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# Protecting Freedom of Expression In Times of Terrorism: A Comparison of United States, Germany, and South Korea

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## **Protecting Freedom of Expression In Times of Terrorism: A Comparison of United States, Germany, and South Korea**

A young Tamil man recounts the time he was kidnapped by his Sri Lankan Government in 2010:

“I was kept in detention for more than a month. During this time, I was questioned and beaten up every day. They asked me about my activities with the LTTE in France. They brought pictures of my participating in anti-war protests in France and accused me of betraying the government. They asked me for the names of others who had organized the protests in France. I was locked in a dark room and my hands were tied in the position of a crucifix. I then was burned all over my arms in this position. I was beaten with hot metal rods on my back and thighs. I was sometimes poked with the end of a hot poker and they kicked my head with metal-toed boots. I was raped many times. Two men would come to my room and one would hold me down. They would take turns raping me.”<sup>1</sup>

This account is just a glimpse into the inhumane treatment imposed on the Tamils living in Sri Lanka, most of the victims being women and boys under the age of 18. The Tamils have been advocating for change and equality within their country, and have been targeted with violence and suppression for their dissents to government actions. A group of United States philanthropists, law professors, and students had gotten wind of the Tamil’s situation, and wanted to assist them in obtaining peace within their country by petitioning to the UN for help. Unfortunately, the United States Government supports the Sri Lankan Government,

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<sup>1</sup> See *Human Rights Watch*, “We will Teach You A Lesson,” <http://www.hrw.org/node/113787/section/3>, (Feb. 26, 2013).

making the Tamils an enemy to the United States.<sup>2</sup>

The Humanitarians traveled all the way up to the United States Supreme Court to ask the simple question, “Can we help them?” In the 2010 decision, *Holder v. Humanitarian Law Project*<sup>3</sup>, the Supreme Court replied with a numbing, “No”. The peaceful assistance of the Tamils was held to be in violation of a ‘material support’ statute within the USA Patriot Act<sup>4</sup>. The decision is a red flag for the future of Freedom of Speech.

Freedom of speech and expression empower citizens to make informed judgments about governmental decisions and policies. During times of instability and terrorism, speech and expression are vital. When war is on the horizon, two

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<sup>2</sup> Despite the inability of the United States humanitarians to help the Tamils, in late September, 2013, the UN Human Rights Commissioner warned, “that unless the Sri Lankan government took “comprehensive measures” to address human rights violations committed during the war against the Liberation Tigers of Tamil Eelam (LTTE) it could face an international investigation.” Additionally, the United States has supported this position of the UN. See Ratnayake, *UNHRC Threatens International Probe of Sri Lankan War Crimes*, <https://www.wsws.org/en/articles/2013/09/30/sril-s30.html>, (Sept. 30, 2013).

<sup>3</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>4</sup> 18 U.S.C.A. §2339B, “Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).”; 18 U.S.C.A. §2339A, “the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

issues arise that are not typical during times of tranquility: national security and the interest in sending troops off to battle. The civil liberties that normally saturate a nation must recede to make room for these two overarching concerns. The more significant the security threats and support for the war are, the more diluted a nation's civil liberties become. However, it is necessary to actually appreciate the magnitude of these two issues in order to accurately decide how much space civil liberties should spare. Freedom of speech and expression are the most useful tools in the search for these truths.

This paper will focus on the tendency of governments to hastily silence dissident speech and expression in response to terrorism, and the need for Courts to apply a heightened level of scrutiny to laws infringing on the freedom of speech and expression. A comparison of the United States, Germany and South Korea will illustrate the Courts' varying approaches and their respective consequences. Part I will discuss the lower threshold that the United States Supreme Court applies to government actions that infringe on the freedom of speech during times of terrorism. Part II will look towards Germany's approach to security laws that stifle the freedom of speech, and reveal the Constitutional Court's trend towards closely scrutinizing the government measures in each individual case. Part III then turns to South Korea, and will explain how decades of North Korean fear has led the country to sacrifice freedom of speech in the name of national security regardless of the propriety of the measures. Finally, part IV will illustrate how serving strict scrutiny in place of broad discretion to the United States Government during times of

terrorism can protect the country from becoming a nemesis to the same rights it is fighting to protect.

## **I. FREEDOM OF SPEECH AND EXPRESSION IN THE UNITED STATES: THE ROOTS**

The United States has valued freedom of speech for a long time. Many commentators have suggested that the United States provides more protection to speech and expression than any other modern society in the world. Freedom of speech is embedded in the First Amendment of the United States Constitution. However, the protection that this fundamental freedom is normally afforded is being jeopardized in the name of national security.

In the United States, the Supreme Court is the protector of speech freedoms and all other constitutional rights. Freedom of speech is believed to help society in its “search for the truth”. This theory suggests that allowing every angle of an argument into the marketplace of ideas enables citizens to make informed decisions and judgments.<sup>5</sup> Additionally, the First Amendment facilitates self-fulfillment, because people tend to feel liberated in an environment where they can freely

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<sup>5</sup> See Justice Brandeis Concurrence in *Whitney v. California*, 274 U.S. 367 (1927), “The Founders believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truths – it is the function of speech to free men from the bondage of irrational fears”. See also *See Richmond Newspapers v. VA*, 448 U.S. 555, 587 (1980)( Brennan, J., concurring).

express themselves.<sup>6</sup> In this vein, the pursuit of happiness is better navigated when the Government works to protect the rights of expression and speech.

### **A. The Supreme Court's Protection of Speech Through Strict Scrutiny**

Like most of the rights enumerated in the United States Constitution, the First Amendment has not been interpreted literally. The social and moral consequences that might result from the Supreme Court striking down laws prohibiting defamation or child pornography has enabled Congress to take measures "abridging the freedom of speech."<sup>7</sup> As a result, the Supreme Court has developed an array of vague criteria for determining when speech is not protected.

The blurred edges surrounding the scope of the First Amendment is in part to blame for the Government's ability to silence speech in the interest of national security. By abandoning the text of the constitution in favor of judicial interpretation, the First Amendment's only line of defense against government intrusion is the strict scrutiny standard of review fashioned by the Supreme Court.

The Court has interpreted Speech to include conduct and the use of other mediums to express ideas or thoughts.<sup>8</sup> In the event freedom of speech is violated by a government action, the Supreme Court will evaluate the infringement under a

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<sup>6</sup> See Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11<sup>th</sup>: First Amendment in Post-World Trade Center America*, 13 Stan. L. & Pol'y Rev. 185, 193 (2002).

<sup>7</sup> See Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11<sup>th</sup>: First Amendment in Post-World Trade Center America*, 13 Stan. L. & Pol'y Rev. 185, 191 (2002).

<sup>8</sup> See *U.S. v. O'Brien*, 391 U.S. 367 (1968); See also Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War time and Peace time*, 14 Il. L. Rev. 539.

strict scrutiny standard of review.<sup>9</sup> Strict Scrutiny requires the government to reach a heavy burden of proving a compelling interest and a narrowly tailored means of achieving that interest so as not to infringe the freedom farther than necessary.<sup>10</sup>

In determining whether strict scrutiny should be applied to a government action that affects freedom of speech, the Court has established an array of factors. First, if the restriction imposed by the government is, on its face, a limitation based on the content of the speech, strict scrutiny will likely apply.<sup>11</sup> Additionally, high value speech will be given more protection than low value speech. High value speech contributes to public discourse and usually has literary, artistic, political, or scientific qualities.<sup>12</sup> Low value speech is less protected and more easily trumped by government actions because it does not have a close nexus to the search for the truth model. Low value speech is, “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>13</sup>

## **B. The Curious Case of National Security and the Absence of Strict Scrutiny**

### **During Times of Terrorism**

Applying these standards to the Supreme Court’s treatment of speech in the face of terrorism, it is clear that strict scrutiny is not being applied. First, the Court

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<sup>9</sup> See *U.S. v. Carolene Products Co.*, 304 U.S. 144, N. 4 (1938), suggesting fundamental right violations are subject to the most stringent standard of review.

<sup>10</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>11</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>12</sup> See *Miller v. California*, 413 U.S. 15 (1973).

<sup>13</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

has rubber stamped the Government's interest in 'national security', post-September 11<sup>th</sup>, as compelling. There is no need for the government to demonstrate the immanency of a threat or even put forth facts pertaining to the gravity of a threat, because the Court has determined that we are a nation at war and terrorism has become an ongoing security hazard with no end in sight.<sup>14</sup> There is therefore no actual burden of proof with respect to the government's compelling interest when dealing with National Security.<sup>15</sup>

Second, and arguably most damaging, is the Court's insistence and deferring to congressional fact-finding in the arena of combatting terrorism. Historically, the government has faced many obstacles in proving that its actions were narrowly tailored to serve a compelling interest. For instance, in *Brandenburg v. Ohio*, the Court struck down a provision aimed at silencing citizens advocating for crimes, violence and terrorism.<sup>16</sup> The Court reasoned that the statute was content-based and the speech being silenced was high value because it was related to protests of the Vietnam War. As a result, the government was forced to overcome the stringent standard of strict scrutiny and failed because violent speech and threats may only be muffled in situations where the government can prove imminent and immediate

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<sup>14</sup> See Barak-Erez and Scharia, *Freedom of Speech, Support For Terrorism, and the Challenge of Global Constitutional Law*, 2 Harv. Nat'l Sec. J. 1 (2011).

<sup>15</sup> See Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11<sup>th</sup>: First Amendment in Post- World Trade Center America*, 13 Stan. L. & Pol'y Rev. 185, 188 (2002) (quoting Michael Walzer, a professor of social science at the Institute for Advanced Study at Princeton, as observing, "I think the burden of proof has shifted in a significant way. Before September 11, a police agency that wanted to expand its powers had to make its case. After September 11, if a police agency comes forward and says we need these additional powers to prevent another terrorist attack, the burden of proof is on those who want to say 'No.'")

<sup>16</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

harm to occur as a result of the expression.<sup>17</sup> This decision seemingly left little room for the government to silence speech advocating, supporting, or even associating with terrorist ideas and groups. This trend did not last long.

In *Holder v. Humanitarian Law Project* the Court was faced with the decision of whether or not a peaceful American organization of students, law professors, and philanthropist groups could teach an oppressed group of peoples in Sri Lanka and Turkey how to petition to the UN for protection from violence being inflicted upon them by their governments. The Humanitarians also wanted to help the groups engage in peaceful discussions with their governments.<sup>18</sup> The obstacle for the Humanitarians was 18 U.S.C.A. §2339B, which criminalized providing ‘material support’, including support of peaceful acts, to associations, or groups deemed by the Secretary of State to be terrorist organizations. The groups in Turkey and Sri Lanka were labeled as terrorist organizations on account of their engagement in civil wars with their respective governments.

The statute was determined to be a content-based restriction on the freedom of speech, potentially overbroad, and a consequential censorship on non-violent, political speech.<sup>19</sup> Although these issues are the benchmarks for ‘strict-scrutiny’ review, the Supreme Court decided to take a different approach in deciding whether the Government’s thin assertion of its interest in “national security” was compelling enough, and the statute in question narrow enough, to trump Freedom of Speech.

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<sup>17</sup> *See id.*

<sup>18</sup> *See generally Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>19</sup> *See Humanitarian*, 561 U.S. 1, 5, 8-10.

Chief Justice Roberts, writing for the majority of the court, explained, “It is vital in this context not to substitute ... our own evaluation of evidence for a reasonable evaluation by the Legislative Branch... In this area perhaps more than any other, the Legislature's superior capacity for weighing competing interests means that we must be particularly careful not to substitute our judgment of what is desirable for that of Congress.”<sup>20</sup> Only 3 Justices dissented from this opinion.

The Government introduced a piling of inferences suggesting that helping these foreign groups engage in peaceful relationships with their governments increased their potential to engage in violent acts. The Court deferred to the Government’s assertion that the Humanitarians would be freeing up the groups’ resources that could conceivably be expended on violent avenues.<sup>21</sup> There was no questioning into the immanency of the threat, nor was there any real burden for the government to overcome once it established its interest in national security.

The United States Judiciary failed to apply the correct standard of strict scrutiny to the Government’s action. Rather than determining whether or not the statute was narrowly tailored, the Court ended its inquiry after determining the Government’s interest in national security was compelling. The Court should have investigated into whether or not the government had proven that the Humanitarians’ peaceful efforts to approach the UN on behalf of the Tamils would have opened the door to grave danger for the United States. Since the UN has recently taken the initiative to assist the Tamils, and the United States has backed

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<sup>20</sup> *See id* at 9.

<sup>21</sup> *See id*.

this decision, it is unlikely that the United States Government would have been able to meet this burden. As a result, the Humanitarians' speech efforts died in vain.

This case marks a new trend of the Judiciary, and it signals that the government could now be limitless in their ability to silence highly valuable speech. Without the capability to express one's thoughts, citizens will be stripped of their search for the truth, and speech questioning the integrity of the war will be chilled. This is dangerous because war opens the door for the Government to carve into the constitutional rights of citizens. Alarming, rather than treading with extreme caution to ensure that these incisions do not cut too deep, the Judiciary has been green-lighting all government actions that are said to be linked to national security. Strict Scrutiny is no longer being applied.

## **II. THE PROTECTION OF SPEECH IN GERMANY'S CONSTITUTIONAL COURT:**

### **PROPORTIONALITY**

The German Judiciary decides constitutional issues with a four-step 'proportionality test'. The method asks whether an action that infringes on a constitutional right: 1) serves a legitimate government interest; 2) is suitable to further that interest; 3) is the least restrictive means; and 4) is balanced proportionately to the degree of the individual right being infringed.<sup>22</sup> The Constitution provides for the basic right to freely express oneself, including freedom

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<sup>22</sup> See Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States*. 11 *Tulsa J. Comp. & Int'l L.* 111, 118-120 (2003); See also Lepsius, *Supra*, 439-441.

of speech and expression, but indicates that it can be limited by the general laws and in the interest of protecting the youth and personal honor of others.<sup>23</sup> These limits have been interpreted to mean content-neutral laws and an overall ban on hate speech and child obscenity.

In practice, when the freedom of expression is allegedly violated, the Judiciary begins its analysis by determining the legitimacy of the government interest being pursued. The Government should demonstrate that its interest is related to the protection of human dignity or the democratic society. Once the government can show it has a legitimate interest, it must then prove that the measure is suitable to achieve that goal. In other words, the means must increase the likelihood of the government's interest being attained. Thirdly, the government measure must be necessary for its interest. Basically, this requires the Government to show it is utilizing a method that causes the least damage to the freedom of expression or speech. Finally, the Court must engage in a balancing test of the Government action and the infringement on the fundamental right of expression. If the impact on the Government's interest is more than or proportional to its impact on the freedom of speech or expression, it will be constitutional.<sup>24</sup>

Article 1 of the German Federal Republic Constitution explains that human dignity is a value placed above all other rights and interests of the German people and government.<sup>25</sup> The reason for this emphasis on human dignity arises from the

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<sup>23</sup> See RUNDGESETZ FUR BUNDESREPUBLIK DEUTSCHLAND, Freedom of Expression Arts and Sciences, May 23, 1949, BGBl. 5 (Ger.).

<sup>24</sup> See *generally* Miller, *Supra*.

<sup>25</sup> See GRUNDGESETZ GG Human Dignity- Human Rights- Legally Binding Force of Basic Rights, May 23, 1949, BGBl. 1 (Ger.)

rich history of individual oppression brought about by Hitler's regime in Nazi-Germany. Generally, the closer a right or interest is related to the concept of human dignity, the more likely it is to triumph in Court. Until recently, the Judiciary had determined national security to be the backbone of human dignity, thereby making certain government actions invincible.

One of the best examples of Germany's restrictions on freedom of expression and speech in the name of human dignity is its ban on hate speech. Unlike the United States, Germany's constitution does not protect insults directed towards individuals based upon their sex, race, ethnicity or religion.<sup>26</sup> This may logically lead to the conclusion that Germany is less protective of the basic right of expression, but it is actually this vehement safeguarding of German citizens that has recently encouraged the Courts to not defer to the other government branches when rights are infringed. Notably, in 2013, the Freedom of the World report gave Germany the best possible score of "1" for both political and civil liberties.<sup>27</sup>

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<sup>26</sup> See Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States*. 11 *Tulsa J. Comp. & Int'l L.* 111, 118-120 (2003); See also Lepsius, *Supra*, 439-441.

<sup>27</sup> See *Freedom House*, *Freedom in the World* (2013), <http://www.freedomhouse.org/report-types/freedom-world>. Additionally on September 9, 2010 Freedom House commended German Chancellor Angela Merkel for "encouraging governments around the world to uphold the universal right of individuals to freedom of expression". The speech was delivered at an award ceremony for Danish cartoonist Kurt Westergaard after his caricature of the Prophet Muhammad led to global protests. Merkel remarked, "In these months, we Germans are remembering the overcoming of the East German Communist dictatorship and the reunification of our country 20 years ago. We still know what it means not to have freedom, so we should never forget how precious freedom is." See *Freedom House*, *German Chancellor Merkel Strong in Support of Freedom of Expression* (Sept. 9, 2010), <http://freedomhouse.org/article/german-chancellor-merkel-strong-support-freedom-expression>.

Germany has dealt with a number of terrorist attacks, both domestic and international, making it a great reference for determining the appropriate amount of erosion a government action may have on civil liberties in the name of national security. Although Germany's Constitutional Court initially treated the government's interest in national security as an insurmountable hurdle when balancing basic rights violations, there appears to be a growing trend towards protecting freedoms from national security legislation.

#### **A. The Unstable Start For Protecting Expression and Speech**

To fully understand Germany's newfound respect for constitutional rights, it is necessary to return to the night of February 27, 1933, when terrorists allegedly set fire to the German Parliament building, Reichstag.<sup>28</sup> In response, Hitler declared a national emergency and increased the already oppressive measures to defeat any threat to the Nazi regime.<sup>29</sup> Whatever fragments of fundamental freedoms that remained to Germany's citizens were swept away in the name of security. Political beliefs and discourse that deviated even slightly from the Nazi ideology were forcefully silenced. The rest, of course, is history.

After World War II ended, its lessons emerged, and in 1949 West Germany established the Country's current Constitution to shield itself from any future, vulgar acts of terrorism reminiscent of the Nazi regime. The Constitution expresses

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<sup>28</sup> German Bundestag, Questions on German History: Paths to Parliamentary Democracy, 264 (1998), explaining the Reichstag fire as a pivotal moment in establishing Nazi Germany. It is still unknown exactly who or what caused the fire.

<sup>29</sup> See *id.*

that human dignity shall be inviolable, lists 17 fundamental rights that the state and its people are obliged to protect, and establishes “militant democracy” which allows the Federal Constitutional Court to strip persons or groups that threaten the democratic order of their constitutional rights.<sup>30</sup>

During the Cold War, Germany again faced threats to democracy, exemplified by the split of its Nation into a western, democratic government and an eastern, communist government. In 1956, the Federal Constitutional Court invoked the “militant democracy” doctrine to ban the Socialist Reich Party and the German Communist Party. Although these political parties were supported by an insignificant fraction of the German population, the newness of Western Germany’s democratic values called for an exaggeration of the weight any democratic threat was to be given. The fear of another Nazi uprising made any government protection measure sensible, because democracy was still considered to be fragile. As a result, these groups’ freedom of expression and association stood no chance against the pursuit of Germany’s security under the proportionality test.<sup>31</sup>

In the 1970’s, terrorism again escalated into a concern for Germany, climaxing in 1977 when the Rote Armee Fraktion terrorist organization assassinated a federal prosecutor, a federal bank president, and the federal Employer’s Association’s President.<sup>32</sup> In response, Germany’s government enacted a series of laws further curtailing the basic rights of suspected terrorists, and the

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<sup>30</sup> See GRUNDGESETZ GG BASIC LAW, May 23, 1949, BGBl. 1-19 (Ger.).

<sup>31</sup> See Miller A., *Balancing Security and Liberty in Germany*. 4 JNSLP 269, 374 (2010).

<sup>32</sup> See *id* at 376.

Federal Constitutional Court declared national security to be a basic right.<sup>33</sup> National security's new label gave it considerably more weight when balanced against specifically enumerated rights in Germany's Constitution. This expansion led to the Government's ability to selectively silence and oppress both violent and non-violent associations that expressed beliefs contrary to the democratic Government's ideology.

The 1990's brought an end to the cold war and, as a result, an end to the defensive border controls that had been in place by the European Union. Still shaken by the idea of international terrorism, Germany's government reacted by heavily policing the threat of international terrorism within its own borders.<sup>34</sup> Government agencies were now capable of monitoring communications of its citizens in an effort to detect terrorism.<sup>35</sup>

These laws clearly violated the freedom of speech, and therefore triggered the proportionality test to assess their constitutionality. The government's interest in national security easily mounted the first hurdle of the proportionality test, but once it did, the remaining three inquiries mysteriously vanished. Instead, The Constitutional Court deferred to the Government's assertion that the threat of international terrorism was proportional to these new surveillance measures, and upheld the constitutionality of the law. In effect, these laws worked to target certain oppositional groups deemed critical of the German Government, and were criticized

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<sup>33</sup> See Lepsius, *Liberty, Security, and Terrorism: The Legal Position in Germany*. German L. J. (2004).

<sup>34</sup> See Miller, *Supra* 381, (explaining that the 1990's marked the peak of judicial deference, resulting in fundamental rights being considerably outweighed and crushed by the Government's interest in National Security).

<sup>35</sup> See Miller, *Supra*, 380.

as an attempt to silence political dissidents. In retrospect, many of the laws would not have been upheld had the proportionality test been used against them.

## **B. A Promising Future For Freedom of Speech and Expression in Germany**

Following the September 11th attacks on the United States, it would be rational to think that Germany further curtailed the freedom of speech and other basic rights in the name of national security<sup>36</sup>. However, in a surprising twist, Germany's Federal Constitutional Court pushed back on the Government's attempt to invade the individual freedoms of its citizens. Rather than defer to the government's interest in national security, the Constitutional Court vehemently protected and acknowledged the basic rights enumerated in the constitution most closely tied to human dignity. Among these rights are expression and speech.

In October 2001 and January 2002, the Government implemented two security packages that attempted to monitor individuals inside and outside its borders, punished association and support of anybody the government believed to be a potential terrorist, and centralized the power of its agencies to investigate and enforce vague, overbroad security laws. Under these packages, the Government could access online data and communications of its citizens, and could enter and

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<sup>36</sup> This is especially true since some of the terrorists were discovered to be residing in Germany.

search private homes of government-targeted individuals.<sup>37</sup> The Court has taken a critical look at these initiatives.

Following the September 11<sup>th</sup> attacks, the President of the German Federal Constitutional Court reacted:

Terrorism seeks to move us to give up on our civil virtues such that we renounce the freedoms of civil society and the necessity of tolerance, which are the foundations of our democracy. But powerlessness and hate are neither promising nor recommendable answers to acts of barbaric terrorism... if the civilized world hopes to be victorious it cannot allow itself to compromise its respect for its fundamental values. Especially the recognition of the dignity and freedom of humankind distinguishes democracy from totalitarian ideologies. Human dignity and human rights know no weapons; rather, only citizens who make the observation of human dignity and human rights an obligation. We grieve together today over the still uncounted victims who have died as members of a society that aims for the highest ideals of human dignity and peace. We honor these victims best when we understand their deaths as a challenge to our shared, fundamental Western values; and we respond by championing these values.<sup>38</sup>

The Constitutional Court has resumed its responsibility of protecting the basic rights of the people from the threat of government intrusion. Following September 11<sup>th</sup>, the Court has indicated that the right to confidentiality of private information, the right to life, and the right to freely develop oneself are significantly heavier than national security.<sup>39</sup> Upholding basic rights instead of deferring to the Government's interest in security is perhaps an indication that the Court has learned from its past mistakes. Allowing the government to suppress the rights of its people

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<sup>37</sup> See Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States*. 11 *Tulsa J. Comp. & Int'l L.* 111, 118-120 (2003); See also Lepsius, *Supra*, 439-441.

<sup>38</sup> See Jutta Limbach, *Every Human Matters – Comments on the Occasion of Terrorist attacks in America*, 2 *Germ. L.J.*, (Sept 15, 2001).

<sup>39</sup> See Miller, *Supra*, 388-393 (2010).

is seemingly anti-democratic. Furthermore, suppressing these rights in the interest of protecting democracy is counterintuitive.

In 2005, the Constitutional Court struck down a wiretapping state law in Lower Saxony that would have allowed the Government to maintain closer surveillance of potential terrorists.<sup>40</sup> The Court applied the proportionality test and noted that the statute was unconstitutional because the Government had failed to put forth concrete evidence showing that a crime was being planned.<sup>41</sup> The holding reiterated, "The loss of constitutionally guaranteed freedoms must not be disproportionate to the aims served by the limitation of basic rights."<sup>42</sup> In a 2010 decision on the constitutionality of the Federal Telecommunications Act, the Court clarified that the government's interest in protecting security through surveillance measures requires a showing of "actual evidence of a concrete threat to life, limb or liberty of a person, the existence or security of the Federation or of a State or of a common danger."<sup>43</sup>

The Court is not protecting the freedom of expression in uncharted territory. Rather, the Court is using the tools it already has by applying the proportionality test to reach objective results rather than allowing subjective political interests make the decision for them. The result is that the Government must prove to the Court that its interest in security is legitimate. This hurdle requires evidence that there is truly a threat to the Nation, and that the action will enhance the likelihood

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<sup>40</sup> See Bernstein, The NY Times Int'l, *German High Court Strikes Down Wiretapping Law*, <http://www.nytimes.com/2005/07/27/international/europe/27cnd-germany.html? r=0>, (July 27, 2005).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See Federal Constitutional Court, 1BvR 256/08 of 2.3.2010, paragraph no. (1-345), (March 2, 2010).

of deterring the threat. Additionally, there must be no other way for the government to protect its nation without infringing on expression to the extent the action will. Finally the government measure must have the same or a greater impact on national security than it does on the freedom of expression. This inquiry dramatically reduces the chances of the freedom of expression being needlessly silenced. The approach makes sense since the proportionality test was created to curb government intrusion into basic rights, and basic rights are most threatened during unstable times.

### **III. SOUTH KOREA'S CONSTITUTIONAL COURT'S APPROACH TO PROTECTING SPEECH AND THE PROPORTIONALITY TEST: IT SOUNDS GOOD ON PAPER**

South Korea's Constitution promises its citizens the freedom of speech, press, assembly and association.<sup>44</sup> The Constitution was established in 1947 and revised in 1987. In 1988 South Korea established its Constitutional Court, a tribunal separate from the general Courts of the Nation, armed with the duty of protecting the rights enumerated in South Korea's Constitution.<sup>45</sup> The Court arose after 40 years of South Korea's Constitutional Committee's failure to properly protect the individual rights of its people.<sup>46</sup> The Court was heavily influenced by the German Constitutional Court

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<sup>44</sup> See DAEHANMINKUK HUNBOEB art. 21 (S. Kor.).

<sup>45</sup> See Lim, *Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions*, 24 Loy. L.A. Int'l & Comp. L. Rev. 327, 328 (2002).

<sup>46</sup> See Lim, *Korean Constitutional Court Standing at the Crossroads*, 24 Loy. L.A. Int'l & Comp. L. Rev. 327, 328 (2002).

model, but nevertheless contains similarities with the Supreme Court of the United States.

Freedom of expression in South Korea is valued for allowing its citizens to freely manifest their personality, formulate reasonable and constructive opinions, and discover truth.<sup>47</sup> The Korean Constitutional Court has adopted the proportionality test, which authorizes the freedom of expression to be infringed by government action if: 1) the government has a legitimate purpose; 2) the means taken by the government are appropriate to achieve the purpose; 3) the government's actions are the least restrictive measure in accomplishing its purpose; and 4) the significance of the government's interest and degree to which it is served by the action is balanced with or outweighs the restraint on the freedom of expression.<sup>48</sup> Additionally, the Court has explained that restrictions on expression and speech must be clear and concrete in order to avoid chilling protected speech.<sup>49</sup>

South Korea's Constitutional Court has the ability, like Germany, to issue abstract decisions. This means that the Court can determine the general constitutionality of its Nation's laws without waiting for it to be brought in an individual case or controversy.<sup>50</sup> Furthermore, the court is empowered to issue

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<sup>47</sup> See Const. Ct., 23-2(B) KCCR 739, 319, (Dec. 29, 2011).

<sup>48</sup> See *id.*

<sup>49</sup> See Const. Ct., 10-1 KCCR 327, 342, (April 30, 1998), "Freedom of expression is essential for ... democracy, restriction ... with unclear norms creates chilling effects toward constitutionally protected expression and results in losing the original function of the freedom of expression which was supposed to provide the forum for various opinions and ideas and to enable interactive verifications ... Therefore, law regulating the freedom of expression shall prescribe the concept of expression to be restricted by the law in a concrete and a clear manner which is the constitutional requirement."

<sup>50</sup> See *id.* 335.

variational decisions, declaring parts of a statute or act unconstitutional while upholding the constitutional aspects of it, or notifying the Legislature of the unconstitutionality of a law so that it can be changed before the Court nullifies it.<sup>51</sup> This power provides a middle ground that is aimed at avoiding animosity towards the Constitutional Court by the other government branches.

### **A. The National Security Law: Killing Speech and Taking Names**

In 1948 South Korea established the National Security Law.<sup>52</sup> The gist of the act was to make communism illegal.<sup>53</sup> South Korea is in the undesirable position of sharing its borders with its mortal enemy, North Korea. It's no wonder then, that after years of war, turmoil, and nuclear weapon threats, South Korea has been on the ceaseless defense against terrorism. Today, the two Nations are in a ceasefire, but there has yet to be any peace treaty drafted, making North Korea's threat to South Korea's democratic government and citizens tangible. The main weapon South Korea has entailed against this threat is its National Security Law.

The National Security Law, in sum, punishes the thought, support, association, or utterance of Communism.<sup>54</sup> On its face, the law poses a striking resemblance to the United States terrorist statutes adopted after September 11<sup>th</sup>,

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<sup>51</sup> See *id* 336.

<sup>52</sup> See Kraft, *South Korea's National Security Law: A Tool of Oppression in an Insecure World*, 24 Wis. Int'l L. J. 627 (2006).

<sup>53</sup> See Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security For What?*, 15 B.U. Int'l L. J. 125 (1997).

<sup>54</sup> See generally Kraft, *South Korea's Nat'l Security Law: A Tool of Oppression in an Insecure World*, 24 Wis. Int'l L. J. 627 (2006).

2001.<sup>55</sup> The Law has been placed under global scrutiny due to its serious suppression of the freedom of expression. From its inception, the act was abused by the Korean Government to silence all dissidents. In 1949, then-president Rhee imprisoned 30-thousand people alleged to be communists.<sup>56</sup> In 1989, then-president Roh arrested an average of 3.3 citizens a day for crimes ranging from listening to North Korean radio broadcasts, reading books related to North Korean sympathizers, reading essays about traveling through communist China, and protesting unemployment policies.<sup>57</sup>

The Constitutional Court has proved to provide little support for the freedom of expression that is silenced by the Law. In 1990, the Court admitted that the Security Law had unconstitutional elements related to its vagueness but declined to hold it unconstitutional.<sup>58</sup> Instead, the Court issued a variational decision, pointing out, but not striking down, the insufficiencies of the Law's unconstitutional provisions in hopes that the Legislature would make the necessary changes.

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<sup>55</sup> Compare 18 U.S.C.A. § 2339, "Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life" with South Korea's Nat'l Security Law Art. 5: "Willful Help or Provision of Money or Materials". Additionally, both the U.S. statute and South Korea's law have been aimed at punishing both violent and non-violent support for certain enumerated groups determined by the Governments to be a threat. The scopes of both nations' laws are aimed at placing the country's citizens at war with these groups as opposed to engaging in peaceful relations.

<sup>56</sup> See Kraft, *Supra* at 628.

<sup>57</sup> See *id* at 633.

<sup>58</sup> See Cho, *Supra* at 145, explaining the Court's unwillingness to follow through with anything but extremely broad leeway in interpreting the Act in favor of the Government's enforcement.

## **B. The Conundrum: The Constitutional Court's Failure to Declare the National Security Law Unconstitutional**

It may seem as though the Constitutional Court is playing both sides. First, it righteously proclaims all of the core principles behind protecting the freedom of expression, and establishes a tough test for the government action to pass before reaching its citizens' rights. Then, it acts as an accomplice to the Government in suffocating the freedom of speech and expression.

Fortunately, there is no scandalous conspiracy theory behind the Court's apparent hypocrisy. Rather, the reluctance of the Court to adequately protect the freedom of expression can be explained by its overall lack of authority and opportunity to do so.

Unlike the United States and Germany, South Korea is a unitary nation without a separation of state and federal power. This means that the Court lacks jurisdiction to decide questions of federalism. Additionally, the Court lacks the power to review lower court decisions.<sup>59</sup> Therefore, once a lower Court determines that no constitutional violations occurred in an individual case, the Constitutional Court's hands are tied. Finally, the Constitutional Court lacks the authority to determine the constitutionality of decisions made by governmental agencies not enumerated in Article 62, Section 1 of its constitution.<sup>60</sup>

Another glaring problem with the enforcement of the freedom of expression by the Constitutional Court is the other government branches' and courts' lack of

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<sup>59</sup> *See id* 344.

<sup>60</sup> *See id* 347.

respect for its rulings. For instance, in 1990, the Court determined that the National Security Law's enforcement should be applied only to a "clear danger of bringing about substantive evils to the state", as opposed to actions lacking a clear and present threat.<sup>61</sup> Unfortunately, the Supreme Court of Korea<sup>62</sup> and the Korean Government failed to use the "clear danger" test, and continued to prosecute expressions that did not present real threats. The reasoning behind this is two-fold.

First, the Constitutional Court's decision was variational and did not declare the Law unconstitutional. Only an unconstitutional ruling by the Constitutional Court has the power to bind the lower Courts and the Supreme Court. Relatedly, the Supreme Court, and not the Constitutional Court, has the jurisdiction and power to sanction and enforce rulings on the Government.<sup>63</sup>

Secondly, the Constitutional Court's interpretation of what constitutes a "clear danger" is a subjective "gravity of the evil" test, not a "clear and present danger" analysis.<sup>64</sup> Therefore, the Supreme Court's enforcement of this ruling on the Government would prove useless in the face of the National Security Law, which is aimed at preventing the heaviest evil of them all: Terrorism.

### **C. A Bleak Future For Freedom of Speech In South Korea**

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<sup>61</sup> *See id* at 151.

<sup>62</sup> Korea's Supreme Court is a tribunal separate from the Constitutional Court. It decides issues of appeals from lower courts and determines the scope of the power of the government. This, in turn, has led to a struggle between the Supreme Court's ability to monitor the government's ability to act and the Constitutional Court's duty of interpreting whether those actions are within the scope of the constitution.

<sup>63</sup> *See Cho, Supra* at 151.

<sup>64</sup> *See id.*

It is clear that the hands of Korea's Constitutional Court will not stop the suppression of expression. However, international pressure and the Country's President may eventually prove to make a difference. In 2004, then-president Roh Moo Hyun called for the repeal of the National Security Law.<sup>65</sup> He was concerned that the Law was being applied discriminately, and punished valuable expressions of political dissidents. Additionally, the President was interested in beginning peaceful negotiations with North Korea in place of the hostile relations between the two nations. The international world fully supported the President's decision, resulting in praise from both Amnesty International and the UN.<sup>66</sup>

Unfortunately, the Supreme Court and a vast majority of the South Korean citizens rejected Roh Moo Hyun's repeal proposal and subsequent bill.<sup>67</sup> Many of the opponents to the repeal felt that the National Security Law was the only shield of defense the Country had against North Korea, and noted the significance of similar laws in place against them in the Northern Nation. Chairperson of the Grand National Party, Park Geun Hye, remarked:

The President is leading the process of pushing for dismantling the defenses of the Republic of Korea, driving the Republic into a fierce ideological confrontation and a split in national opinion. We face an unrelenting national struggle if he persists in pushing through the abrogation. I am prepared to stake everything on blocking the abrogation of the National Security Law.<sup>68</sup>

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<sup>65</sup> See Kraft, *Supra* at 636.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See Tai'ichiro, *Democracy and National Security in South Korea: The Song Du Yol Affair*, <http://nautilus.org/napsnet/napsnet-special-reports/democracy-and-national-security-in-south-korea-the-song-du-yol-affair/#axzz2kHP1nfuH> (2005).

Today, Park Geun Hye is celebrated as becoming the first female President of South Korea in 2013. Perhaps her election is not surprising since it came on the heels of North Korea's 2012 long-range missile launch and 2013 testing of nuclear weapons. It appears that South Korea's history of oppressing peace with North Korea has led the majority of its citizens to find forfeiting their freedom of expression in exchange for extreme security measures to be their only safety option.

#### **IV. THE NEED FOR COURTS TO START USING THE SHARPEST TOOLS IN THEIR SHEDS**

Germany, South Korea, and the United States are all countries guaranteeing the freedom of speech and expression, and each of these nations have been forced to react to terrorism. All three of these countries have handled terrorist attacks and threats with war and violence. The Governments polarized their enemies, branding them as 'terrorist organizations', and united their people under patriotism painted by black enemy lines. However, while South Korea and the United States have allowed their Governments' interests in national security to bypass all scrutiny of the Government's security measures, Germany has utilized the proportionality test to strike down government actions that are not narrowly tailored to promote security. In Germany, merely saying that an action promotes national security is only the first- and lowest- of four escalating hurdles for the government to overcome, whereas in the United States and South Korea it has become the only obstacle in place.

Germany's history has taught its country that in times of war and threats against national stability, freedoms are vulnerable to government oppression. When fighting for democracy and freedoms, the Court has made a conscious effort of emphasizing the importance of protecting these values rather than being an additional threat to them. By applying the proportionality test vigorously, the Court has managed to weed out government measures that are not narrowly tailored to promote national security. In effect, overbroad and speech curtailing laws do not pass muster under Germany's approach unless the government can show through concrete evidence that the law is necessary and effective to combat a clear threat of terrorism.

South Korea has allowed its conflict with North Korea to become the Nation's primary focus. After almost a century of hatred and violence, the value of democracy has become little more than a reason to continue its battle with North Korea. While claiming to be taking measures to ensure democratic stability and fundamental freedoms to its citizens, the Government has enacted laws that strip away from its people those very things. Although South Korea has adopted the same proportionality test used by the German Courts, it has failed to utilize it in a meaningful way. As a result, the National Security Law which silences harmless speech has been consistently upheld because of the Court's broad deference towards the Government's measures in promoting security.

The idea of security against North Korea has run so deeply into the veins of South Korea that the majority of its people are willing to surrender all fundamental freedoms in support of the Government's means of protection. It's questionable

whether these ideologies would be the same if the freedom of expression and speech had not been so devastatingly suppressed. The search for the truth is virtually impossible when the marketplace of ideas is void of opinions varying from the Government's. The Courts have allowed the Government to bypass the final three-prongs of the proportionality test at the mere utterance of the words national security. Although national security is inarguably significant, the measures taken to promote that interest should be narrowly tailored and proven with actual evidence to have a considerable effect of achieving peace in each individual situation.

The United States is on trend to suppressing the freedom of expression to an unrecognizable degree. Although the Nation's history serves as a reminder to the possibility for unnecessary governmental abuse of freedoms during war, the Court has been hesitant to learn from its mistakes. Instead of applying the legal analytical frameworks forged by the Nation's forefathers, the Supreme Court has instead deferred to the other branches of government, labeling itself incompetent to determine the constitutionality of security measures. The United States has given up on applying strict scrutiny and, similar to South Korea, allowed the Government's compelling interest in national security to open the gates to government actions that are not narrowly tailored.

The United States should bring teeth back into the Judicial Branch's review of fundamental freedom infringements. Like Germany, the United States should reconsider the importance of freedom of speech and expression during times of war, and protect these values from government intrusion. The war on terror has seemingly no end, and unless the Supreme Court changes course, neither will the

infringements on speech and expression. The Supreme Court needs to start applying strict scrutiny in the same manner it does when the country is not at war.

Similar to South Korea, the United States has filled the marketplace of ideas with hate against government-selected groups of people, necessity for violent measures, and patriotic duties of sacrificing fundamental rights. Unfortunately, this has left little room for questioning the veracity of the war and the Government infringements on individual rights. As opposed to Germany, the United States is intolerant of the idea of peaceful dispute settlements. Both non-violent and violent actions are punishable indiscriminately, and the value of freedom of expression has all but lost the battle to the war on terror.

Saying that an action promotes national security is not enough. History has revealed that there will never be world peace, and countries will never be free from the fear of terrorism. Thus, while terrorism echoes within every crevice of the world, each measure taken by the Government should be shown to have a direct, substantial effect on national security. To do this, every case must be closely scrutinized to ensure that words and opinions are not being unnecessarily snuffed. Before any action can be considered narrowly tailored, the Courts should ask whether the Government has proven through concrete evidence, as opposed to a piling of inferences that, in the absence of applying this measure to this particular situation in front of the Court, terrorism will result. The violence taken against democracy and the lives of innocent citizens is truly horrific, but so is the thought of allowing these atrocious acts of terror to tear down civil liberties and censor civilians for decades thereafter.