed Traveller in front of His Three Children and Elderly Mother." *SCMP*, May 13, 2015. https://www.scmp.com/news/china/society/article/1794689/chinese-policeman-guns-down-unarmed-traveller-front-his-three.

Spigelman, James. "The Forgotten Freedom: Freedom from Fear." *The International and Comparative Law Quarterly 59*, no. 3 (2010): 543-570.

Sprick, Daniel. "Judicialization of the Chinese Constitution Revisited: Empirical Evidence from Court Data." *China Review 19*, no. 2 (2019): 41-68.

Srikanth, Divya. "Non-Traditional Security Threats in the 21st Century: A Review." *International Journal of Development and Conflict 4*, (2014): 60-68.

Ssenyonjo, Manisuli. "Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law." *The International Journal of Human Rights 15*, no. 6 (2011): 969-1012.

State Council Information Office of China. *China's Peaceful Development*. State Council Information Office of China, 2011. Accessed February 11, 2020. https://www.scio.gov.cn/zxbd/nd/2011/Document/1006416/1006416.htm.

State Council Information Office of China. *China's Progress in Poverty Reduction and Human Rights*. State Council Information Office of China, 2016. Updated October 17, 2016. http://www.china.org.cn/government/whitepaper/node_7242770.htm.

State Council of China. *National Human Rights Action Plan of China (2021-2025)*. State Council of China, 2021. Updated September 9, 2021. http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a111c6d0df57f98dfeec.html.

State Council Information Office of China. *New Progress in the Judicial Protection of Human Rights in China*. State Council Information Office of China, 2016. Updated June 2016. http://english.www.gov.cn/archive/white_paper/2016/09/12/content_281475440241794.htm.

State Council Information Office of China. *Progress in Human Rights over the 40 Years of Reform and Opening Up in China*. Xinhua, 2018. Updated December 12, 2018. http://www.xinhuanet.com/english/2018-12/12/c_137668699.htm.

State Council Information Office of China. *The Right to Development: China's Philosophy, Practice and Contribution*. State Council Information Office of China, 2016. Updated December 1, 2016. http://www.scio.gov.cn/32618/Document/1534069/1534069.htm.

State Council Information Office of China. *Seeking Happiness for People: 70 Years of Progress on Human Rights in China*. Xinhua, 2019. Updated September 22, 2019. http://www.xinhuanet.com/english/2019-09/22/c_138412720.htm.

State Council of China. Decision of the Standing Committee of the National People's Congress on Abolishing the Legal Provisions on Re-education through Labour. State Council of China, 2013. Updated December 28, 2013. http://www.gov.cn/jrzg/2013-12/28/content_2556412.htm.

State Council of China. "Eight Political Parties." State Council of China, 9 March 2020. Accessed May 1, 2020. http://www.gov.cn/guoqing/2017-12/31/content_5269697.htm.

State Council of China. *The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang*. State Council of China, 2019. Updated March 18, 2019. http://www.gov.cn/zhengce/2019-03/18/content_5374643.htm.

Stewart, Susan. "Democracy Promotion before and after the 'Colour Revolutions'." *Democratization 16*, no. 4 (2009): 645-660.

Stockmann, Daniela, and Mary E. Gallagher. "Remote Control: How the Media Sustain Authoritarian Rule in China." *Comparative Political Studies 44*, no. 4 (2011): 436-467.

Strasbourg Observers. "Belkacemi and Oussar v Belgium and Dakir v Belgium: The Court Again Addresses the Full-face Veil, but it does not Move away from its Restrictive Approach." *Strasbourg Observers*, July 25, 2017. Accessed October 25, 2021. https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach/.

Stratford, Timothy P., and Luo Yan. "China's New National Security Law." *The National Law Review 5,* (2015). Accessed February 10, 2020. https://www.natlawreview.com/article/china-s-new-national-security-law.

Strøm, Kaare. "Delegation and Accountability in Parliamentary Democracies." *European Journal of Political Research 37*, (2000); 261-289.

Sudworth, John. "China's Hidden Camps – What's Happened to the Vanished Uighurs of Xinjiang?" *BBC*, October 24, 2018. https://www.bbc.co.uk/news/resources/idt-sh/China_hidden_camps.

Suhrke, Astri. "Human Security and the Interests of States." *Security Dialogue 30*, no. 3 (1999): 265-276.

Sun, Yuan. "An Outline of the Substantive Explanation of the Clause against Self-incrimination." *Tribune of Political Science and Law 34*, no. 2 (2016): 59-69.

Sun, Zhanwang. "The Differences between Legal Reservation and Parliament Reservation: Article 8 of Legislation Law." *Tribune of Political Science and Law*, no. 2 (2011): 105-112.

Supreme People's Court of China. "Case Law of State Compensation." The Supreme People's Court, January 7, 2016. Accessed May 24, 2020. http://www.court.gov.cn/zixun-xiangqing-16448.html.

Susan, Rose-Ackerman, and Billa Benjamin. "Treaties and National Security." *New York University Journal of International Law and Politics 40*, no. 2 (2008): 437-496.

Sussex, Matthew. "Understanding National Security: The Promises and Pitfalls of International Relations Theory." in *The Palgrave Handbook of National Security*, edited by Michael Clarke, Adam Henschke, Matthew Sussex, and Tim Legrand, 23-52. Switzerland: Palgrave Macmillan Cham, 2021.

Sweet, Alec Stone, and Jud Mathews. "Proportionality Balancing and Global Constitutionalism." *Columbia Journal of Transnational Law 47*, (2008): 68-149.
Tadjbakhsh, Shahrbanou, and Anuradha Chenoy. *Human Security: Concepts and Implications*. London: Routledge, 2007.
Tan, Mi. "Empirical Research on the "Information Note" in Criminal Proceedings." Thesis for Master Degree of Sichuan Academy of Social Science, 2018.
Tang, Aijun. "Ideological Security in the Framework of the Overall National Security Outlook." *Socialism Studies*, no. 5 (2019): 49-55.
Tang, Liang. "An Empirical Analysis of China's Pre-trial Detention." *Law Science*, no. 7 (2001): 29-35.
Tatlow, Didi Kirsten. "New Signs that China is Scrutinizing Foreign NGOs." *New York Times*, June 30, 2014. https://cn.nytimes.com/china/20140630/c30ngo/en-us/.
Taylor, Paul M. *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*. Cambridge University Press, 2020.
Tian, Hongjie. "The Positioning, Function and Application Scope of the Proportionality Principle in Criminal Law." *Journal of Renmin University of China 33*, no. 4 (2019): 55-67.
Tian, Wenlin. "The Mentality and Tactics of the Western Powers to Manipulate the 'Colour Revolution'." *Guangming*, September 11, 2019. http://m.cwzg.cn/theory/201909/51402.html?page=full.
Tomlin, Patrick. "Could the Presumption of Innocence Protect the Guilty?" *Criminal Law, Philosophy 8*, (2014): 431-447.
Tomuschat, Christian. "The Right to Life – Legal and Political Foundations." In *The Right to Life*, edited by Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter, ix-18. Boston: Brill, 2010.
Tsakyrakis, Stavros. "Proportionality: An Assault on Human Rights?" *International Journal of Constitutional Law 7*, no. 3 (2009): 468-493.
Turkut, Emre, and Thomas Phillips. "Non-Discrimination, Minority Rights and Self-Determination: Turkey's Post-Coup State of Emergency and the Position of Turkey's Kurds." In *Human Rights in Turkey: Assaults on Human Dignity*, edited by Hasan Aydin and Winston Langley, 109-129. Switzerland: Springer, 2020.
Ulfstein, Geir. "The European Court of Human Rights as a Constitutional Court?" *PluriCourts Research Paper No. 14-08*, (2014). Accessed June 17, 2023. https://deliverypdf.ssrn.com/delivery.php?ID=220090127065000103126122090123106064054038089037048042010100081081119006071112083093100042033122009045047068021124078110114029052078043034093122123093092007102100089081046043006073127088006067017124003073083021113026124075030103075029098083106074112112&EXT=pdf&INDEX=TRUE.
UN Audiovisual Library of International Law. "International Covenant on Civil and Political Rights – Procedural History." UN Audiovisual Library of International Law. Accessed May 23, 2017. http://legal.un.org/avl/ha/iccpr/iccpr.html.
UN Economic and Social Council. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. E/CN.4/1985/4 (September 28, 1984).
UN General Assembly. Letter Dated 8 July 2019 from the Permanent Representatives of Australia, Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Japan, Latvia, Lithuania, Luxembourg, the Netherlands,

New Zealand, Norway, Spain, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland to the United Nations Office at Geneva Addressed to the President of the Human Rights Council. A/HRC/41/G/11(July 23, 2019).

UN General Assembly. National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China. A/HRC/WG.6/31/CHN/1 (August 20, 2018).

UN General Assembly. Report of the Special Rapporteur on the Right to Privacy. A/HRC/37/62 (October 25, 2018).

UN General Assembly. The Right to Privacy in the Digital Age. A/HRC/RES/28/16 (April 1, 2015).

United Nations. Universal Declaration of Human Rights 1948, A/RES/217(III).

United Nations Commission on Human Rights. Report of the Sixth Session, Annexes Ⅰ. E/1681(May 29, 1950).

United Nations Development Programme. *Human Development Report 1994: New Dimensions of Human Security*. New York: Oxford University Press, 1994.

United Nations Library. "Drafting of the Universal Declaration of Human Rights." United Nations Library. Accessed May 23, 2017. http://research.un.org/en/undhr/introduction.

United Nations Office on Drugs and Crime (UNODC). "Terrorism and Violent Extremism." UNODC. Accessed June 8, 2020. https://www.unodc.org/e4j/en/secondary/terrorism.html.

US Congress. Uyghur Human Rights Policy Act of 2020, S.3744.

US Mission to the United Nations in Geneva. "Joint Statement – Human Rights Situation in China." U.S. Mission to the United Nations in Geneva, 10 March 2016. Accessed May 12, 2020. https://geneva.usmission.gov/2016/03/10/item-2-joint-statement-human-rights-situation-in-china/.

van der Schyff, Gerhand. "The Concept of Democracy as an Element of the European Convention." *Comparative and International Law Journal of Southern Africa 38*, no. 3 (2005): 355-372.

van Dijk, Pieter, Fried van Hoof, Arjen van Rijn, and Leo Zwaak, eds. *Theory and Practice of the European Convention on Human Rights*. 5th edn. Cambridge: Intersentia, 2018.

Varga, Csaba. "Autonomy and Instrumentality of Law." *Acta Juridica Hungarica 40*, nos. 3-4 (1999): 213-236.

Waldron, Jeremy. "Fake Incommensurability: A Response to Professor Schauer." *Hastings Law Journal 45*, no. 4 (1994): 813-824.

Waldron, Jeremy. "Security and Liberty: The Image of Balance." *The Journal of Political Philosophy 11*, no. 2 (2003): 191-210.

Wallace, Stuart. *The Application of the European Convention on Human Rights to Military Operations*. Cambridge: Cambridge University Press, 2019.

Wallace, Stuart. "Derogations from the European Convention on Human Rights: The Case for Reform." *Human Rights Law Review 20*, no. 4 (2020): 769-796.

Waltz, Kenneth. *Theory of International Politics*. New York: McGraw-Hill, 1979.

Wan, Yi. "Criticism of Evidence Transformation Rules." *Political Science and Law*, no. 1 (2011): 130-140.

Wan, Yi. "How to Improve China's Criminal Coercive Measures System." *Criminal Science*, no. 5 (2006): 70-76.

Wan, Zhenhui. "The Basic Category of Criminal Coercive Measures – Comments on the Relevant Provisions of the New 'Criminal Procedure Law'." *Tribune of Political Science and Law*, no. 3 (2012): 62-73.

Wang, Chao. "An Empirical Analysis of the Explanation of Case Handling in Criminal Proceedings – Case Study on the Z County, B City, Shandong Province." *People's Procuratorial Semimonthly*, no. 2 (2020): 70-74.

Wang, Chen. "A Brief Explanation of the Draft Amendment to China's Constitution." *The Website of the National People's Congress of the People's Republic of China*, March 20, 2018. https://web.archive.org/web/20180411025710/http://www.npc.gov.cn/npc/xinwen/2018-03/20/content_2052202.htm.

Wang, Cunkui, and Aili Peng. "Foreign NGOs' Activities in China and Countermeasures: From the Perspective of Maintaining Political Security." *Journal of People's Public Security University of China (Social Sciences Edition) 30*, no. 1 (2014): 122-128.

Wang, Jinwen. "Interpreting and Applying Limitation Clauses' Functions on Protecting Fundamental Constitutional Rights: How to Confirm and Protect the Emerging Rights." *ECUPL Journal*, no. 5 (2018): 88-102.

Wang, Lei. "On the Two-level Standards for Arrest." *Journal of Northeastern University (Social Science) 20*, no. 3 (2018): 291-298.

Wang, Minyuan. "Judicial Control over China's Criminal Detention." *Global Law Review*, no. 4 (2003): 403-407.

Wang, Xigen. "The Definition of the Right to Development in Philosophy of Law." *Modern Law Science*, no. 6 (2004): 3-8.

Wang, Xigen. "The Jurisprudence of the Right to Development." *Cass Journal of Law*, no. 4 (1999): 16-24.

Wang, Xinzi. "Judicial Review on Determining State Secrets." *China Law Review*, no. 3 (2019): 186-192.

Wee, Sui-Lee. "China Says It will Shut Plant as Thousands Protest." *Reuters*, August 14, 2011. https://www.reuters.com/article/us-china-protests-idUSTRE77D0EK20110814.

Wei, Xiaoxu. "The Chinese Expression of the Right to Subsistence: The Progressive Expansion of a Dual Orientation." *Human Rights*, no. 3 (2021): 38-56.

Wei, Xiaoxu. "Redefining the Right to Development: Function, Fulfilment and Value." *Human Rights*, no. 2 (2020): 35-52.

Wei, Xiuling. "On the Supervision of the Criminal Investigation Actions of Public Security Organs by Administrative Judicial Power." *Policing Studies*, no. 8 (2003): 85-88.

Wei, Zhentuan. "Application of Law in Technical Reconnaissance and Procurement of Evidence." *Journal of Guangxi Public Security Management Cadres Institute*, no. 3 (2001): 11-13.

White House. "Executive Order: Border Security and Immigration Enforcement Improvements." White House, January 25, 2017. Accessed February 4, 2017. https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements.

White House. "Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States." White House, January 27, 2017. Accessed February 4, 2017. https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

Whiting, Susan H. "Authoritarian 'Rule of Law' and Regime Legitimacy." *Comparative Political Studies 50*, no. 14 (2017): 1907-1940.
Wimmer, Andreas, and Yuval Feinstein. "The Rise of the Nation-State across the World, 1816 to 2001." *American Sociological Review 75*, no. 5 (2010): 764-790.
Wolfers, Arnold. "'National Security' as an Ambiguous Symbol." *Political Science Quarterly 67*, no. 4 (1952): 481-502.
World Bank. "The World Bank in China." World Bank. Updated March 29, 2021. https://www.worldbank.org/en/country/china/overview.
Wu, Qian, Chunran Jing, and Liang Qiao. "Confirming the Principle of Presumption of Innocence: Judicial Protection of Human Rights." *Henan Legal Newspaper*, March 9, 2015. http://www.humanrights.cn/html/2015/8_0311/4701.html.
Wu, Qingrong. *Basic Theories of State Security Administrative Law*. Beijing: Current Affairs Press, 2008.
Wu, Xiaolin. *Research on Criminal Detention*. Thesis for Doctoral Degree of Southwest University of Political Science and Law, 2017.
Wu, Yajie. "The Inspiration of Gorbachev's Failure of Political Pluralism for Contemporary China." *Journal of Qiqihar University (Philosophy & Social Science Edition)*, no. 7 (2016).
Wu, Zhanying. "On the Issues of the Crime of Refusing to Provide Evidence for the Crime of Espionage." *Legal Forum*, no. 3 (2007): 110-115.
Xi, Xuan, and Chunming Jin. *A Brief History of the Cultural Revolution*. Beijing: History of Chinese Communist Party Publishing House, 1996.
Xia, Qingxia "Research on Individual Human Right to Development." *The Political Science and Law Tribune*, no. 6 (2004): 171-179.
Xia, Xinhua, and Qingshan Wu. "The Reconstruction of Restrictive Clauses of the Constitutional Right in China – Take the Article 51 of the Constitution as the Centre." *Journal of Xiangtan University (Philosophy and Social Sciences)*, no. 1 (2017): 25-29.
Xie, Chuanyu. "An Analysis of the Police Inspection Power – From System Construction to Practice." *Journal of People's Public Security University of China (Social Sciences Edition)*, no. 3 (2005): 31-37.
Xie, Fang, and Lei Cheng. "The Difference between Technical Investigation and Technical Reconnaissance: Viewed from the Reform of Due Process." *Journal of Sichuan University (Philosophy and Social Science Edition)*, no. 2 (2018): 184-192.
Xie, Libin. "Level of Legislative Guarantee of Basic Rights." *Journal of Comparative Law*, no. 4 (2014): 40-50.
Xie, Xiaojian. "Cross-examination of Secret Evidence after the Amendment of the Criminal Procedure Law." *Legal Forum 28*, no. 5 (2013): 92-99.
Xie, Xiaojian. "The Element of Urgency for Criminal Detention in China." *Modern Law Science*, no. 4 (2016): 110-120.
Xinhua. "Armed Police to be Commanded by CPC Central Committee." *Xinhua*, December 27, 2017. http://www.xinhuanet.com/english/2017-12/27/c_136855602.htm.
Xinhua. "CCTV Restore Qing'an Incidence, Police Said Feeling Aggrieved." *Xinhua*, May 31, 2015. http://www.xinhuanet.com/politics/2015-05/31/c_127860705.htm.
Xinhua. "China will Unswervingly Follow the Path of Human Rights Development that Suits its Own National Conditions: Ma Zhaoxu on China's Participation in the 48th

Session of the UN Human Rights Council." *Xinhua.* Accessed September 25, 2021. http://www.news.cn/2021-09/25/c_1127899157.htm.
Xinhua. *The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang*. Xinhua, 2019. Updated March 18, 2019. http://news.cn/english/2019-03/18/c_137904166.htm.
Xinhua. *Full Text: Vocational Education and Training in Xinjiang*. Xinhua, 2019. Updated August 16, 2019. http://www.xinhuanet.com/english/2019-08/16/c_138313359.htm.
Xinhua. "International Forum Analyzes Evil Nature of Falun Gong." *Xinhua*, December 3, 2017. http://www.xinhuanet.com/english/2017-12/03/c_136797683.htm.
Xinhua. "We must be Highly Vigilant and Guard against the 'Colour Revolution'." *Xinhua*, February 26, 2016. http://www.xinhuanet.com//politics/2016-02/26/c_128755417.htm.
Xinhua. "Xi Jinping Presided over the First Meeting of CNSC, Emphasized the Holistic Security Concept and the Path of National Security with Chinese Characteristics." *Xinhua*, April 15, 2014. http://www.xinhuanet.com//politics/2014-04/15/c_1110253910.htm.
Xu, Jian, and Tian Xie. "'Colour Revolution' and 'Arab Spring', Causes and Social Early Warning Mechanism." *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences)*, no. 3 (2017): 23-33.
Xu, Jian, and Tian Xie. "Social Early Warning Analysis of International Political Turbulence." *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences) 25*, no. 3 (2017): 23-33.
Xu, Shuang. "The Basic Rights of Citizens and National Construction in the Chinese Constitution." Chap. 1 in *Constitution and Legal Protection of Citizens' Basic Rights*. Beijing: Social Sciences Academic Press, 2017.
Xu, Shuang. "How to Understand the Human Rights Clauses in the Chinese Constitution." *Global Law Review*, no. 6 (2012): 55-57.
Xu, Xianming. "On the Right to Subsistence." *Social Sciences in China*, no. 5 (1992): 39-56.
Xu, Xing. "The Mistakes of Stability Maintenance: Dissimilation and Challenge." *People's Tribune*, no. 27 (2010): 14-15.
Xu, Youyu. "Studies on China's Cultural Revolution by Western Scholars." In *The Cultural Revolution: Facts and Analysis*, edited by Qingfeng Liu, 847-881. Hong Kong: The Chinese University of Hong Kong Press, 1996.
Xu, Yuanxian, and Donghao Wu. "The Constitutional Basis of the Administrative Regulations in China." *The Jurist*, no. 3 (2005): 63-68.
Yan, Xuetong. "Chinese Values vs. Liberalism: What Ideology Will Shape the International Normative Order?" *The Chinese Journal of International Politics 11*, no. 1 (2018): 1-22.
Yang, Dengfeng. "From Principle of Reasonableness to Principle of Proportionality." *China Legal Science*, no. 3 (2016): 88-105.
Yang, Guisheng. "On the Essence, Problems and Solutions of Limits of Our Constitutional Rights." *Journal of Sichuan Administration College*, no. 4 (2009): 59-62.
Yang, Guisheng. "Restrictions on Constitutional Rights of China: Substance, Problems and Solutions." *Journal of Sichuan Administration Institute*, no. 4 (2009): 59-62.

Yao, Longfei, and Jianhui Chen. "The Normative Basis of the Principle of Proportionality in the Chinese Constitution." *Journal of Shandong University of Science and Technology (Social Sciences) 18*, no. 4 (2016): 37-45 & 51.

Ye, Xinhuo. "Analysis and Lessons of Surveillance Measures of Foreign Countries." *ECUPL Journal*, no. 3 (2003): 96-101.

Ye, Xinyi. "Stories Reflecting the New Path of Lawfully Governing Xinjiang, Vocational Education and Training Centres Protect the Legitimate Rights and Interests of People of All Ethnic Groups in Xinjiang." *Sohu*, December 9, 2019. https://www.sohu.com/a/359225280_119038.

Yili News Network. "We Know Best about Whether Vocational Education and Training Centres are Good." *Yili News Network,* December 8, 2019. http://www.ylxw.com.cn/2019/1208/205053.shtml.

Ying, Songnian, ed. *Lectures on Administrative Law*. Beijing: China University of Political Science and Law Press, 1988.

Yu, Jianrong. "Major Types and Basic Characteristics of Group Event in Today's China." *Journal of CUPL*, no. 6 (2009): 114-120 & 160.

Yu, Jianrong. "Problems and Solutions of China's Current Pressure Stability Maintenance System: Reanalyse the Rigid Stability Type of the Society of China." *Exploration and Free Views*, no. 9 (2012): 3-6.

Yu, Keping. "China's Civil Society: Concept, Categories, and Policies." *Social Sciences in China*, no. 1 (2006): 109-122 & 207-208.

Yutaka, Arai-Takahashi. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. Antwerp: Intersentia, 2002.

Zand, Joseph. "The Concept of Democracy and the European Convention on Human Rights." *University of Baltimore Journal of International Law 5*, no. 2 (2017): 195-227.

Zeng, Jinghan. *The Chinese Communist Party's Capacity to Rule: Ideology, Legitimacy and Party Cohesion*. Hampshire: Palgrave Macmillan, 2016.

Zeng, Shuiying, and Dongshui Yin. "Overseas Political Study on Models of Authoritarianism of Modern China: Review and Rethink." *Dynamics of Social Sciences*, no. 1 (2017): 25-32.

Zhang, Qianfan. "The Communist Party Leadership and Rule of Law: A Tale of Two Reforms." *Journal of Contemporary China 30*, no. 130 (2021): 578-595.

Zhang, Taisu, and Tom Ginsburg. "Legality in Contemporary Chinese Politics." *Virginia Journal of International Law*. Accessed May 20, 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250948.

Zhang, Xiaosha. "A Constitutional Analysis of Hate Speech – A Comparative Analysis Based on the Jurisprudence of the US Supreme Court and the European Court of Human Rights." *Human Rights*, no. 2 (2022): 92-117.

Zhang, Zetao. "The Connection of Public Security Organs' Investigative Power and Administrative Power." *Social Sciences in China*, no. 10 (2019): 160-183 & 207.

Zhao, Bingzhi, ed. *The Implementation of Crimes against National Security and Other Related Crimes.* Beijing: China Legal Publishing House, 2016.

Zhao, Juan. "The Constitutionality of Cases of Administrative Permission on Assembly." *Jiangsu Social Sciences*, no. 6 (2017): 87-97.

Zhao, Kejing. "China's National Security Commission." *Window into China*, July 14, 2015. https://carnegietsinghua.org/2015/07/14/china-s-national-security-commission-pub-60637.

Zhao, Shiyi, Liansu Liu, and Yi Liu. "Comments on Defects in Current Version of Constitution." *Law and Social Development*, no. 3 (2003): 57-72.
Zhao, Suisheng. "The Ideological Campaign in Xi's China: Rebuilding Regime Legitimacy." *Asian Survey 56*, no. 6 (2016): 1168-1193.
Zhao, Tingyang. "'Credit' Human Rights: A Non-Western Theory of Universal Human Rights. *Social Sciences in China*, no. 4 (2006): 17-30 & 205.
Zheng, Chunyan. "Open Government Information and State Secrets Protections." *China Legal Science*, no. 1 (2014): 144-157.
Zheng, Rong. *Empirical Research Report on the Witness Cross-examination Mechanism in Criminal Trials*. China Court, 2017. Updated January 8, 2017. https://www.chinacourt.org/article/detail/2017/01/id/2516422.shtml.
Zheng, Yongliu. "The Text and Interpretation of Public Interests in China's Public Laws." In *Public Interests in Chinese Law*, edited by Yongliu Zheng and Qingyu Zhu. Beijing: Peking University Press, 2014.
Zhou, Bing. "Foreign NGOs' Political Infiltration into China, the Case Study on the 'Labour Movement Star'." *Zhonghuahun*, no. 7 (2016): 25-27.
Zhou, Guojun. "Study on 'Investigations' and 'Reconnaissance'." *The Political Science and Law Tribune*, no. 5 (1993).
Zhou, Zunyou. "'Fighting Terrorism According to Law': China's Legal Efforts against Terrorism." In *Terrorism and Counter-Terrorism in China: Domestic and Foreign Policy Dimensions*, edited by Michael Clarke. Oxford: Oxford University Press, 2018.
Zhu, Chenge. "Debate on the Functions of the Legislative Affairs Commission of the Standing Committee of the National People's Congress." *China Law Review*, no. 1 (2017): 191-198.
Zhu, Jie, and Xiaoshan Zhang. "From 'Taiwan Independence' to 'Hong Kong Independence': How Hong Kong Followed the Steps of Taiwan on the Road of Separatism." In *Critique of Hong Kong Nativism: From a Legal Perspective*. Singapore: Springer, 2019.
Zhu, Xuemei, and Jun Wei. "The Evidential Capacity of the Communication Interception Materials: How to Improve the Technical Investigation Regimes in the Criminal Procedure Law." *Nomocracy Forum*, no. 22 (2010).
Zhu, Yansheng. "The Concept of the Right to Development." *Cass Journal of Political Science*, no. 3 (2001): 33-41.
Zhu, Zhiling. "Implementation Dilemma and Solutions of the Law on Assemblies, Processions and Demonstrations in China." *Journal of Hunan Police Academy 26*, no. 4 (2014): 100-105.
Zhuang, An. "Xie Yang Claimed at the First Instance Trial: There was no Torture, and I Regret My Deeds." *The Paper*, May 8, 2017. https://www.thepaper.cn/newsDetail_forward_1680640.
Ziegler, Katja S. "Building a Peoples' Europe: Political Rights of Foreigners: Freedom of Expression, Assembly and Association and Electoral Rights from the Perspective of EC Law and the ECHR." In *The 'New Europeans': Migration and Integration in Europe*, edited by Hartmut Bauer, Pedro Cruz Villalón, and Julia Iliopoulos-Strangas, 385-424. Nomos, 2009.
Zou, Wei, and Qingchang Huang. "Unveiling the Insider Story of Rights Activists." *People's Daily Online*, July 12, 2015. http://politics.people.com.cn/n/2015/0712/c1001-27290030.html.

Zou, Yi, and Mingqiang Wang. "The Legislative Improvement on Technical Reconnaissance Measures." *Political Science and Law*, no. 9 (2005).
Zrinski, Maša Marochini. "The Interpretation of the European Convention on Human Rights." *Zbornik radova Pravnog fakulteta u Splitu 51*, no. 1 (2014): 63-84.
Zuo, Weimin. "Avoiding and Replacement – An Empirical Investigation of the Measure of Searching." *China Legal Science*, no. 3 (2007): 114-125.
Zwart, Tom. "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach." *Human Rights Quarterly 34*, no. 2 (2012): 546-569.

LIST OF CASES

European Court of Human Rights and former European Commission of Human Rights

A., B., C., D., E., F., G., H. and I. v. Federal Republic of Germany, no. 5573/72, Commission decision of 16 July 1976, Decisions and Reports 7.
A. and Others v. the United Kingdom, no. 3455/05, ECHR 2009.
A.B. et autres c. France, no. 11593/12, CEDH 2016.
Affaire Union Nationale Turque et Kungyun c. Bulgarie, no. 4776/08, CEDH 2017.
Ahmed c. Roumanie, no. 34621/03, CEDH 2010.
Aksoy v. Turkey, no. 21987/93, Reports of Judgments and Decisions 1996-VI.
Al-Nashif v. Bulgaria, no. 50963/99, 20 June 2002.
Amann v. Switzerland [GC], no. 27798/95, ECHR 2000-II.
A.M. et autres c. France, no. 24587/12, CEDH 2016.
Armani Da Silva v. the United Kingdom, no. 5878/08, ECHR 2016.
Asan c. Turquie, no. 28582/02, CEDH 2008.
Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, no. 62540/00, 28 June 2007.
Association Rhino and Others v. Switzerland, no. 48848/07, ECHR 2011.
Atristain Gorosabel v. Spain, no. 15508/15, ECHR 2022.
Bäck v. Finland, no. 37598/97, ECHR 2004-VIII.
Bartik v. Russia, no. 55565/00, ECHR 2006-XV.
Bayar et Gürbüz c. Turquie, no. 37569/06, CEDH 2012.
Beck, Copp and Bazeley v. the United Kingdom, nos. 48535/99, 48536/99 and 48537/99, 22 October 2002.
Becvár and Becvárová v. the Czech Republic, no. 58358/00, 14 December 2004.
Bédat v. Switzerland [GC], no. 56925/08, ECHR 2016.
Belashev v. Russia, no. 28617/03, ECHR 2008.
Belcacemi et Oussar c. Belgique, no. 37798/13, CEDH 2017.
Benedik v. Slovenia, no. 62357/14, ECHR 2018.
Bensaid v. the United Kingdom, no. 44599/98, ECHR 2001-I.
Berkovich and Others v. Russia, nos. 5871/07, 61948/08, 25025/10, 19971/12, 46965/12, 75561/12, 73574/13, 504/14, 31941/14 and 45416/14, ECHR 2018.
Berrehab v. the Netherlands, 21 June 1988, Series A no. 138.
Big Brother Watch and Others v. the United Kingdom, nos. 58170/13, 62322/14 and 24960/15, ECHR 2018.
Blecic v. Croatia, no. 59532/00, 29 July 2004.
Bobek v. Poland, no. 68761/01, 17 July 2007.
Boicenco v. Moldova, no. 41088/05, 11 July 2006.
Botmeh and Alami v. the United Kingdom, no. 15187/03, 7 June 2007.
Bozano v. France, 18 December 1986, Series A no. 111.

Thorgeir Thorgeirson v. Iceland, 25 June 1992, Series A no. 239.
Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, 10 July 1998, Reports 1998-IV.
Tiron v. Romania, no. 17689/03, ECHR 2009.
Toma c. Roumanie, no. 40238/02, CEDH 2013.
Turek v. Slovakia, no. 57986/00, ECHR 2006-II.
Union Nationale Turque et Kungyun c. Bulgarie, no. 4776/08, CEDH 2017.
United Communist Party of Turkey and Others v. Turkey, 30 January 1998, Reports of Judgements and Decisions 1998-I.
Uzun v. Germany, no. 35623/05, ECHR 2010.
Valenzuela Contreras v. Spain, 30 July 1998, Reports of Judgments and Decisions 1998-V.
Van Den Dungen v. the Netherlands, no. 22838/93, Commission decision of 22 February 1995, Decisions and Reports 80-A.
Van Mechelen and Others v. the Netherlands, 23 April 1997, Reports of Judgments and Decisions 1997-III.
Varnava and Others v. Turkey [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009.
Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, 19 December 1994, Series A no. 302.
Vereniging Weekblad Bluf! v. the Netherlands, no. 16616/90, 9 February 1995.
Weber and Saravia v. Germany (dec.), no. 54934/00, ECHR 2006-XI.
Welke and Białek v. Poland, no. 15924/05, ECHR 2011.
Yazar and Others v. Turkey, nos. 22723/93, 22724/93 and 22725/93, ECHR 2002-II.
Zana v. Turkey, 25 November 1997, Reports of Judgments and Decisions 1997-VII.
Zhechev v. Bulgaria, no. 57045/00, 21 June 2007.
Žičkus v. Lithuania, no. 26652/02, ECHR 2009.

China

Cao Jishan v. State Secrecy Bureau of Henan Province. Judgement of the Second Instance, issued by the Zhengzhou Railway Transport Intermediate Court, 2016. Accessed March 7, 2020. https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=ac91934ec3474d07bc345d8afc641f26.
Changsha Intermediate People's Court. "First Instance Trial on Case of Jiang Tianyong." Weibo. Accessed February 27, 2020. https://www.weibo.com/hncszy?profile_ftype=1&is_all=1&is_search=1&key_word=%E6%B1%9F%E5%A4%A9%E5%8B%87&sudaref=passport.weibo.com#_rnd1582790597922.
Changsha Intermediate People's Court. Judgement of the First Trial of Xie Yang's Incitement to Subversion of State Power. *Changsha Intermediate People's Court*, December 26, 2017. Accessed July 3, 2023. http://cszy.hunancourt.gov.cn/article/detail/2017/12/id/3139850.shtml.
Changsha Intermediate People's Court. "Xie Yang's Case." Weibo. Accessed February 27, 2020. https://www.weibo.com/hncszy?profile_ftype=1&is_all=1&is_search=1&key_word=%E8%B0%A2%E9%98%B3#_rnd1561898826337.

Chen Jianwei v. Public Security Bureau of Qingfeng County and Public Security Bureau of Puyang City. Judgement of the Second Instance, issued by the Intermediate People's Court of Puyang City, 2016. Accessed March 7, 2020. https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=897e331efdb341d08b13a74400ff6de0.

Lin Xuliang's case on secretly gathering state secrets for personnel outside the country. Accessed May 27, 2020. https://tjlx.pkulaw.com/pfnl/a25051f3312b07f347c28e3ec0ba16e5ff79c0b58677b31bbdfb.html.

Liu Yunwu v. Jinyuan Police Office, Traffic Police Detachment, Shanxi Taiyuan Public Security Bureau. Administrative Retrial Judgment, issued by the People's Supreme Court. Accessed May 30, 2020. http://www.lawinfochina.com/display.aspx?lib=case&id=2080.

Ma Yafen v. Ministry of Natural Resources. Judgement of the Second Instance, issued by the Beijing Municipal High People's Court, 2018. Accessed March 7, 2020. https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=b0950956446843e6ad68a9c800111c6b.

People's Court Daily. "Zhou Shifeng, Hu Shigen, Zhai Yanmin, and Gou Hongguo's Case of Subversion of State Power: Verdict Delivered in Court." *People's Court Daily*, August 6, 2016. Accessed July 3, 2023. http://rmfyb.chinacourt.org/paper/images/2016-08/06/03/2016080603_pdf.pdf.

People's Procuratorate of Fuyang City v. Han Liying and others. Judgement of the Second Instance, issued by the Higher People's Court of Anhui Province. Accessed May 30, 2020. https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=45271b83a51047a98e51a9a1015482b5.

People's Procuratorate of Guiyang City v. Zhang Hao. Judgement of the First Instance, issued by the Intermediate People's Court of Guiyang City, Guizhou Province, 2016. Accessed May 27, 2020. https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=42a32c904b09476d9ec55ec9b580b66f.

People's Procuratorate of Qingdao City v. Deng and Qu. Judgement of the First Instance, issued by the Intermediate People's Court of Qingdao City, Shandong Province, 2015. Accessed May 27, 2020. https://pkulaw.com/pfnl/a25051f3312b07f3f9463300ee3fd8f9bc8d24b9001fe6bbbdfb.html.

People's Procuratorate of Suqian City v. Liu Shi. Criminal Ruling of the Second Instance, issued by the Higher People's Court of Jiangsu Province, 2001. Accessed May 27, 2020. http://www.chncase.cn/case/case/2193256.

People's Procuratorate of Wuzhou City v. Li Shuwang and others. Criminal Ruling of the Second Instance, issued by the Higher People's Court of Guangxi Zhuang Autonomous Region. Accessed May 27, 2020. https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=5cb8c0b716404fd4bb8aab2200355545.

People's Procuratorate of Xicheng District v. Wu Zhiwen. Judgement of the Second Instance, issued by Beijing First Intermediate People's Court, 2012. Accessed May 27, 2020.

http://210.37.32.28:8088/FullText/fulltext_form.aspx?db=pfnl&gid=125651904
&ix=2&w=H4sIAAAAAAAEAOy9B2AcSZYlJi9tynt/SvVK1+B0oQiAYBMk2JBAEOzB
iM3mkuwdaUcjKasqgcplVmVdZhZAzO2dvPfee++999577733ujudTif33/8/XGZkA
Wz2zkrayZ4hgKrIHz9+fB8/In6NX/PX+DV+jf+bHvzE8xv9WvTP45Oy+Mn7o/Qn8
7opquVnu+Md/DdKT9Zlu67zz5b5uq2zcpS+XE/KYvp75ddvqrf58rPluix/XYD6hC
GMT6rFolqelFnTjF/ndZGVL7M6W3zyOs/q6fz3f93W62n761H73+Bp1maTrMl/3
e/O8zr/dV5XdfvrE9irqp79+mfN53W1Xv3YWfN6vVhk9fWvSc+v8Wv8mr8mcP3
1fm3659dZnS/LX+/Xod9++a/9X/7Nf+9//kf9tZ/t7Oz+7mm2nKX/xd/6p/8Xf/5f
/J/9A3/+f/HH/w2fffyf/V1//X/+x/8J/9nf8/f8F3/Tn/yf/+F/83/+p/xx//mf+/f/5
3/Un0ytft+t3YcPH/xn/+Df8F/9DX/J73vnx3cf7Ozu/Pi9hwc/fnDv4ODT+/cPDj4e
/ey8/5/9g3/+f/43/FEA9Df8Hf/lX/ln/ed/4x9B4OjVh5/++M6P73yNt/a+1lsPh9+
iEf5nf88f+1/9jX/0f/U3/H1mqJ/SUP+Lv/4vxVDvPdzd+/F7G3q91fuffi2sQaFf79el
qf+Nt//Lv/eP+s//hr/4v/gz//L/4s/7C389sBU9v+H/EwAA//+USO7i4wIAAA==.

People's Procuratorate of Xinyu City v. Cui Wei and Hu Weihua. Judgement of the Second Instance, issued by the Higher People's Court of Jiangxi Province. Accessed May 30, 2020.
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html
?docId=f7bf1311d9394e36a2a1a9c3003aa15d.

People's Procuratorate of Yichun City v. Sun Xianyi. Judgement of the First Instance, issued by the Intermediate People's Court of Yichun City, Heilongjiang Province, 2019. Accessed May 27, 2020.
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html
?docId=b2bc68a0654f4bcdb6b0ab36008e1a39.

People's Procuratorate of Yining City v. Ma Wenqing and others. Judgement of the First Instance, issued by the People's Court of Yining City, Xinjiang Uighur Autonomous Region, 2017. Accessed May 27, 2020.
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html
?docId=977792c55b4941a2b8dfa90900ca48a8.

People's Procuratorate of Yufeng District v. Tan Xiaowu. Judgement of the First Instance, issued by the People's Court of Yufeng District, Liuzhou City, Guangxi Zhuang Autonomous Region, 2017. Accessed May 27, 2020.
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html
?docId=3beb6b8fe0fc42179243a8ce0031ff9a.

Qiu Shuai v. Public Security Bureau of Runan County. Judgement of the Second Instance, issued by the Intermediate People's Court of Zhumadian City, 2019. Accessed March 7, 2020.
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html
?docId=9f84c672ad474fac82b7aaf60089cef6.

Shanghai Higher People's Court. "Criminal Ruling of the Second Instance for Zheng Enchong's Case on Illegally Providing State Secrets for a Foreign Organisation." *East China Criminal and Justice Review*, no. 2 (2004): 345-351.

Tianjin Second Intermediate People's Court. "Hu Shigen's Case." Weibo. Accessed February 27, 2020.
https://www.weibo.com/u/3919910570?profile_ftype=1&is_all=1&is_search=1
&key_word=%E8%83%A1%E7%9F%B3%E6%A0%B9#_rnd1561969778828.

Yueyang Intermediate People's Court. "Peng Yuhua and Li Mingzhe's Case." Weibo. Accessed February 27, 2020.
https://weibo.com/u/3960688335?is_all=1&is_search=1&key_word=%E5%BD

%AD%E5%AE%87%E5%8D%8E%E3%80%81%E6%9D%8E%E6%98%8E%E5%93%B2%E9%A2%A0%E8%A6%86%E5%9B%BD%E5%AE%B6%E6%94%BF%E6%9D%83%E6%A1%88%E5%85%AC%E5%BC%80%E5%BC%80%E5%BA%AD%E5%AE%A1%E7%90%86&reason=&retcode=.

CURRICULUM VITAE

Chao JING (1990) was born in Qingdao, China. Before studying in the Netherlands, he obtained the Bachelor's Degree in Law from Ocean University of China in 2013. Then he obtained his Master's Degree in Human Rights Law from China University of Political Science and Law in 2016. Chao Jing started his PhD project in 2016 at the School of Law of Utrecht University as a member of the International and European Law Department. During his PhD, he took up internship at the UN Office of the High Commissioner for Human Rights in 2018 for six months. He also actively participated in three research programmes (Derogations in State of Emergency, 2022-2023; 5G and Right to Privacy, 2020; The Impact of International Human Rights Law on Extradition, 2019). Since 2022, he worked as an assistant editor for Chinese Journal of Human Rights. This thesis is the outcome of his PhD research.