

A Comparative Research Study on Radical and Extremist (Hate) Speakers in European Member States

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Table of Contents

Introduction	4
Section 1 – International Legal Obligations	5
Section 2 – Regional Legal Obligations	7
1. <i>Council of Europe – General Regime</i>	7
2. <i>European Court of Human Rights Jurisprudence</i>	9
Section 3 – Country Case Studies	10
A. Belgium	10
1. <i>Criminal Law Provisions</i>	10
2. <i>Immigration Law Provisions.....</i>	13
3. <i>Administrative Law on Demonstrations and Gatherings.....</i>	13
4. <i>Prohibition of Organisations or Political Parties.....</i>	14
5. <i>Extreme Speech Online.....</i>	15
B. Denmark.....	15
1. <i>Criminal Law Provisions</i>	15
2. <i>Immigration Law Provisions.....</i>	17
3. <i>Extreme Speech Online.....</i>	19
C. France.....	19
1. <i>Criminal Law Provisions</i>	19
2. <i>Administrative Measures</i>	23
3. <i>Extreme Speech Online.....</i>	24
D. Germany.....	25
1. <i>Criminal Law Provisions</i>	25
2. <i>Immigration Law Provisions.....</i>	27
3. <i>Demonstrations and/or Public Meetings</i>	29

4.	<i>Extreme Speech Online</i>	29
E.	The United Kingdom	30
1.	<i>Counter-Terrorism Legislation targeting Extreme Speakers</i>	31
2.	<i>Relevant Case Law</i>	34
3.	<i>General Sentencing Rules and Special Prison Regime for Extreme Speakers</i>	36
4.	<i>The PREVENT Programme</i>	37
	Summary of adopted measures targeting extreme speakers	41

Introduction

The right to freedom of expression is one of the essential foundations of a democratic society.¹ It is a right applicable not only to information or ideas that are favourably received or regarded as inoffensive but also those which offend or shock the state or a part of the population.² As such, freedom of expression is one of the cornerstones of any pluralist and progressive democratic state.³ Yet, this is also a qualified right subject to restrictions at international, regional and domestic level. Under the International Covenant on Civil and Political Rights (ICCPR), the exercise of this right carries special duties and responsibilities. Thus, a state may place restrictions on it based on national security considerations for example. Similarly, at regional level, the European Convention on Human Rights (ECHR) allows for conditions, restrictions or penalties necessary in the interests of national security, territorial integrity and prevention of disorder or crime amongst others.

In recent years, driven by the multifaceted nature of various terrorism threats, states have (vastly) expanded their domestic criminal law, counter-terrorism and national security toolkits. Improving the capacity and capabilities of the relevant agencies to pre-empt terrorism related activity as early as feasible has been a common core rationale behind these legislative and strategic expansions. The range of what is now considered a terrorism-related activity has also been extended as the country specific discussions which follow will illustrate. As part of their strategies to counter and prevent (violent) extremism and radicalisation as a vital first step towards countering terrorism, states have increasingly focused on targeting **incitement to, encouragement of, invitation for, support for and glorification of terrorism**.

As noted in the United Kingdom's (UK) counter-terrorism and counter-extremism strategy, there is no clear distinction between terrorist and extremist ideologies.⁴ The malevolent narratives which extremists of all kinds employ, have been used to justify behaviours that contradict and undermine the values of democratic societies.⁵ In order to tackle extremism in all its forms states such as Belgium, Denmark, France, Germany and the UK have adopted a wide range of new criminal and administrative measures as well as bespoke legislative responses such as a separation prison regime for convicted extreme speakers (UK). The report has chosen to focus on these five countries as they represent a very comprehensive study of the range of (non-)criminal, (non-)administrative and counter-terrorism/counter-extremism strategies currently being adopted by EU member states to combat the potential threats posed by extreme and radical speakers. Further, as these five countries have arguably updated their relevant legislation most recently and thoroughly, they are most representative of the range of possible measures with which to target extreme and radical speakers. In addition, both France and the UK have a long history of targeting glorification or apology for terrorism and countering domestic terror threats through various legislative and other means. As such, their long experience is indispensable in understanding how (non-)criminal, (non-)

¹ *Handyside v. the United Kingdom*, Application no. 5493/72, Judgment of 7 December 1976, para. 49.

² *Ibid.* Subsequent jurisprudence of the European Court of Human Rights has found that the choice of shocking words may be taken into account as affecting the application of restrictions within the margin of appreciation: *Otto Preminger Institut v. Austria*, App. no.13470/87, A295-A 1994; *Wingrove v. United Kingdom*, App. no.17419/90, 1996-V; *E.S. v. Austria*, App. no.38450/12, 25 October 2018.

³ UNESCO, 'Freedom of expression: A Fundamental Human Right underpinning all Civil Liberties'.

⁴ CONTEST – The United Kingdom's Strategy for Countering Terrorism, June 2018.

⁵ *Ibid.*

administrative and counter-terrorism/counter-extremism measures can evolve over time in order to remain effective against an ever-developing threat.

Some of the legislative provisions enacted have inevitably resulted in potentially substantial limitations on the right to freedom of speech. A number of individuals have been subjected to onerous administrative measures in relation to their speech – sometimes after a criminal conviction, sometimes in the absence of criminal law action. Thus, the question of proportionality has inevitably arisen – to what extent can a state legitimately and justifiably restrict the right to freedom of expression in the interests of national security? To put it differently, in respecting its broader social obligation to ensure and preserve security, how much should a state qualify the right to freedom of expression? In addressing these questions, this comparative report will first outline in more detail the applicable international and regional legal obligations and relevant case law in Sections 1 and 2 respectively. Section 3 will focus on the following countries – Belgium, Denmark, Germany, France and the United Kingdom – with particular emphasis on domestic legislative provisions, jurisprudence and national strategies specifically adopted to respond to the risks posed by extreme speakers. It should be noted at the outset that the United Kingdom has legislated against extreme and radical speech within its counter-terrorism legislation. The report will conclude a list of conclusions and closing remarks based on the impact of these domestic practices and legal responses on the right to freedom of expression.

Section 1 - International Legal Obligations

At the international level, Article 19 ICCPR is the core provision outlining the protections afforded to holding opinions and seeking, receiving and imparting information and ideas. As is customary, the UN Human Rights Committee (HRC) has provided an interpretation of the scope and operation of Article 19 in its General Comment No. 34.⁶ In this Comment, the HRC reiterated the importance of this right and described freedom of opinion and freedom of expression as essential and indispensable conditions for the full development of an individual.⁷ Similar to the European Court of Human Rights (ECtHR),⁸ the HRC affirmed the Article 19(2) protects expression that may be regarded as deeply offensive.⁹ Nevertheless, the right to freedom of expression under Article 19 is a qualified right subject to restrictions. These restrictions should not jeopardise the right itself, must be provided for by law and be necessary.¹⁰ Thus, to qualify the right, a state must ensure that the restriction is proportionate and pursues a legitimate objective.¹¹

The HRC's General Comment has also offered guidance on how states can meet these requirements. In order to comply with the proportionality requirement, a restriction must be

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⁶ HRC, 102nd session, Geneva 11-29 July 2011, CCPR/C/GC/34, 12 September 2011. This General Comment replaced the HRC's earlier General Comment 10 from 1983.

⁷ Ibid, paras. 1 and 4.

⁸ *Handyside v. the United Kingdom*, Application no. 5493/72, Judgment of 7 December 1976, para. 49.

⁹ HRC, 102nd session, Geneva 11-29 July 2011, CCPR/C/GC/34, 12 September 2011, para. 11.

¹⁰ Ibid, para. 21.

¹¹ Article 19(3) refers to "special duties and responsibilities." This phrasing "does not identify duties or responsibilities of individuals to the State, but to other individuals and the communities in which they live, an acknowledgement that the only legitimate restrictions are those necessary for the protection of the rights of other individuals or a specific public interest." See further, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/71/373, 6 September 2016, para. 8.

the “least intrusive instrument amongst those which might achieve their protective function.”¹² Thus, a State party must demonstrate on a case by case basis the precise nature of the relevant threat and the necessity and proportionality of the specific action taken to combat this threat i.e. a state party must establish a direct and immediate connection between the type of expression or speech targeted and the threat.¹³ To fulfil the requirement of “provided by law”, a state party must enact legislative provisions, however such provisions may not confer an unfettered discretion to restrict freedom of expression on those charged with its execution.¹⁴ Any law adopted must respect the provisions, aims and objectives of the ICCPR.¹⁵

When addressing the legitimate objective requirement, a state can only qualify the right to freedom of expression for one of two reasons under the terms of the ICCPR – respect of the rights or reputations of others or for the protection of national security, of public order (*ordre public*) or of public health or morals. In relation to the first, the HRC noted that the term ‘others’ relates to people addressed either individually or as members of a community.¹⁶ As to the second legitimate ground, the HRC warned that state parties must ensure that provisions relating to national security are drafted and applied in a manner reflective of the requirements of necessity and proportionality.¹⁷ In addressing counter-terrorism measures specifically, the HRC stressed that offences such as encouragement of terrorism, extremist activity, praising, glorifying or justifying terrorism should be clearly defined to safeguard against unnecessary or disproportionate interference with freedom of expression.¹⁸

The ICCPR is not the only international document which requirements states need to comply with in addressing incitement and encouragement to terrorism. Since 2001, with the adoption of Resolution 1373, the UN Security Council entered into its legislative phase.¹⁹ There are by now a number of UN Security Council Resolutions referred to as law-making due to the language, temporality and nature of obligations imposed.²⁰ One such Resolution is 1624 (2005) specifically calling on states to prohibit incitement to commit terrorism. Aside from strongly condemning these types of expressions, the Resolution expressly demanded that states should legislate domestically for the type of measures necessary, appropriate and respectful of international law obligations that prohibit incitement to terrorism, prevent such conduct and deny safe haven to any persons against whom there is credible information suggesting that they have engaged in such conduct.

This Resolution was also adopted in 2005 – the same year the Council of Europe (CoE) adopted its Convention on the Prevention of Terrorism.²¹ The CoE Convention likewise imposed obligations on states to enact measures countering what was referred to as “**public provocation to commit a terrorist act.**”²² The immediately following section will address in

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¹² HRC, 102nd session, Geneva 11-29 July 2011, CCPR/C/GC/34, 12 September 2011, para. 33.

¹³ Ibid, para. 35. See also Article XIX, ‘The Camden Principles on Freedom of Expression and Equality’, April 2009, principle 11.

¹⁴ Ibid, para. 25.

¹⁵ Ibid, paras. 26 – 46.

¹⁶ Ibid.

¹⁷ Ibid. See also the Johannesburg Principles 1995.

¹⁸ Ibid.

¹⁹ On this point see Paul C. Szasz, “The Security Council Starts Legislating” (2002) 96 *American Journal of International Law* 901 and Stefan Talmon, “The Security Council as World Legislature” (2005) 99 *American Journal of International Law* 175.

²⁰ Ibid.

²¹ Council of Europe Convention on the Prevention of Terrorism (signed 16 May 2005, entered into force 1 June 2007) CETS No. 196.

²² See also the EU Directive on combating terrorism, 2017/541, art. 5 (see Annex).

more detail this Convention as well as the other relevant states obligations arising under the European Convention on Human Rights regime.

Section 2 - Regional Legal Obligations

1. Council of Europe – General Regime

There is no precise definition of ‘extremist speech’ at regional level. Lamentably, neither the European Convention on Human Rights (ECHR) nor secondary CoE legislation offer clear definitional guidance. Instead, phrasing such as ‘**recruitment of terrorism**’, ‘**hate speech**’ (or earlier various forms of ‘**propaganda of hatred**’), ‘**counteraction to manifestations of neo-Nazism and right-wing extremism**’, ‘**public provocation to commit a terrorist offence**’ and ‘**apologie du terrorisme**’ are the closest relevant terms used both within the instruments of the CoE and the decisions of the European Court of Human Rights (ECtHR).

A definition of **hate speech** was provided for the first time in 1997 in CoE Recommendation No R 97(20). Under the Recommendation, hate speech includes “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance.”²³ Another relevant CoE document in the context of extremist speech is Resolution 1344 (2003) addressing the **threat posed by extremist parties and movements**.²⁴ Article 13 of this Resolution, encourages CoE member states to legislate for measures countering extremism provided however that such measures comply with the requirements of the ECHR. In other words, any measures adopted must be a proportionate and dissuasive penalty against public incitement to violence, racial discrimination and intolerance.

The 2005 CoE Convention on the Prevention of Terrorism offers guidance on the following two terms – ‘**public provocation to commit a terrorist offence**’ and ‘**recruitment of terrorism**’.²⁵ Article 5 defines **public provocation to commit a terrorist offence** as the distribution or making available of a message to the public with the intent to incite the commission of a terrorist offence. This is applicable to conduct, which causes a danger that one or more terrorist offences may be committed regardless of whether the message advocates directly or indirectly for the commission of such offences. Article 6 describes **recruitment of terrorism** as soliciting another person to commit or participate in the commission of a terrorist offence or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group. Both provisions require member states to adopt appropriate legislative measures to criminalise domestically these Convention offences.

There are two relevant ECHR provisions in the context of **extremist speech** – Article 10 ECHR (freedom of speech) and Article 17 ECHR (prohibition of the abuse of rights). Article 10(1)

²³ See Appendix to Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe to Member States on “Hate Speech” (adopted 30 October 1997) for the full text.

²⁴ Parliamentary Assembly of the Council of Europe Resolution 1344 (2003) on the “Threat Posed to Democracy by Extremist Parties and Movements in Europe” (adopted 29 September 2003), Article 8.

²⁵ Council of Europe Convention on the Prevention of Terrorism (signed 16 May 2005, entered into force 1 June 2007) CETS No. 196, Articles 5 and 6 in particular.

protects the freedom to express opinions and to receive and impart ideas without interference by a public authority. Article 10 (2) does, however, permit legitimate restrictions of this freedom in a number of circumstances such as in the interests of national security, territorial integrity or public safety and the prevention of disorder or crime.²⁶ States also have the option of justifying their restrictive measures against extremist speech in light of Article 17, which embodies the paradigm of militant democracy within the Council of Europe.²⁷ In the past Article 17 was used by the ECtHR in extreme or grave cases. The ECtHR has however cited it more often in recent years.²⁸

Article 10 proportionality test. Both provisions have been scrutinised by the European Court of Human Rights (ECtHR), with particular reference of how/where to strike the balance between speech that poses a danger to society and the fundamental right to freedom of speech. With reference to Article 10, the ECtHR assesses any restrictions to extremist speech through a proportionality analysis. This proportionality analysis involves an assessment of whether the restrictive measure is prescribed by law, demonstrates evidence of pertinent necessity directly connected to the targeted extreme speech²⁹ and is the least restrictive measure available to address the extreme speech. The key point the Court considers is whether it is apparent that the applicant intended to use the freedom of expression right under Article 10 in contravention to the purposes of the Convention. If so, it will then consider Article 17 as applicable instead of Article 10. It should be noted that the Court's criteria on the use of Article 17 ECHR are not clearly elucidated.³⁰

2. European Court of Human Rights Jurisprudence

Numerous cases on hate speech have been brought to the ECtHR, challenging national jurisprudence and alleging breaches of Article 10 ECHR. Two particular lines of case-law are relevant in the context of the extremist speech. The first one addresses a series of cases stemming from the complex relationship between the Kurdish minority and the Turkish government and in particular with the manner in which the Turkish authorities have interpreted the scope of Article 10 ECHR. As Turkey is not featured as a country case study within this comparative report, a brief summary of some of the cases addressing its approach to Article 10 is provided within Annex 3 of this Report.

In *ROJ TV A/S v. Denmark* (2018),³¹ the applicant was a Danish TV network was mainly broadcasting Kurdish-language material in Europe and the Middle East from 2004 to 2010. In September 2010, the applicant was charged with breaching Danish counter-terrorism provisions by promoting and sharing the un-critiqued views of the PKK in its transmissions from 2006 to 2010. The applicant claimed violations of both Articles 10 and 17 ECHR. As

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²⁶ See Annex for full text of Article 10.

²⁷ Uladzislau Belavusau, "Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant?", (2014) 1 *Israel Law Review*, 47. András Sajó (ed.), *Militant Democracy* (Eleven International Publishing, Utrecht, 2004).

²⁸ *Hizb ut Tahrir v Germany*, App. No.31098/08, 19 June 2012; *Kasymakhunov & Saybatalov v Russia* App nos. 26261/05 and 26377/06, 14 March 2013; *Dieudonné M'Bala M'Bala v France*, App. no.25239/13, 20 October 2015; *Roj TV v Denmark*, App. no.24683/14, 24 May 2018.

²⁹ This is done with reference to the qualifying factors under Article 10(2) – for example national security or protection of public order.

³⁰ Antoine Buyse, "Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR", in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 190.

³¹ *ROJ TV A/S v. Denmark*, App No 24683/14 (2018)

regards Article 17, the Court stressed that this provision is typically only considered in grave cases. It also noted that the applicant had been largely funded by PKK, and found “that the *one-sided coverage*”, “the *incitement to participate in fights and actions*”, “the *incitement to join the organisation/the guerrilla*, and the *portrayal of deceased guerrilla members as heroes*, amounted to propaganda for the PKK, a terrorist organisation, and that it could not be considered only a declaration of sympathy.” The Court, therefore, unanimously declared the application inadmissible.

The second line of relevant ECtHR cases addresses **glorification of terrorism** (in general), **apologie du terrorisme** and speech specifically glorifying Islamic terrorism.³² In the case of *Leroy v. France* (2008),³³ the applicant, a cartoonist, faced criminal sanctions for glorification of terrorism on the basis of a drawing in a Basque newspaper. The drawing referred to the 9/11 attacks and had the following caption – “We have all dreamt of it.... Hamas did it.” The Court did not consider Article 17 ECHR, but it did consider the proportionality requirement of Article 10. In light of the context of the incident, and the seriousness of the 9/11 attacks, the Court found no violation of Article 10.

In *Belkacem v. Belgium* (2017),³⁴ the applicant, head of an organisation called *Sharia4Belgium*, was prosecuted for Islamist speech. From 2007 to 2012, the applicant posted several YouTube videos in which he called for sharia law to be enforced in Belgium, for his followers to target and assault non-Muslims, and advocated for jihad. In February 2012, based on Belgium’s 2007 law on combating discrimination, the Antwerp Criminal Court sentenced the applicant to two years’ imprisonment (suspended for 5 years) and to a 550 euro fine. On a 6 June 2013 appeal, this was reduced to a suspended sentence of one year, six months’ imprisonment and 550 euro fine. On 29 October 2013, the Court of Cassation dismissed his appeal, and the applicant filed a claim before the ECtHR. The applicant claimed a violation of Article 10. The ECtHR agreed with the Belgian courts, finding his speech to have been hateful and inciting violence in contravention to the values of the ECHR. Based on previous case law,³⁵ the ECtHR found that *calling for sharia law in combination with inciting violence could be viewed as hate speech*, and therefore was not speech protected by Article 10. In contrast, in *Gündüz v. Turkey* (2004),³⁶ the Court found that merely defending sharia *without calling for violence* was protected expression.

Following on from this overview of the most pertinent international and regional obligations and relevant jurisprudence addressing extreme speech, the report will proceed with an outline of five country case studies – Belgium, Denmark, Germany, France and the United Kingdom.

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³² It should be noted that of ‘glorification to terrorism’ and ‘apology for terrorism’ should not be read as meaning the same thing or addressing the same type of offence.

³³ *Leroy v. France*, App No 36109/03 (2008)

³⁴ *Belkacem v. Belgium*, App No 34367/14 (2017)

³⁵ *Refah Partisi (The Welfare Party) and Others v. Turkey*, nos. 41340/98 and 3 others, §§123-124

³⁶ *Müslüm Gündüz v. Turkey*, App No 35071/97 (2004)

Section 3 – Country Case Studies

A. Belgium

1. Criminal Law Provisions

Incitement to commit terrorist acts is criminalised under Article 140bis of the Criminal Code as follows – the distribution of (or making available) a message to the public, with the intent to directly or indirectly incite the commission of terrorist offences; the relevant terrorist offences are defined in Articles 137 – 140 but exclude threats to commit terrorist offences.³⁷ Article 141 of the Criminal Code emphasises however that the provisions of Articles 137 – 140 should not be interpreted as intending to restrict or impede rights or fundamental freedoms, including freedom of expression (and in particular the freedom of the press and other media) and freedom to protest.³⁸

Article 140bis has already undergone three important changes. In 2016, the words ‘directly or indirectly’ were included in its text. Further, the incitement to several new terrorist offences (within Articles 138 – 140) was incorporated. The final amendment removed the requirement that the alleged behaviour, whether or not directly advocating the commission of such offences, causes a risk that one or more of the relevant offences might be committed. The government considered that the previous provision was unclear and thus hindered efficient action against incitement to terrorism in its current forms.

In 2018, the Belgian Constitutional Court³⁹ ruled that the amendment removing the risk requirement of Article 140bis, violated the right to freedom of expression. The Court stressed that the requirement of serious indications of a risk that a terrorist offence could be committed presents an important safeguard and that the perceived need to ease the requirements to prove this offence cannot legitimate such a far-reaching change in an offence that carries five to ten years’ imprisonment.⁴⁰ Moreover, the Court stressed that EU law (currently Directive 2017/541/EU) does pose such a risk requirement.

There have been further proposals in the Belgian Parliament to criminalise **glorifying, grossly minimising, justifying and approving acts of terrorism**.⁴¹ Interestingly, in a recent case concerning extradition, the Belgian courts have refused to surrender the Spanish rapper Valtònyc to serve a sentence given by the Spanish courts for glorifying terrorism amongst other things, because this is not a criminal offence in Belgium.⁴²

³⁷ See Annex for a full text of the Article.

³⁸ Ibid.

³⁹ Constitutional Court nr. 2018/31.

⁴⁰ This test is also included in the EU Directive on Combating Terrorism. See Constitutional Court 28 January 2015, nr. 9/2015, where the Constitutional Court judged the old version of the law to be in line with freedom of expression.

⁴¹ See the Belgian Chamber of Representatives and in particular, the Bill criminalizing grossly minimizing, justifying, approving, making an apology for or celebrating a terrorist offence (Wetsvoorstel tot bestraffing van het verheerlijken, schromelijk minimaliseren, pogen te rechtvaardigen of goedkeuren van terroristische misdrijven en van het uiten van blijdschap over deze misdrijven), 27 November 2015. See also Belgian Chamber of Representatives, Bill to punish apology for terrorism in public and on the internet (Wetsvoorstel tot betuugeling van de verheerlijking van terrorisme, in het openbaar en op het internet), 20 November 2015.

⁴²De Morgen, “In Spanje veroordeelde rapper Valtònyc wordt niet uitgeleverd”, 17 September 2018, <https://www.demorgen.be/nieuws/in-spanje-veroordeelde-rapper-valtonyc-wordt-niet-uitgeleverd-bb74e57e/?referer=https%3A%2F%2Fwww.google.com%2F>.

Incitement to hatred, discrimination or violence. The convictions of *Sharia4Belgium's* spokesperson Fouad Belkacem (see part 2, par. 2) show that in Belgian law, calls for jihadist violence can also be dealt with under the **hate speech** laws. In 2012, Belkacem was convicted to 18 months' imprisonment for **incitement to hatred, discrimination and violence** against non-Muslims and against Parliamentarian Filip Dewinter.⁴³ The courts found that he had called for violent action against nonbelievers. Incitement to hatred, discrimination or violence on the grounds of race and the spreading of ideas based on racial superiority or racial hatred is a criminal offence under Article 22 of the Discrimination Law.⁴⁴ Further, belonging to a group or association which visibly and repeatedly propagates racial discrimination or segregation or cooperating with such groups, is also a criminal offence.⁴⁵

In 2013, Belkacem was additionally convicted of stalking⁴⁶ former Vlaams Belang chairperson Frank Vanhecke for posting a video online the day after the passing away of Vanhecke's partner, stating that her cancer was a punishment of Allah because she was a member of an anti-Islamic party. Belkacem was also convicted to six months' imprisonment in 2012 for incitement to hatred, discrimination and violence against non-Muslims for spreading a video message on YouTube about a police check on a woman wearing a niqaab, praising the violence she used against the police agent and the riots that broke out.⁴⁷ After Belkacem was convicted to twelve year's imprisonment for his leading role in *Sharia4Belgium*, which was judged to be a terrorist organisation, he was deprived of his Belgian citizenship thus leaving him with his Moroccan nationality only.

A report of the Parliamentary Investigative Committee on Terrorist Attacks in 2016 found that the legal possibilities to target organisations that spread ideas that run counter to Belgian law, are not used well enough.⁴⁸ The anti-racism and anti-discrimination laws could be used more often against 'hate preachers'.⁴⁹ The Committee expressly noted that such laws could also be used to counter radicalism online yet the laws' capabilities were underused.

Participation in a terrorist organisation. Article 140 of the Criminal Code, which addresses the participation in a terrorist organisation, is also used to deal with groups that are accused of extreme speech. In what was a controversial case, Bahar Kimyongür was prosecuted for participation in a terrorist organisation, namely the Belgian part of the Turkish Marxist-Leninist organisation DHKP-C. This organisation is currently placed on the EU Terrorist List. He was prosecuted for distributing leaflets with a press release of DHKP-C that he had translated into French. His case eventually ended in an acquittal in 2009. The Court of Appeal considered that the contents of the press release were political speech that fell within the protections of the right to freedom of expression.⁵⁰ In 2016, Muslim preacher Jean-Louis Denis was convicted

⁴³ <https://www.unia.be/nl/artikels/fouad-belkacem-veroordeeld-tot-18-maanden-cel-wegens-aanzetten-tot-haat-geweld-en-discriminatie>; Hof van Cassatie 29 October 2013, P.13.1270.N/1; ECHR (dec.) Belkacem v. Belgium, 27 June 2017, appl.nr. 34367/14.

⁴⁴ Wet van 10 MEI 2007 ter bestrijding van bepaalde vormen van discriminatie, Articles 20 and 21, Wet van 30 JULI 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden.

⁴⁵ Art. 22 Wet van 30 JULI 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden.

⁴⁶ Art. 442bis and 442ter Criminal Code.

⁴⁷ <https://www.unia.be/nl/artikels/fouad-belkacem-opnieuw-veroordeeld-voor-aanzetten-tot-haat>.

⁴⁸ Parlementaire onderzoekscmissie terreuraanslagen 2016.

⁴⁹ Ibid.

⁵⁰ Comité de vigilance en matière de lutte contre le terrorisme (Comité T), Rapport 2017.

to 5 years' imprisonment for participating in a terrorist organisation for his role in encouraging youth to travel to Syria for engaging in jihad. He was convicted on the basis of engaging in jihadist propaganda rather than provision of material or financial support.⁵¹

2. Immigration Law Provisions

The various possibilities in the Belgian Aliens Act for denying entrance or deporting persons for public order and national security reasons, are sometimes used in case of extreme speech. In 2016, the Belgian Secretary for Asylum and Migration expelled the Muslim preacher El Alami Amaouch. At the time, Amaouch held double Moroccan-Dutch nationality. He was accused of radical expressions and inspiring the terror cell in Verviers.⁵² What is significant is that he was expelled without a prior criminal conviction. However, the Council of State has rejected his complaint that this violated his right to freedom of expression.⁵³ The imam has since been preaching in The Hague. His then 15-year old son, who had published a video inciting the murder of Christians in the centre of Verviers, was sent to a youth institution.⁵⁴ Later, the State Secretary for Asylum and Migration also announced his intention to expel the son as well for posing a threat to national security; the son also has Dutch nationality.⁵⁵

As indicated before, Fouad Belkacem has lost his Belgian nationality after his conviction for extreme speech. This is possible for persons who have not been born as Belgians, on the basis of the Law on the Belgian Nationality. The possibility has already existed for a long time (but was not used until recently) to deprive a person of his Belgian nationality (*vervalvenverklaring*) under certain circumstances, when that person is seriously falling short of his obligations as a Belgian citizen (art. 23 par. 1 under 1) – which can also include participation in a terrorist organisation. Belkacem lost his nationality on that ground. The same provision has been used against six others until July 2018, all on the basis of convictions of terrorism.⁵⁶ Also, loss of Belgian nationality is possible, since 2015, for persons convicted to a prison sentence of at least five years because of a terrorist offence (including, amongst other things, the offence of incitement to terrorism in art. 140bis Criminal Code⁵⁷). This has been used against one person by July 2018.⁵⁸

3. Administrative Law on Demonstrations and Gatherings

When confronted with gatherings in public places and the risk of extreme speech, the role of the municipality is of interest as well. Municipalities have broad powers at their disposal to act against public order and public nuisance issues under Article 135 of the New Municipalities Act. The municipal council can take preventive and repressive action against demonstrations. The Council of State has held, however, that there can be no preventive action because of the (expected) *content* – *there has to be a risk of disorder*.⁵⁹ There are also specific provisions in

⁵¹ Het Laatste Nieuws, "Celstraf voor moslimprediker Jean-Louis Denis gehalveerd", 18 November 2016.

⁵² De Morgen, "Haatimam uit Verviers vrijwillig naar Marokko", 29 November 2016.

⁵³ Het Laatste Nieuws, "Raad van State verwerpt cassatieberoep van haatimam Dison: hij kon zonder problemen het land worden uitgezet", 23 March 2018.

⁵⁴ De Morgen, "Jonge haatprediker Verviers drie maanden naar gesloten instelling, vader weer vrijgelaten", 23 August 2016.

⁵⁵ De Morgen, "Ook zoon (18) van haatimam Verviers land uit gezet", 19 September 2017.

⁵⁶ <https://www.vrt.be/vrtnws/nl/2018/08/29/verlies-van-nationaliteit-vijf-vragen-vijf-antwoorden/>.

⁵⁷ See art. 23/2 lid 1 Law on the Belgian Nationality.

⁵⁸ <https://www.vrt.be/vrtnws/nl/2018/08/29/verlies-van-nationaliteit-vijf-vragen-vijf-antwoorden/>.

⁵⁹ RvS 15 januari 1976, nr. 17.375, Arr.RvS 1976, 60; RvS 27 maart 2007, nr. 169.335; RvS 18 maart 2010, nr. 202.037; RvS 3 april 2014, nr. 227.046.

the New Municipalities Act (art. 134) for the mayor to act against ‘malicious gatherings’ and serious public order problems in urgent cases. However, even gatherings in closed settings can be preventively prohibited if there is a risk for the public order – such as in the case of the ‘European Congress on Dissidence’ organised by the political movement Debout Les Belges, where several speakers would appear who had been convicted for anti-Semitic expressions.⁶⁰

In case of serious indications⁶¹ that terrorist offences are conducted in a certain place, the mayor can close the relevant venue subject to the provisions of Article 134septies. Moreover, the mayor can enact area prohibitions if individual or collective behaviour causes disturbances of public order under Article 134sexies. The New Municipalities Act also allows for the imposition of administrative sanctions for disturbing public order; during a *Sharia4Belgium* demonstration in 2010, some members of the group received such sanctions.⁶²

4. Prohibition of Organisations or Political Parties

In Belgian law it is not possible to ban or prosecute political parties as such – it is only possible to prosecute them by indirect means, as political parties themselves are not considered ‘legal persons’. The associations behind them can, however, be prosecuted and subsequently convicted if they repeatedly engage in the dissemination of racial hatred as the case of the far right Vlaams Blok shows.⁶³ With the rise of *Sharia4Belgium* the question was raised again whether it could be worthwhile to prohibit such an organisation. Politicians have made various proposals – for example amending the law prohibiting private violent militias (which dates to 1934) to include a prohibition of organisations that pose a danger for democracy due to terrorist or racist activities. Another proposition was to prohibit organisations that incite to hatred, discrimination or violence or that spread ideas or theories justifying or propagating this.⁶⁴ Participation in, or support for, terrorist or racist organisations is already dealt with by the criminal law as stated above. However, it was argued that a prohibition specifically targeting organisations could make it easier for internet providers and those renting out spaces to deny cooperation with a group and for the mayor to prohibit their manifestations.

5. Extreme Speech Online

In Belgium, websites can be made unavailable in the context of a criminal investigation for - amongst other things - incitement to terrorism.⁶⁵ Since 2016, the Belgian federal police has an ‘Internet referral unit’ that monitors extreme and radical expressions such as terrorist speech and racial discrimination. Any relevant findings are sent to the online platforms where the expressions are posted with the request to voluntarily (on the basis of their own codes of

⁶⁰ RvS 4 mei 2014, 227.249; https://www.lemonde.fr/europeennes-2014/article/2014/05/04/belgique-un-congres-controverse-de-dieudonne-et-alain-soral-interdit_4411297_4350146.html. See further Devroe, E. et al, An Expanding Culture of Control? The Municipal Administrative Sanctions Act in Belgium (2017) 23 European Journal on Criminal Policy and Research 59–76.

⁶¹ These need to be based on concrete arguments, e.g. information by the Public Prosecution or other government institutions, complaints or determinations by the police e.g. after checks. See https://www.brulocalis.brussels.nl/burgemeester-kan-instelling-sluiten-wegens-terrorisme-goed-of-slecht-nieuws.html?cmp_id=7&news_id=5547&vID=130.

⁶² Gazet van Antwerpen, “Vijf aanhouding bij demonstratie van Sharia4Belgium”, 26 April 2010.

⁶³ See further Hof van Cassatie 9 November 2004, P.04.0849.N/1. The financial fines imposed led to the party dissolving itself even though it was followed up by the Vlaams Belang.

⁶⁴ 9 July 2012, <https://www.gva.be/cnt/aid1204306/zeven-vragen-over-het-verbod-van-sharia4belgium>.

⁶⁵ Art. 139bis par. 6 Criminal Code; Jo Baert en Benny de Sutter, “Veranderingen en aanpassingen – vanuit een rechtsstatelijkperspectief – van bestuur, regelgeving en rechtspraak, die noodzakelijk zijn als gevolg van digitalisering, automatisering entoeëpassing van informatie- en communicatietechnologie bij deoverheid. Implicaties van deze ontwikkelingen voor de rechtshandhaving”, 2014, Raad van State, http://webcache.googleusercontent.com/search?q=cache:w2U-tDqrV_IJ:www.raadvst-consetat.be/%3Faction%3Ddoc%26doc%3D1005+%&cd=3&hl=en&ct=clnk&gl=be,par.3.2.1.

conduct) remove and/or block access to messages.⁶⁶ The unit focuses on detecting ‘information and publications relating to propaganda, terrorism, radicalism, violent extremism, hate speech/hate crimes and human trafficking’.⁶⁷ In 2016, the Parliamentary Investigative Committee on Terrorist Attacks recommended an assessment of whether it would be possible to criminalise repeated consultation of radical websites.⁶⁸

B. Denmark

1. Criminal Law Provisions

Section 136(1) of the Danish Criminal Code (*Straffeloven*) criminalises both direct and indirect public incitement to commit a criminal offence. This provision was used for the first time in 2007 against Said Mansour, a Danish-Moroccan bookseller who was viewed as Al-Qaeda’s PR person in Denmark. He was sentenced to three and a half years’ imprisonment for his calls to violent jihad and for producing and distributing materials celebrating terrorist acts.⁶⁹ Mansour’s expressions also resulted in a conviction under Section 266b (hate speech). Section 266b criminalises anyone who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people is threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination.

In 2014, Mansour was convicted again – this time to four years’ imprisonment – for calling on people to join Al Nusra and praising and condoning terrorist acts.⁷⁰ He posted messages, pictures and videos online; he also distributed books authored by the extreme radical cleric Abu Qatada justifying jihad. He was convicted of incitement to terrorism under Sections 136 (1) and section 136 (2) of the Danish Criminal Code. These Sections criminalise express approval (in public) of crimes against national security and terrorist crimes. Moreover, he was convicted of “otherwise promoting the activities of a person, a group or an association committing or intending to commit terrorist crimes” (Section 114e Criminal Code) and for hate speech (Section 266b) as the books contained anti-Semitic messages. The High Court also revoked Mansour’s Danish citizenship.

Despite being renowned for its freedom of speech tradition, Denmark has recently adopted several measures curbing freedom of religious expression. Since 2017, Section 136(3) of the Criminal Code, criminalises the explicit condoning (or approval) of certain criminal offences (such as terrorism) in religious teaching.⁷¹ It includes public and private speech and can apply

⁶⁶ De Vice-Eerste Minister, Minister van Veiligheid en Binnenlandse Zaken, Antwoord op de parlementaire vraag nr. 1595 van 16 augustus 2016 van dhr. Deseyn, Internetcensuur.

⁶⁷ De Vice-Eerste Minister, Minister van Veiligheid en Binnenlandse Zaken, Antwoord op de parlementaire vraag nr 127 van mw. Jadin van 27 juni 2017, Werk van de IRU- eenheid van de federale politie (IRU) (MV 18905), 23/08/2017, B127-B128.

⁶⁸ An idea which was taken from France, where Article 421-2-5-2 of the Penal Code was introduced by Loi 2016-731 of 3 June 2016, art.18. This offence was struck down by the French Conseil Constitutionnel (*Decision no. 2016-611 QPC of 10 February 2017 - Mr. David P.* It was reintroduced by Loi no.2017-258 of 28 February 2017, art. 24, however, the amended version of the offence had again been struck down by the Conseil Constitutionnel in its *Decision no. 2017-682 QPC of 15 December 2017 - Mr. David P.*

⁶⁹ European Commission, Commission Staff Working Document, Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism, 5 September 2014, COM(2014) 554 final, p. 2.

⁷⁰ Eastern High Court, 22 June 2015, case no. S-3475-14.

⁷¹ Lov om ændring af straffeloven - Kriminalisering af udtrykkelig billigelse af visse strafbare handlinger som led i religiøs oplæring.

not only to religious preachers, but also to other persons who express themselves in the context of religious education. According to the government, it only applies to religious education where there is an element of preaching.⁷² The provision has led to criticism for encroaching too much upon freedom of religion and freedom of expression.⁷³ In July 2018, the first person prosecuted for this offence was an imam who during the Friday prayer – amongst other things – quoted from an Islamic *hadith* and thereby allegedly incited to violence against Jews.⁷⁴ He is due to be prosecuted for hate speech.

Under Section 114c and 114e of the Criminal Code, it is an offence to join terrorist groups and to promote the activities of such groups. The second provision has been used in 2009 to prosecute the company behind the Kurdish TV station, Roj TV, and its holding company Mesopotamia Broadcast. The company was convicted of support for the PKK (see part 2, par. 2), and they lost their license to broadcast in Denmark.⁷⁵ A few years earlier, the Danish Radio and Television Board had opted not to act against Roj TV, because the programmes did not incite hatred and merely broadcast information and opinions, while the violent images broadcast reflected the real violence in Turkey and the Kurdish areas.⁷⁶

The criminal prohibition of terrorist financing has also been used to target expressions. In 2009, six members of the collective *Fighters+Lovers* who sold t-shirts with the logos of the FARC and the Popular Front for the Liberation of Palestine (under the slogan ‘Look Great And Stand Up For Freedom’), were convicted because they were planning to donate their profits to humanitarian projects within these organisations.⁷⁷ Their case sparked a discussion about freedom of expression – the defendants argued that they regarded the organisations as legitimate resistance movements and that the EU Terror Lists were illegitimate.

2. Immigration Law Provisions

Revocation of Danish citizenship is possible under Section 8B of the Citizenship Act (Infødsretsloven) for persons who are convicted of crimes against national security or terrorist crimes and who are sentenced to deportation (Chapters 12 and 13 of the Criminal Code). This involves a proportionality test, and the measure is only possible if it does not result in statelessness. In 2015, the High Court revoked Said Mansour's Danish citizenship after having convicted him, thus expelling him with no possibility for return. The Supreme Court has upheld the High Court's 2015 ruling, but whether he will actually be expelled is yet to be determined by the immigration authorities – Mansour has claimed he will be executed in Morocco if transferred there.⁷⁸

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⁷² Danish Government, Preventing and Countering Extremism and Radicalisation - National Action Plan, October 2016.

⁷³ Danish Institute for Human Rights, Consultation response from the Danish Institute for Human Rights, 11 July 2016.

⁷⁴ Danish Public Prosecution Service (Anklagemyndigheden), “Anklagemyndigheden rejser straffesag mod hadprædikant”, 24 July 2018; The Local, “Danish imam charged over call to kill Jews”, 24 July 2018. BBC, “Copenhagen imam accused of calling for killing of Jews”, 11 May 2017.

⁷⁵ Please refer to Section 2 of this report ECtHR, which addresses the ECtHR case. See also *Mesopotamia Broadcast A/S METV and Roj TV A/S v. Germany*, 22 September 2011, C-244-10 and C-245-10.

⁷⁶ *Roj TV A/S v Denmark*, 17 April 2018, appl.no. 24683/14.

⁷⁷ Højesteret, Sag 399/2008, 25 March 2009 and The Guardian, “Danish T-shirt sellers convicted of financing terrorism”, 25 March 2009.

⁷⁸ Supreme Court 8 June 2016, Case No. 211/2015. See The Local, “Supreme Court strips terrorist of Danish citizenship”, 8 June 2016.

In 2017, the Danish government published its first national exclusion list involving religious preachers who are denied entry to the country. This was a significant change in policy. In 2006, a number of proposals denying entry to foreigners who behaved or were at risk of behaving in a manner hostile to democratic values were put forward. The Danish government opted not to proceed with such legislation as several measures denying entry to, or expelling, aliens for national security reasons already existed.⁷⁹ Under Section 9f of the Aliens Act, certain special rules for denying residence permits to religious missionaries could also be used against a person who incites terrorist violence. In 2011, the Canadian radical Muslim preacher Bilal Philips was invited to give a public talk in Copenhagen at a conference organised by the Muslim Youth of Denmark. There was a lengthy public discussion whether he should be allowed into the country – he had already been denied entry into the United Kingdom and Australia. He was ultimately allowed entry into Denmark.⁸⁰

Aside from introducing the exclusions list, 2016 amendments to the Aliens Act also included the criminalisation of explicit condoning of criminal actions in connection with religious education. As a result, in its operation, the exclusions list aims to prevent the entry of hate preachers who “want to undermine Danish law and values and support parallel legal systems.”⁸¹ A person can be placed on the list for two years, with possible extensions of further two years, if he or she is a religious preacher or someone who in another way works to expand a religion or faith combined with public order concerns, which require that the alien not be permitted to stay in Denmark.⁸² The government is not obliged to let the person know the basis of the information on which he or she has been placed on the list (Section 29(c)(2) Aliens Act). Those who violate the ban can be sentenced to a fine or a prison sentence of three years. By November 2018, there were 18 preachers on the list.⁸³ It does not apply to EU citizens and to those who already have a residence permit. The law has been criticised for its far-reaching limitations of the rights of religious communities, which go further than the rules for non-religious groups and persons.⁸⁴

Also in 2016, a legislative agenda – political agreement to initiate several bills - to strengthen efforts against religious preachers and publishers “seeking to undermine Danish laws and values and to support parallel conceptions of law.”⁸⁵ The package also included Bills (now laws) to take measures against associations that undermine democracy or fundamental freedoms⁸⁶ and to provide for a mandatory course in Danish family law, freedom and democracy for religious preachers and for those applying for a residence permit to sign a declaration of

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⁷⁹ Jacob Mchangama, “Hadprædikanter, Indrejseforbud og Ytringsfrihed”, *Justitia*, 30 March 2016, par. 3-4.

⁸⁰ Lasse Lindekilde, “The mainstreaming of far-right discourse in Denmark”, *Journal of immigrant & refugee studies* 2014, 12:363-382.

⁸¹ L 48 Forslag til lov om ændring af udlændingeloven.

(Indførelse af en offentlig sanktionsliste over udenlandske religiøse forkyndere m.fl., som kan udelukkes fra at indrejse).

⁸² S. 29c Aliens Act (Udlændingeloven), Translation Law Library of Congress, ‘Denmark: List of Religious Extremists Banned from Denmark Published’, 21 June 2017.

⁸³ https://www.nyidanmark.dk/en-GB/News-Front-Page/2018/11/National_sanktionsliste_udvidet

⁸⁴ Copenhagen Post, “Denmark criticised for limiting religious freedom”, 20 December 2016.

⁸⁵ Aftale mellem regeringen og Socialdemokraterne, Dansk Folkeparti og Det Konservative Folkeparti om initiativer rettet mod religiøse forkyndere, som søger at undergrave danske love og værdier og understøtte parallelle retsopfattelser, 31 May 2016.

⁸⁶ Lov om ændring af folkeoplysningsloven og ligningsloven (Indsats mod foreninger, som modarbejder eller underminerer demokrati eller grundlæggende friheds- og menneskerettigheder).

compliance with Danish legislation.⁸⁷ The measures have encountered heavy criticism for casting suspicions on religious communities.⁸⁸

3. Extreme Speech Online

In its National Action Plan on Extremism And Radicalisation, the Danish government proposes a multi-pronged effort to counter extremist propaganda and prevent radicalisation via the internet and social media, including more rigorous prosecution of the dissemination of extremist materials.⁸⁹ The Plan also advocates the establishment of a special unit within the Security and Intelligence Services to identify violent extremist online materials and consequently take them down. Finally, the Plan suggests implementing an internet-blocking filter to limit access to foreign webpages that contain terrorist propaganda.

In 2017, in the context of the government's action plan on extremism and radicalisation, a new Bill addressing the blocking of websites was proposed.⁹⁰ This Bill has now passed.⁹¹ Such blocking can take place by the police after a prior court order, if there is reason to assume that a violation of Sections 114 – 114i, 119 or 119a Criminal Code has taken place on a website. It is aimed at tackling websites containing terrorist propaganda, although it does not include violations of Section 136 of the Criminal Code (public incitement). Sections 114 – 114i, 119 or 119a refer to other kinds of terrorist offences such as support for terrorist groups and threats. The Bill has been criticised due to this broad wording (the vague test of “reason to assume”), but also because the proceedings before the court only involve the police and no opposing party – the website owner will only be informed afterwards.⁹²

C. France

This section focuses on the core measures available and used in France to address extremist speech. They include criminal provisions on **incitement to terrorism (direct provocation, public apology, dissemination)**, **criminal provisions on incitement to hatred** more generally, individual administrative control measures, and measures addressing online incitement.

1. Criminal Law Provisions

France has a broad and relatively old arsenal of criminal measures addressing extremist speech, either specifically targeting incitement to terrorism, or more generally addressing incitement to hatred. The main criminal measure addressing extremist speech is the prohibition of the **direct provocation to terrorism or public apology of terrorism**. The

⁸⁷ Lov om ændring af udlændingeloven (Obligatorisk kursus i dansk familieret, frihed og folkestyre for religiøse forkyndere m.fl. og løfteerklæring om overholdelse af dansk lovgivning).

⁸⁸ Danish Institute for Human Rights, Status Report Human rights in Denmark 2016 – 2017, p. 55; Copenhagen Post, 'Denmark criticised for limiting religious freedom', 20 December 2016.

⁸⁹ Ibid.

⁹⁰ See section 791d Retsplejeloven (Administration of Justice Act). Proposal: Fremsat den 26. april 2017 af justitsministeren, Forslag til Lov om ændring af retsplejeloven og forskellige andre love (Blokering af hjemmesider og stop af offentlige ydelser til fremmedkrigere). European Digital Rights, 'New Danish law can lead to substantial internet censorship', 25 January 2017.

⁹¹ Section 791d Retsplejeloven.

⁹² European Digital Rights, 'New Danish law can lead to substantial internet censorship', 25 January 2017. However, if the proactive measures required in the European Commission's Proposal for a regulation on preventing the dissemination of terrorist content online (COM (2018) 640 final) would be passed and translated into Danish law, this criticism would become largely irrelevant as these measures go much further.

offences of provocation to terrorism (*provocation au terrorisme*) and of apology of terrorism (*apologie du terrorisme*) were introduced in France in 1986, in one of the first major French anti-terrorist legislation.⁹³ Until 2014, the relevant provisions were found in the Law on the Freedom of the Press,⁹⁴ which generally addressed incitement to serious crime. Under its Article 24, the provocation to, or apology of, terrorism was punishable by five years in prison and €45,000 fine. The Law of 2014 on the Fight Against Terrorism⁹⁵ moved the provisions to the Penal Code's Chapter on terrorism, which are now found in Article 421-2-5 Penal Code.⁹⁶

Article 421-2-5 Penal Code provides that the **direct provocation to commit terrorist acts**, or the **public apology of terrorist acts**, is punishable by five years' imprisonment and a fine of €75,000. While the offence of provocation to terrorism is comparable to the criminalisation of incitement to terrorism in many other countries in line with UNSC Resolution 1624, the criminalisation of 'apology of terrorism' in France goes further. Provocation to terrorism concerns incitement to commit terrorist acts in the future; apology of terrorism addresses the fact of justifying, glorifying, or otherwise expressing positive views of terrorist acts that have been committed, or of their authors. Apology of terrorism is thus a broad offence capturing the expression of views favourable to terrorism. Asked to review the constitutionality of the measure, the Constitutional Council found that the offence of apology of terrorism constituted a legitimate, necessary and proportionate restriction to freedom of expression.⁹⁷ The rationale for criminalisation is that apology of terrorism contributes to the wide diffusion of dangerous ideas, which creates by itself a disturbance to the public order.⁹⁸ The criminalisation of apology is thus seen as conducing to the prevention of conditions conducive to terrorism.

Provocation to, or apology of, terrorism can be realized through a variety of means including speeches in public places or meetings, writings, prints, illustrations, images, or statements sold, distributed, or displayed in public places or meetings, posters exposed to the public, or any means of electronic communication to the public.⁹⁹ According to established case law, the requirement of publicity is further satisfied when incitement occurs in circumstances reflecting the willingness of the author to make it public.¹⁰⁰

Since the Law of 2014 on the Fight Against Terrorism, the use of online public communication services to incite to terrorism is an aggravating circumstance within other listed offences, with the penalties increased to seven years' imprisonment and a fine of €100,000.¹⁰¹ According to the Constitutional Council, this is justified by the particular magnitude of the broadcasting of prohibited messages that this mode of communication allows, as well as its influence in the process of indoctrination of individuals.¹⁰² In the context of this Report, it can be noted that,

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⁹³ Law of 9 September 1986 on Combating Terrorism and Attacks on State Security (*Loi du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l'Etat*), Article 8.

⁹⁴ Law of 29 July 1881 on the Freedom of the Press (*Loi du 29 juillet 1881 sur la liberté de la presse*), Article 24. For further commentary see Francesca Galli, *The Law on Terrorism: The UK, France, and Italy Compared* (Bruylant, Brussels, 2015); Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge University Press, 2013); Vasiliki Chalkiadaki, "The French 'war on terrorism' in the post-Charlie Hebdo era" (2015) 1 *Eu crim* 26.

⁹⁵ Law of 13 November 2014 Strengthening the Provisions Relating to the Fight Against Terrorism (*Loi du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme*).

⁹⁶ See Annex 4.

⁹⁷ Decision No. 2018-706 of 18 May 2018 (*Décision n° 2018-706 QPC du 18 mai 2018*).

⁹⁸ Decision No. 2018-706 of 18 May 2018 (*Décision n° 2018-706 QPC du 18 mai 2018*), para. 21.

⁹⁹ Law of 29 July 1881 on the Freedom of the Press (*Loi du 29 juillet 1881 sur la liberté de la presse*), Article 23.

¹⁰⁰ Court of Cassation, Criminal Chamber, Decision of 8 April 2014, No. 12-87,497 (*Cour de cassation, Chambre criminelle, décision du 8 avril 2014, no. 12-87.497*); Decision No. 2018-706 of 18 May 2018 (*Décision n° 2018-706 QPC du 18 mai 2018*), para. 9.

¹⁰¹ Art 421-2-5(2) Penal Code, see Annex 4.

¹⁰² Decision No. 2018-706 of 18 May 2018 (*Décision n° 2018-706 QPC du 18 mai 2018*), para. 12.

in order to specifically address the threat of extremist discourse by religious preachers, a Senate Inquiry Committee recently suggested the creation of a new aggravating circumstance when provocation or apology occurs in the context of the exercise of a religious cult.¹⁰³

In practice, the offence of apology of terrorism currently stands out as one of the most used measures in France, with convictions for apology of terrorism accounting for a significant majority of recent terrorism-related convictions. In the past years, the number of convictions for apology of terrorism has surged from an average of five per year in the period 2012–2014, to about 300 convictions per year in 2015–2016. In the same period, the number of convictions for other terrorist offences remained relatively stable at an average of seventy per year.¹⁰⁴ The rise in the number of convictions for apology of terrorism is linked to the terrorist attacks of January and November 2015, in the aftermath of which a Circular of the Minister for Justice called for courts to be particularly reactive and strict in prosecuting individuals expressing positive views of the attacks or their authors.¹⁰⁵ Many cases have involved messages posted on social media often by relatively young individuals. For instance, an eighteen-year-old was sentenced to three months of prison after posting on his Facebook page “there will be others [...] death to France)” together with a photo of terrorists.¹⁰⁶ A nineteen-year-old was sentenced to twelve months of prison with probation and two hundred and ten hours of community service for posting a message congratulating terrorists on social media.¹⁰⁷

The broad offence of **apology of terrorism** in France has been subject to criticisms for excessively restricting freedom of expression. In her preliminary findings following a country visit in May 2018, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, concluded that “the extent to which this crime [of apology for terrorism] captures a broad and indiscriminate range of expression and actors evidences an undue restriction on the freedom of expression as protected by international human rights law in France.”¹⁰⁸

Association in relation with a terrorist enterprise. The broad notion of association in relation with a terrorist enterprise (*association de malfaiteurs à but terroriste*) is a cornerstone of French anti-terrorist legislation. The offence is constituted through the participation in a group aimed at the preparation of acts of terrorism and has been used to address a wide range of circumstances. The provision allows the prosecution of behaviours that do not fall under a specific terrorist offence, and to impose sentences of up to ten years’ imprisonment and a fine of €225.000. The provision is found in Article 421-2-1 Penal Code.¹⁰⁹

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¹⁰³ Report on behalf of the Senate Committee of Inquiry into the organization and means of the state services to deal with the evolution of the terrorist threat after the fall of the Islamic State, 4 July 2018 (*Rapport fait au nom de la commission d’enquête du Sénat sur l’organisation et les moyens des services de l’État pour faire face à l’évolution de la menace terroriste après la chute de l’État islamique, 4 juillet 2018*), p. 149.

¹⁰⁴ Ibid., pp. 146 and 153. See Annex 4.

¹⁰⁵ Circular of 12 January 2015 on offenses committed following the terrorist attacks of January 2015 (*Circulaire du 12 janvier 2015 relative aux infractions commises suite aux attentats terroristes de janvier 2015*).

¹⁰⁶ Le Parisien “Apologie d’actes terroristes: 3 mois ferme pour un jeune majeur”, 15 January 2015.

¹⁰⁷ La Provence, « Un lycéen condamné pour apologie des attentats », 10 January 2015.

¹⁰⁸ Preliminary findings of the visit: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to France, 23 May 2018.

¹⁰⁹ Ibid.

Offers or pressure to engage in terrorist activities. This provision, introduced in 2012 to address recruitment, is also relevant with regards to extremist speech and incitement, in particular by religious leaders. Under Article 421-2-4 Penal Code,¹¹⁰ addressing offers or promises, offering gifts or advantages, or threatening or exerting pressure on someone else to participate in a terrorist group or to commit a terrorist offence are punishable by up to ten years' imprisonment and a fine of €150.000.

Incitement to (racial or religious) hatred. As an alternative to terrorist-specific legislation, extremist speech can be addressed with criminal provisions on incitement to hatred more generally. Pursuant to Article 24 of the Law on the Freedom of the Press, **incitement to hatred, discrimination, or violence** in relation to the origins or religion of a person or a group is punishable by up to one year of imprisonment and a fine of €45.000.¹¹¹ Furthermore, **non-public incitement to hatred** is punishable by a fine of €1.500 under Article R625-7 Penal Code.¹¹² In practice, radical speech in the counter-terrorism context seems to be more often tackled through incitement to terrorism and other terrorist-specific legislation. Recently, a Muslim cleric residing in the south of France was investigated for incitement to hatred after delivering an anti-Semitic sermon.¹¹³

2. Administrative Measures

In support of the broad criminalisation of extremist speech in France, a number of administrative measures can be used to impose specific restrictions on certain individuals. From 2015 to 2017, the state of emergency declared in France allowed for the imposition of a number of individual administrative control measures on the condition that there were serious reasons to believe that an individual constituted a threat to security and public order. Measures included assigned residence, reporting obligations, prohibitions to go to certain areas, prohibitions of meetings, and temporary closure of public venues or places of worship.¹¹⁴

The Law of 30 October 2017 Strengthening Internal Security and the Fight Against Terrorism¹¹⁵ integrated a number of these measures into ordinary legislation. In particular, it introduced the possibility to impose **individual measures of administrative control and surveillance** (*mesures individuelles de contrôle administratif et de surveillance*, 'MICAS') where there are serious reasons to believe that an individual constitutes a serious threat to public safety and order. This specifically includes individuals who support and diffuse ideologies making the apology of terrorism.¹¹⁶ Applicable measures include the prohibition to leave a certain city or larger area and reporting requirements. They are imposed by decision of the Minister of the Interior for a duration of three months renewable up to twelve months.¹¹⁷

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¹¹⁰ See Annex 4.

¹¹¹ Law of 29 July 1881 on the Freedom of the Press (*Loi du 29 juillet 1881 sur la liberté de la presse*), Article 24.

¹¹² See Annex.

¹¹³ "French imam investigated for incitement over anti-Semitic sermon", 27 September 2018, Times of Israel.

¹¹⁴ Law of 3 April 1955 on the state of emergency, as amended (*Loi du 3 avril 1955 relative à l'état d'urgence, version consolidée*). See further Amnesty International, *Upturned Lives: The Disproportionate Impact of France's State of Emergency* (EUR 21/3364/2016); Amnesty International, *Punished without trial - the use of administrative control measures in the context of counter-terrorism in France* (EUR 21/9349/2018).

¹¹⁵ *Loi du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*, abbreviated as 'Loi SILT'.

¹¹⁶ Article L228-1 Code of Interior Security (*Code de la sécurité intérieure*). See Annex.

¹¹⁷ Article L228-2 Code of Interior Security (*Code de la sécurité intérieure*). See Annex.

Other available measures include immigration law measures such as expulsion or prohibition of entry. Foreigners who are considered to constitute a threat to public order can be either denied entry¹¹⁸ or be issued an **administrative interdiction to enter the territory**.¹¹⁹ Further, administrative authorities can issue **expulsion orders** towards foreigners who are considered to constitute a serious threat to public order.¹²⁰ In the period 2015–2017, about a hundred expulsions have been ordered in relation to alleged involvement in terrorist activities.¹²¹ In 2018, El Hadi Douadi, a controversial radical Imam based in Marseille, was expelled to Algeria pursuant to this measure.¹²²

3. Extreme Speech Online

Withdrawal or blockage of online inciting materials. Online inciting content, defined as online materials which provoke to terrorism or make its apology (as specified in Article 421-2-5 Penal Code), can be blocked by order of a judge.¹²³ Furthermore, since 2014, administrative authorities can order the **withdrawal or blockage of inciting content**. Authorities can first request hosting services and content providers to remove inciting content, and, if content is not removed, to order that the website be blocked from access in the French territory and de-referenced from search engines.¹²⁴ Requests for removal or blocking are submitted by police services to a governmental agency (*Office central de lutte contre la criminalité liée aux technologies de l'information et de la communication*), which verifies content and issues as necessary removal and blocking orders. The National Commission for Informatics and Liberties (*Commission nationale de l'informatique et des libertés, 'CNIL'*), in charge of controlling the implementation of this measure, noted a very sharp increase of blocked content in practice. In the period of March 2017 to February 2018, there was 235 percent more inciting content removed than in the previous year.¹²⁵

The **dissemination of inciting materials that have been subject to a removal order** constitutes a criminal offence. Article 421-2-5-1 Penal Code provides that knowingly reproducing and disseminating materials that have been subject to a removal order is punishable by up to five years' imprisonment and a fine of €75.000.

Consultation of online inciting materials. France attempted to criminalise the mere consultation of online inciting materials, but the provision was invalidated by the

¹¹⁸ Articles L213-1 to L213-9 Code of Entry and Residence of Foreigners and the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*).

¹¹⁹ Articles L214-1 to L214-7 Code of Entry and Residence of Foreigners and the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*).

¹²⁰ Articles L521-1 to L521-5 Code of Entry and Residence of Foreigners and the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*).

¹²¹ Report on behalf of the Senate Committee of Inquiry into the organization and means of the state services to deal with the evolution of the terrorist threat after the fall of the Islamic State, 4 July 2018 (*Rapport fait au nom de la commission d'enquête du Sénat sur l'organisation et les moyens des services de l'État pour faire face à l'évolution de la menace terroriste après la chute de l'État islamique, 4 juillet 2018*), pp. 113. See Annex 4.

¹²² « Too Radical for France, a Muslim Clergyman Faces Deportation », 5 April 2018, New York Times; « La CEDH autorise l'expulsion d'un imam salafiste vers l'Algérie », 20 April 2018, Le Monde. See further, *MA v France*, App. no. 9373/15, 1 February 2018 and *AS v France*, App. no. 46240/15, 19 April 2018.

¹²³ Article 706-23 Penal Procedure Code. See Annex.

¹²⁴ Article 6-1 Law of 21 June 2004 on confidence in the digital economy.

¹²⁵ National Commission for Informatics and Liberties, Qualified Person Activity Report: March 2017-February 2018 (*Commission nationale de l'informatique et des libertés (CNIL), Rapport d'activité de la personnalité qualifiée: mars 2017–février 2018*); See Annex 4.

Constitutional Council, as it excessively restricted fundamental freedoms. The offence of consultation of inciting materials was first introduced in June 2016. It provided that the habitual consultation of websites which encourage the commission of terrorist acts or defend such acts was punishable by two years' imprisonment and a fine of €30.000.¹²⁶ However, the Constitutional Council held in February 2017 that the measure was an unnecessary and disproportionate restriction to the freedom of thoughts and opinions, and repealed the provision.¹²⁷ The measure was nonetheless reintroduced in a slightly modified version by the Law of 28 February 2017 relating to public safety,¹²⁸ and again invalidated on similar grounds by the Constitutional Council in December 2017.¹²⁹

D. Germany

1. Criminal Law Provisions

Incitement to criminal offences. Section 111 of the Federal Criminal Code prohibits the public incitement to criminal behaviour.¹³⁰ Since the German Federal Constitutional Court (Bundesverfassungsgericht) is highly protective of the freedom of speech,¹³¹ convictions for this offence are rather rare. To be convicted, a person must be directly inciting the commission of certain offenses. The courts have ruled that simply giving information, a statement of political dissatisfaction or engaging in provocation is not sufficient for Section 111; neither is the mere endorsement of criminal offenses. The incitement must have a deliberate and final impact on others such as provoking the decision to commit certain criminal offences.¹³²

In 2006, the High Court of Oldenburg found that the publication of a religious cursing ('Mubahala') would not incite to criminal behaviour.¹³³ In this case, an Islamic preacher was urging for the punishment of a particular individual by Allah. The court decided it could not assume with absolute certainty that the man sought to encourage other individuals to engage in lawless actions because the prayer solely called for Allah to judge over the victim. Considering the publication against the then relevant political and social background, a conviction could not be expected. Overall, due to the high threshold set by Section 111, people engaging in incitement and encouragement for terrorism are prosecuted under other sections (as shown below).

Approval of certain criminal acts committed. Section 140(2) criminalises approval – if made in public such as in a meeting or by disseminating writings – of certain criminal acts that have already been committed, in a manner capable of disturbing the public peace. The approval

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¹²⁶ Law of 3 June 2016 reinforcing the fight against organized crime, terrorism and their financing, Article 18 (*Loi du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement*).

¹²⁷ Constitutional Council Decision no. 2016-611 QPC of 10 February 2017 (*Décision n° 2016-611 QPC du 10 février 2017*), paras 13-14.

¹²⁸ *Loi du 28 février 2017 relative à la sécurité publique*.

¹²⁹ Constitutional Council Decision no. 2017-682 QPC of 15 December 2017 (*Décision n° 2017-682 QPC du 15 décembre 2017*). See further, Bérénice Boutin, "Excesses of Counter-Terrorism and Constitutional Review in France: The Example of the Criminalisation of the Consultation of Websites", *Verfassungsblog*, May 2018.

¹³⁰ S. 91(1)(1) also criminalises incitement to serious violent offences endangering the state. This section has been adopted in 2009 and was mainly meant to target the dissemination or promotion of "terrorist instructions" on the internet, e.g. instructions for the production of explosives.¹³⁰ For instance, in 2016 a man was convicted for sharing a link to the 'Mudschaheddin Explosives-Handbook' on his Twitter Account. See AG München, 27.09.2016 - 1117 Ds 111 Js 206538/14.

¹³¹ See Shawn Marie Boyne, "Free Speech, Terrorism, and European Security: Defining and Defending the Political Community", 30 *Pace L. Rev.* 417 (2010).

¹³² See BGHSt 28, 312 et seq., BGHSt 32, 310 f. 7.

¹³³ <https://openjur.de/u/320108.html>, para 12 f.

must relate to specific acts that have been committed, and not general political support for violent resistance.¹³⁴ A person has been convicted under this section for expressions approving the killing of a journalist and a military pilot by ISIS in an online interview, the Bundesgerichtshof found that such expressions could also promote the general readiness to commit such offenses in Germany.¹³⁵

Symbols and uniforms. The picturing of symbols of prohibited organisations is banned under Section 9 Federal Law on Associations (*Vereinsgesetz*).¹³⁶ The Law concerning Processions and Assemblies (*Versammlungsgesetz*)¹³⁷ prohibits the wearing of uniforms 'as an expression of a joint political attitude'. This legislation is relevant in relation to a case currently ongoing within the German courts. In 2015, a group of persons including Sven Lau¹³⁸ patrolled the streets of Wuppertal under the guise of the 'Sharia Police'. The group, founded by Sven Lau, wore vests with the words 'Sharia police' and told people not to engage in drinking, gambling and music.¹³⁹ The case is still ongoing as the various instance courts have reached differing interpretations on the criminality of this behaviour. On the one hand, the depiction of religious, as opposed to political, views is not prohibited and the law has to be interpreted in light of freedom of expression and association. The law should thus only prohibit uniforms which go beyond the mere depiction of a shared political view by showing a militant, intimidating (quasi-military) attitude.¹⁴⁰ On the other hand, the courts have held that the particular use of the wording 'sharia police' was similar to brutal religious police forces in Islamic countries and thus meant to intimidate people.¹⁴¹

Participation in a terrorist organisation. Section 129a of the Criminal Code prohibits the founding of, membership of, supporting or recruitment for (amongst other things) a terrorist organisation. It was tightened in 2002 to make clear that only recruitment for specific members or supporters, for a specific organisation, would be a criminal offence – and not generally raising sympathy ('Sympathiewerbung').¹⁴² Such a tighter delineation would provide more guarantees for freedom of expression. The Supreme Court has held that since the change in the law, it is no longer sufficient to advocate for a terrorist organisation, to justify its goals or the crimes committed by it and to glorify their ideology. Neither is a general call to participate in unspecified terrorist activities or a call to join 'the jihad' in itself sufficient, as this term stands for a variety of Islamist activities.¹⁴³ According to the Supreme Court this could

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¹³⁴ Supreme Court BGHSt 22, 282.

¹³⁵ BGH 3 StR 435/16 - Beschluss vom 20. Dezember 2016 (KG). The Bundesgerichtshof had to delve into the question of whether approval of foreign acts could also be a criminal offence under this article; it ruled that these expressions about foreign acts could also promote the general readiness to commit such offenses in Germany.

¹³⁶ Available at <https://www.gesetze-im-internet.de/vereinsg/BJNR005930964.html>.

¹³⁷ Art. 3 jo. 28. German version available at <https://www.gesetze-im-internet.de/versammlg/BJNR006840953.html>.

¹³⁸ He was also convicted to five and a half years' imprisonment for funding Islamist militants and recruiting jihadists. He was found guilty of supporting the U.S.-designated terrorist group Jaish al-Muhajireen wal-Ansar (JAMWA). See counterextremism.com.

¹³⁹ <http://www.spiegel.de/politik/deutschland/sharia-polizei-in-wuppertal-salafist-sven-lau-und-seine-neue-taktik-a-990191.html>.

¹⁴⁰ The District Court first argued as such when looked at whether the charges could be allowed: District Court Wuppertal, Decision, 02.12.2015, 22 KLS-50 Js 180/14-27/15. Later, the District Court Wuppertal had to look at the case in full and acquitted the defendant: Judgement, 22 KLS, ECLI:DE:LGW:2016:1121.22KLS8211.50JS180.00, paras 116 – 144.

¹⁴¹ Higher Regional Court Düsseldorf, Decision, 25.04.2016, III-3 Ws 52-60/16, para II. 1. See also the judgments of Higher Regional Court Düsseldorf, Judgement, 26.7.2017, III-5 StS 1/16, not published and of the Federal Supreme Court: Judgement, 11.1.2018, BGH 3 StR 427/17.

¹⁴² https://dipbt.bundestag.de/doc/btd/14/088/14_08893.pdf

¹⁴³ <https://www.hrr-strafrecht.de/hrr/2/07/ak-6-07.php>, par. 26. See also <https://www.hrr-strafrecht.de/hrr/3/12/3-218-12.php>

be different in case of a call for Jihad by a prominent representative of the association.¹⁴⁴ In another case, the Supreme Court has judged that a statement must not be given a meaning that it does not objectively possess – in case it is ambiguous, one must also look at other possible interpretations and make clear why these do not apply.¹⁴⁵

2. Immigration Law Provisions

The terrorist attack at the Christmas market in Berlin on 19 December 2016 marked a shift in the acceptance of stricter migration controls on persons considered to be extremists.¹⁴⁶ Under Section 7(1) sub 1 Passport Act (Paßgesetz),¹⁴⁷ an individual may be denied a passport or subjected to a passport revocation if he or she constitutes a threat to the internal or external security or other significant interests of Germany. This can also be done if a person's expected political statements of the passport applicant abroad would adversely affect Germany's reputation.¹⁴⁸ Citizens with dual nationality could be stripped of their German citizenship if they join the armed forces or comparable armed organizations of a foreign state.¹⁴⁹ Such citizenship stripping cannot however be done simply on the basis of extreme speech. For non-EU citizens, under the Federal Residence Act¹⁵⁰, expulsion can take place "if their residence is endangering the public safety and order, the free and democratic basic order or other significant concerns" and if "weighing the interests in the foreigner's departure against the foreigner's individual interests in remaining in the federal territory, which is to be conducted taking account of all the circumstances of the particular case, there is an overriding public interest in the foreigner leaving."¹⁵¹

An expulsion has been accepted, for instance, for sharing IS videos, photos and other advertising content on social media.¹⁵² The support, approval and/or recruiting for a *general ideology* used by a terrorist group is not sufficient for expulsion.¹⁵³ A person has however been expelled for writing and publishing online articles calling the victims of the terror attacks of 9/11 and the 7/7 London bombings "so-called victims" and describing their deaths as a "punishment ordered and led by Allah." This statement was deemed to be "approving of terrorism acts." The description of the events of 9/11 as a "justified response to the aggression towards the Islamic world" was found to be "calling for similar acts" or incitement.¹⁵⁴

Another person has been expelled for using the photo of a known member of ISIS as his own profile picture in an instant-messaging service while chatting with a third individual. The use of this profile photo has been interpreted as supporting a terrorist organization.¹⁵⁵ Furthermore, an individual has been expelled for supporting Hamas and importing and selling CDs containing songs praising the Intifadas. His job was to sell CDs; therefore he had different

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¹⁴⁴ <https://www.hrr-strafrecht.de/hrr/2/07/ak-6-07.php,par.26>.

¹⁴⁵ <https://www.hrr-strafrecht.de/hrr/3/14/3-197-14.php>

¹⁴⁶ Egmont Institute paper (Heinke, Raudszus)

¹⁴⁷ An English version is available at <https://germanlawarchive.iuscomp.org/?p=271>.

¹⁴⁸ Highest Administrative Court Baden-Württemberg, Decision, 18.05.1994, 1 S 667/94, para 4.

¹⁴⁹ S. 16(1) of the German Federal Basic Law; s. 17(1) no. 5, s. 28 German Federal Nationality Act (Staatsangehörigkeitgesetz).

¹⁵⁰ See David Anderson and Clive Walker, "Deportation with Assurances" (Command Paper 9462, 2017).

¹⁵¹ S. 53 German Federal Residence Act (Aufenthaltsgesetz).

¹⁵² Administrative Court of Hamburg, Judgement, 20 December 2017, 2 K 2745/16.

¹⁵³ Highest Administrative Court of Bavaria, Judgement, 22.02.2010, 19 B 09.929, para 49.

¹⁵⁴ Administrative Court Berlin, Judgement, 22.04.2008, 35 A 397.07, para 83 ff.

¹⁵⁵ Administrative Court Munich, Judgement, 24.05.2017, M 25 K 16.5916.

CDs for sale. The court came to the conclusion that he had the duty to check the content of the CDs.¹⁵⁶ Additionally, he himself endorsed Hamas and hatred against Jews. In yet another decision, an individual has been expelled for sharing audio- and video-content of Al-Qaida online and founding a website that was used to publish declarations of radical-Islamic propaganda and videos of executions.¹⁵⁷

Under Section 58a of the Federal Residence Act (Abschiebungsanordnung), an individual can be expelled immediately even if there was no prior decision for expulsion (Ausweisung) under Section 53 of the Act; normally, such a decision is necessary.¹⁵⁸ In a recent key decision on *immediate* expulsion under Section 58(a), the German Federal Administrative Court (Bundesverwaltungsgericht) found that an expulsion as a preventive measure can be ordered before, and even in absence of, a conviction or even in respect of an attempt to commit a criminal offence.¹⁵⁹ In this case the public glorification of suicide attackers of ISIS justified an expulsion because “concrete and actual facts indicated a considerable risk of a terrorist danger and/or a comparable danger for the inner security of [Germany] by the alien could realize at any moment if no intervention takes place.”¹⁶⁰ However, as a deportation order under section 58a 'requires a fact-based threat situation in which the risk of a security-threatening or terrorist act emanating from the alien could realize at any time and convert into a concrete danger'¹⁶¹, mere speech will generally not be sufficient to expel aliens under this section (as opposed to s. 53).

3. Demonstrations and/or Public Meetings

The mere passive participation in legal demonstrations in which illegal (PKK) slogans are shouted cannot as such lead to expulsion for supporting terrorism.¹⁶² There has also been a case where an assembly was prohibited on the basis that the speakers represented an aggressive, extremist religious ideology that violated the free democratic basic order. According to the Oberverwaltungsgericht, that the speakers would represent such an ideology cannot, as such, justify a ban. Prohibiting an assembly on the basis of the expected content of the statements is only admissible if the utterances would exceed the right to freedom of expression because they violate the criminal law.¹⁶³

4. Extreme Speech Online

In 2015, a special task force handling unlawful hate speech on the internet with voluntary commitments from social media platforms was established.¹⁶⁴ However, an evaluation concluded that the voluntary commitments did not lead to a sufficient improvement, and

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¹⁵⁶Administrative Court Munich, Judgement, 09.09.2008, M 4 K 08.2158.

¹⁵⁷ Highest Administrative Court of Rheinland-Pfalz, Judgement, ECLI:DE:OVGRLP:2018:0405.7A11529.17.00.

¹⁵⁸ For the difference between 'Ausweisung' as a decision that a foreigner is no longer entitled to be present on the territory of the German Federal Republic and 'Abschiebung' as the forceful expulsion of an individual not entitled to be present on the territory of Germany, see Marcel Keienborg, Generalprävention kann Aufenthaltserlaubnis entgegenstehen [General Prevention can Conflict a Residence Permit], 13 July 2018.

¹⁵⁹ German Federal Administrative Court, Decision, 31 May 2017, ECLI:DE:BVerwG:2017:310517B1VR4.17.0, para 17.

¹⁶⁰ Ibid. 17 ff.

¹⁶¹ <https://www.bverwg.de/220817U1A3.17.0>.

¹⁶² <https://openjur.de/u/358064.html>.

¹⁶³ <https://www.oberverwaltungsgericht.bremen.de/sixcms/detail.php?qsid=bremen72.c.11130.de&asl=bremen72.c.11265.de>

¹⁶⁴ See, generally and for the information in the following, the website of the initiative German Federal Ministry for Justice and Consumer Protection, Die Initiative gegen Hasskriminalität im Netz.

therefore the voluntary commitments were translated into the binding Network Enforcement Act (Netzwerkdurchsetzungsgesetz).¹⁶⁵ This law applies to social networks with more than 2 million registered users in Germany. They are obliged to delete content that is unlawful under particular sections of the German Criminal Code, including dissemination of propaganda material of unconstitutional organisations, using symbols of unconstitutional organisations, encouraging the commission of a serious violent offence endangering the state, public incitement to crime, incitement to hatred, dissemination of depictions of violence and rewarding and approving of offences.¹⁶⁶ Content that is manifestly unlawful should be deleted within 24 hours if the illegality can be detected within 24 hours without an in-depth examination.¹⁶⁷ Otherwise, unlawful content is to be deleted within 7 days. There are also reporting obligations and there is a complaints procedure. If these obligations are not met, fines of up to € 5 million (for representatives responsible for dealing with these tasks in Germany) and even up to € 50 million (for the companies themselves) can be given. These fines will not be given for single wrongful non-deletions, but for systematic shortcomings in the complaints procedure.¹⁶⁸ The law has been criticised for the danger of over-blocking and therefore the danger of unlawful restriction of the freedom of speech.¹⁶⁹

E. The United Kingdom

The current UK approach towards prevention of terrorism broadly rests on the following three distinct pillars: countering terrorism,¹⁷⁰ countering extremism¹⁷¹ and promoting integration.¹⁷² The counter-extremism and counter-terrorism strategies (and legislation), at present, are intrinsically linked. As such, all the relevant provisions targeting extreme and radical speakers pre- and post-conviction are to be found in or are linked to counter-terrorism legislation. What the pertinent Acts have not provided for, however, is a legal definition of ‘extremism’. A legally non-binding definition of ‘extremism’ can be found in the government’s current Counter-Extremism Strategy – “extremism is the vocal or active opposition to our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs.”

Currently, criminalisation and prosecution of offensive behaviour rather than imposition of administrative measures¹⁷³ is the preferred approach of the UK government. Unlike other

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¹⁶⁵ See further Karl-Nikolaus Peifer, Network Enforcement Act: self-assertion of the law or first step into self-regulated pre-censorship? - Civil aspects (2018) 49 *Zeitschrift für das gesamte Medienrecht* 14-22 and Martin Eifert, Das Netzwerkdurchsetzungsgesetz und Plattformregulierung in Martin Eifert and Tobias Gostomzyk (eds.), *Netzwerkrecht* (Nomos, 2018).

¹⁶⁶ For an explanation (of the use) of these (and other) criminal provisions for the subject matter, see section 1.

¹⁶⁷ German Federal Parliament, Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG) 16 May 2017, Document No. 18/12356, p 22.

¹⁶⁸ German Federal Parliament, Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG) 16 May 2017, Document No. 18/12356, pp 24 f. See Fabian Reinbold, So will Maas Facebook & Co büßen lassen [This is how Maas wants to punish Facebook & Co.], *Spiegel Online*, 5 April 2017.

¹⁶⁹ Isabell Hülsen/Peter Müller, EU-Justizkommissarin zweifelt am Maas-Gesetz, *Spiegel Online*, 19 January 2018. Even the Amadeu Antonio Stiftung, which is fighting online hate speech in its daily agenda, has signed the declaration. Global Network Initiative, Proposed German Legislation Threatens Free Expression around the Globe, 20 April 2018. It is to be awaited what the recent EU plans on proactive action against online terrorist content will bring for Germany.

¹⁷⁰ CONTEST Strategy 2018 (Command Paper 9608).

¹⁷¹ See further Counter Extremism Strategy 2015 (Cm.9148). The most current policy is set around the non-statutory Commission for Countering Extremism.

¹⁷² Integrated Communities Strategy Consultation 2018.

¹⁷³ For example, the number of Terrorism Prevention and Investigation Measures (TPIMs) and financial sanctions listings imposed both pre and post-crime are enforced in very limited number of cases in comparison to use of criminal measures.

countries however, UK's pertinent legislative provisions addressing extreme speech are to be found in counter-terrorism legislation. It should be stressed from the outset that unlike its other continental counterparts, the UK is a common law system, which accounts for some substantial differences in the role of the courts. Court jurisprudence can have a significant and long-term impact on the overall legislative framework within the UK; it can set a precedent to be followed for years or lead to considerable changes in existing legislation. This is the rationale behind the more detailed focus on certain UK case law.

1. Counter-Terrorism Legislation targeting Extreme Speakers

Inviting support for a *proscribed* organisation. Section 12 of the Terrorism Act 2000 (TA 2000) is an apt but limited starting point in understanding how comprehensive the UK legislative regime addressing incitement, encouragement and invitation for terrorism is. Under Section 12 (1) of the TA 2000, a person commits an offence if he invites support for a *proscribed* organisation.¹⁷⁴ Under Section 12 (2),¹⁷⁵ a person commits an offence if he arranges, manages or assists in arranging or managing a meeting, which he knows, is to support a proscribed organisation or to be addressed by a person who belongs or professes to belong to a proscribed organisation. So far there have been a limited number of prosecutions under this Section. The reform proposed by Clause 1 of the Counter Terrorism and Border Security Bill 2017 – 2019 aims to make the Section 12 offences more effective.¹⁷⁶

Encouraging support for a *proscribed* organisation. Under Section 12 (3), a person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities. In this context, a meeting means a meeting of three or more persons, whether or not the public are admitted; a meeting is private if the public are not admitted (Section 12 (5)). A person guilty of an offence under this Section shall be liable on *conviction on indictment*¹⁷⁷ to imprisonment for a term not exceeding ten years, to a fine or both; *on summary conviction*,¹⁷⁸ a person shall be liable to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both (Section 12 (6)).

Extraterritorial incitement. Under Sections 59 and 60 of the TA 2000,¹⁷⁹ an individual commits an offence if he incites another person to commit acts of terrorism wholly or partially outside the UK and the act if committed within the UK would constitute an offence such as murder, wounding with intent, endangering life by damaging property and others. It is immaterial whether or not the person incited is within the UK at the time of the incitement (Sections 59 (4) and 60 (4)), i.e. the offence has extraterritorial scope. A person guilty of incitement shall be liable to any penalty to which he would be liable on conviction of the relevant offence which corresponds with the act he incites (murder, wounding with intent, endangering life by damaging property, etc). Section 59 reflects the requirements in the 2017 EU Directive on Combating Terrorism and the 2005 Council of Europe Convention on the Prevention of

¹⁷⁴ See Annex for an explanation on the UK *proscription* regime.

¹⁷⁵ *Ibid.*

¹⁷⁶ See Annex for further details of the proposals.

¹⁷⁷ An indictable offence is an offence which can *only* be tried in the Crown Court; an individual is 'tried on indictment' before a judge and a jury in the Crown Court (but can be tried without a jury under the Justice and Security (Northern Ireland) Act 2007).

¹⁷⁸ This refers to a criminal offence, which is triable (*summarily* – without a jury) in the Magistrates' Court.

¹⁷⁹ Part IV Miscellaneous (Terrorist Offences) of the Terrorism Act 2000.

Terrorism to criminalise ‘public provocation to commit a terrorist offence’, and for participant states to take extra-territorial jurisdiction over their nationals who commit this offence outside of their territory. In 2018 Max Hill Q.C., the then Independent Reviewer of Terrorism Legislation, suggested that the UK government should carefully consider whether there is an ongoing need for the offence under Section 59.¹⁸⁰ This advice has since been rejected by the current UK government.¹⁸¹ The government put forward two core arguments: a) the police and the Crown Prosecution Service need flexibility to bring the most appropriate charges based on the circumstances of each case and b) that the UK’s compliance with certain international agreements on tackling terrorism is in part dependent on these offences being in force.

New offences of encouragement and incitement. Following the 7/7 attacks in London, the UK government adopted the Terrorism Act 2006 in order to address the emergence of ‘neighbourhood terrorism’.¹⁸² The 2006 Act created a number of new offences including the offence of encouragement of terrorism, and an offence relating to disseminators of terrorist publications. Under Section 1 (2) of the 2006 Act, an individual commits an offence if he publishes a statement, which is likely to be understood by some or all of the members of the public to whom it is addressed as a direct or indirect encouragement or other incitement to commit, prepare or instigate acts of terrorism. Further, an individual commits an offence if at the time he publishes or causes a statement to be published, he either *intends to*, or *is reckless*,¹⁸³ as to whether members of the public will be encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism. For the purposes of Section 1, statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism include *every* statement which

- a) glorifies the commission or preparation, whether in the *past*, *in the future* or *generally*, of acts of terrorism
- b) is a statement that the targeted members of the public could *reasonably be expected to infer* that what is being glorified is conduct that they should aspire to emulate.

The question of how a statement is likely to be understood and what members of the public are reasonably expected to infer is to be determined with reference to both the statement’s contents as a whole and the circumstances and manner of its publication. It is irrelevant whether any person is in fact encouraged or induced by such a statement to commit, prepare or instigate an act of terrorism. It is equally irrelevant whether a statement relates to the commission, preparation or instigation of one or more particular acts of terrorism, or acts of terrorism of a particular description, or acts of terrorism in general.

These tests are due to be altered by Clause 5 of the Counter Terrorism and Border Security Bill 2017 – 2019. Subsections (3) and (4) of the Clause amend Section 1 of the 2006 Act to provide

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¹⁸⁰ Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, January 2018.

¹⁸¹ Government Response to the Annual Report on the Operation of the Terrorism Acts in 2016 by the Independent Reviewer of Terrorism Legislation (Cm 9704, 2018) pp.10, 11

¹⁸² See further Clive Walker, “‘Know Thine Enemy as Thyself’: Discerning Friend from Foe under Anti-Terrorism Laws” (2008) 32 *Melbourne University Law Review* 275-301.

¹⁸³ There is a (clear) distinction in UK criminal law between what is “recklessness” in the context of the commission of an offence and “intention.” Additionally, there is a distinction between objective or subjective recklessness as a form of *mens rea* within UK case law and legislation. See further, *R v G* [2003] UKHL 50.

instead for a 'reasonable person' test. An individual will be deemed to have committed the offence of encouragement if a reasonable person would understand the statement as an encouragement or inducement to commit, prepare or instigate an act of terrorism.

Distribution or circulation, which results in encouragement or incitement. Under Section 2 of the 2006 Act, an individual commits an offence if he distributes or circulates a terrorist publication, transmits the contents of such a publication electronically and provides a service to others that enables them to obtain, read, listen to or look at such a publication or to acquire it by means of a gift, sale or loan amongst others.¹⁸⁴ At the time of engaging in the aforementioned activities, an individual must intend that his conduct results in direct or indirect encouragement or other inducement to commit, prepare or instigate acts of terrorism or that his conduct provides assistance in the commission or preparation of such acts. Further, an individual would be committing the offence of dissemination if he is *reckless* as to whether his conduct results in direct or indirect encouragement or other incitement or the provision of assistance. In general, a publication under Section 2(13) refers to an article or record of *any description* that contains either individually or in combination a matter to be read, a matter to be listened to and/or matter to be looked at or watched. A publication is a terrorist publication if the subject matter contained within it is likely to be understood by some or all of the persons to whom it is or may become available as a result of the dissemination as a direct or indirect encouragement or other inducement to commit, prepare or instigate acts of terrorism.

Section 2 is also due to be amended by Clause 5 of the Counter-Terrorism and Border Security Bill 2017 – 2019. Subsections (6) and (7) of the Clause will amend Section 2 of the 2006 Act to provide for a 'reasonable person'. An individual will be deemed to have committed the offence if a reasonable person understands the content of the publication as being an encouragement or inducement to commit, prepare or instigate an act of terrorism.

Online incitement, encouragement or distribution. Section 3 of the 2006 Act was specifically designed to address internet activity. The full application of Sections 1 and 2 extends to such activity.¹⁸⁵ Section 3(1) captures statements published or caused to be published in the course of, or in connection with, the provision or use of a service provided electronically. Section 3(2) applies to dissemination of terrorist publications (Section 2(2) definition of publication applies) when the conduct engaged in was in the course of, or in connection with, the provision or use of a service provided electronically. A statement, article or record falling under Section 3 is deemed to have been endorsed by the relevant person at any time including cases where a) the relevant individual has been given notice by a **constable** that the material is terrorism-related; b) the relevant individual has not complied with the warning period of two days to either amend the material or make it publicly unavailable and c) the relevant individual has failed to comply without reasonable excuse. This measure has never been formally invoked.¹⁸⁶ There is however a specific agency, which deals with internet materials – the Counter Terrorism Internet Referral Unit within the Metropolitan Police. The Unit was set

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¹⁸⁴ See further <https://www.legislation.gov.uk/ukpga/2006/11/contents>.

¹⁸⁵ See further <https://www.legislation.gov.uk/ukpga/2006/11/contents>.

¹⁸⁶ Clive Walker, *The Anti-Terrorism Legislation*, 3rd ed. (OUP, 2014).

up in 2010 and reacts proactively to reports of online materials, which promote or encourage terrorism.¹⁸⁷

As the language and complexity of the core UK provisions addressing incitement, encouragement and invitation for acts of terrorism and dissemination of terrorism related material suggests, the relevant provisions thread a very fine line between protecting freedom of speech and the necessity to pre-empt terrorism related activity including extremism. The task of assessing the proportionality of the application of the relevant provisions in each specific case has been given to the courts.

2. Relevant Case Law

The UK jurisprudence relating to offences deemed to be committed under Section 1 (encouragement or incitement) and 2 (dissemination of information) of the Terrorism Act 2006 under Section 2 of the Terrorism Act 2006 is growing. Overall, the UK courts have found that the provisions of Sections 1 and 2 are compliant with the requirements of the ECHR (Article 10). In the leading case of *R v Faraz*,¹⁸⁸ the defendant was convicted of seven counts of disseminating a ‘terrorist publication’ contrary to Section 2 (1)(a) and (2) of the Terrorism Act 2006. He was also convicted of four counts of possessing information likely to be useful to a person committing or preparing an act of terrorism contrary to Section 58 (1)(b) of the Terrorism Act 2000. He appealed his conviction on a number of grounds including the submission that Section 2 of the Terrorism Act 2006 created an offence in violation of the obligations under Article 10 of the ECHR. On this particular point, the Court of Appeal found that there was no unlawful encroachment on Article 10 of the ECHR i.e. Section 2 of the 2006 Act was a proportionate and legitimate restriction on the right to freedom of expression. The Court of Appeal further noted that Lord Judge CJ had reached a similar conclusion in *R v Brown*¹⁸⁹. In the *Brown* case, the court found that the criminal act of distribution or circulation of a terrorist publication with the specific intent or frame of mind to encourage or assist in acts of terrorism cannot be justified or excused by reference to the right of freedom of expression.

The only major reported case addressing the offence of inviting support for a proscribed organisation was that of *R v Anjem Choudary and Mohammed Rahman*.¹⁹⁰ Anjem Choudary’s notoriety is such that he has been described as “a key influence in the spread of the jihadi movement in the Netherlands” by the AIVD. In delivering his thorough judgment, Mr Justice Holroyde recognised that the two defendants were free to hold and express their views (para.35); however, the right to freedom of expression is not absolute. Rather than engaging in a legitimate expression of their own views, the defendants had instead committed a criminal act of inviting support for an organisation (ISIS) which was at the time involved in “appalling acts of terrorism.” The defendants argued that their communication had not involved direct encouragement of any particular violent action and the evidence did not show any specific link between what they had said and acts of violence committed by individuals

¹⁸⁷ See further <https://www.gov.uk/report-terrorism>.

¹⁸⁸ [2012] EWCA Crim 2820. Also note *Iqbal v R* [2014] EWCA Crim 2650.

¹⁸⁹ [2011] EWCA Crim 2571.

¹⁹⁰ [2016] EWCA Crim 61. The *proscribed* organisation in question was ISIS. There are other cases however they did not establish important precedents: *R v Goldan Lambert* [2009] EWCA Crim 700; *R v Quinn* [2011] NICA 19; *R v McDaid* [2014] NICA 1.

who had listened to statements made. In other words, there was no evidence that anyone was actually inspired by the defendants' words to commit a particular act.

While this was deemed a limiting factor in respect of the sentence imposed, the lack of a direct link did not lessen the seriousness of the offence. The following four core reasons were put forward to explain the reasoning behind the sentences imposed and to emphasise the continuing danger posed by these two individuals. First, both men were regarded as *important* and *influential* in certain sections of the Muslim community within and outside the UK. As such, they were "highly likely to influence those who listened." Second, the defendants aptly utilised their notoriety by addressing large audiences through public lectures. The clear rationale behind broadcasting the lectures in the manner chosen was to reach as many people as possible. Thirdly, in the particular circumstances, it was necessary to consider not only any harm *actually caused* but also the harm, which the defendants' offences under Section 12 TA 2000 *intended to cause or might foreseeably have caused*. Finally, the offences under Section 12 TA 2000 were "*repeated and determined*."

Another significant tenet of the case was the judge's reflections on the sentencing provisions attached to offences committed under Section 12 TA 2000. Under Chapter 5 of the Criminal Justice Act 2003, an extended (or longer) sentence could be applied in circumstances where the court considers that the commission of further specified offences by the offender would pose a significant risk of harm to members of the public. Section 12 TA 2000 was not one of the specified and relevant offences within Chapter 5 of the 2003 Act. Thus, even though both Anjem Choudary and Mohammed Rahman were likely to continue spreading their message and were considered "dangerous", the court had no power to impose an extended sentence. The proposed changes in the 2017 – 2019 Counter-Terrorism and Border Security Bill 2017 – 2019, Clause 9, which is currently being debated, seek to close this gap.

The proposed legislative changes under Clause 1 of the Counter-Terrorism and Border Security Bill 2017 – 2019 are also driven by the findings in this case. Clause 1 provides for a *new offence* which criminalises the expression of an *opinion* or *belief* that is supportive of a proscribed organisation (the *actus reus* or criminal act) in circumstances where the perpetrator is *reckless* as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation (the *mens rea* or mental element). The recklessness test is a subjective one, requiring that the perpetrator be aware of the risk. The new offence, as with the offence under Section 12(1) of the TA 2000, is not subject to a minimum number of people to whom the expression is directed, nor is it limited in applying only to expressions in a public place.

3. General Sentencing Rules and Special Prison Regime for Extreme Speakers

General sentencing regime for terrorism offences and extreme speech. Sentencing for terrorism offences in the UK is currently regulated by the Sentencing Council of England and Wales.¹⁹¹ For now, the offences of encouragement of terrorism (Section 1 TA 2006) and dissemination of terrorist publications (Section 2 TA 2006) can incur a sentence of up to 7

¹⁹¹ For full details, see Sentencing Council for England and Wales, "Terrorism Offences: Definitive Guideline", London, 2018, <https://www.sentencingcouncil.org.uk/publications/item/terrorism-offences-definitive-guideline/>.

years in custody. Clause 7 of the Counter-Terrorism and Border Security Bill 2017 – 2019 will extend the maximum sentence for offences under Sections 1 and 2 of the Terrorism Act 2006 to up to 15 years. In determining the appropriate sentence, the court should weigh the following factors – culpability of the offender with reference as to whether he/she was in a position of authority and trust, the level of harm caused and statutory aggravating factors. Aggravating factors can include vulnerable/impressionable audience, communication with known extremists, significant volume of terrorist publications published or disseminated, use of multiple social media platforms to reach a wider audience and deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection.¹⁹²

Notification scheme/regime for convicted extreme speakers. Part 4 of the Counter-Terrorism Act 2008, introduced a notification scheme for convicted terrorists, aged 16 or over on the date of their being dealt with, being subject to a relevant sentence (broadly, at least 12 months’ imprisonment). Part 4 is applicable to a number of terrorism offences and their associated ancillary offences (Section 41); further, it provides the Secretary of State with an order-making power to amend the list of offences subject to certain conditions. Any offence under sections 11 or 12 of the TA 2000¹⁹³ and Sections 1 and 2 of the 2006 Act¹⁹⁴ are examples of the type of offences captured by this new notification regime. Under the regime, an individual who has committed a relevant offence and received a relevant sentence, has to register with police, on an annual basis, details of their name, addresses National Insurance number and date of birth. Similar to the Sex Offenders’ Register, an individual is required to provide the police with details of any addresses they are resident at for 7 days or any shorter periods, which add up to 7 days. The length of the notification requirement may be for up to 30 years and will depend on the sentence initially received.¹⁹⁵

Special Prison Separation Regime for Extremist and Radical Speakers. The UK government’s counter-terrorism and counter-extremism strategies have recently been reflected in the manner in which certain prisoners are detained post-conviction. The Prison (Amendment) Rules 2017, SI 2017/560, which are connected to certain offences such as inciting terrorism outside the UK under TA 2000 or encouragement of terrorism under the 2006 Act, allow for a special separation regime for extremist or radical prisoners. R.46A provides for separation centres to which an individual will be allocated to in the interest of national security or to prevent the (further) dissemination of views or beliefs that might encourage or induce others to commit any such acts or offence, whether in a prison or otherwise.¹⁹⁶ Under R. 46A.3, a direction to place an individual in a separation centre must be reviewed every three months. These separation centres are situated in three high security prisons each holding up to 12 prisoners; the intention is to hold only the most dangerous and radicalised extremists in these centres.¹⁹⁷

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¹⁹² Ibid.

¹⁹³ Offences relating to proscribed organisations and support for such an organisation.

¹⁹⁴ Offences relating to incitement and encouragement to terrorism.

¹⁹⁵ National Offender Management Service: Managing Terrorist and Extremist Offenders in the Community. In 2017, the new Criminal Justice Act 1988 (Reviews of Sentencing) Amendment Order, added 19 more offences, which can trigger the terrorism notification requirements under Part 4, of the 2008 Act.

¹⁹⁶ See further <http://www.legislation.gov.uk/uk/si/2017/576/article/2/made>.

¹⁹⁷ See further Ian Acheson, *Summary of Main Findings of the Review of Islamist Extremism in Prisons, Probation and Youth Justice* (Ministry of Justice, London, 2016).

4. The PREVENT Programme

CONTEST – the UK’s Strategy for Countering Terrorism – and more specifically its PREVENT component is also of significance in the context of reducing the influence and effectiveness of extreme speakers. A core aim of PREVENT is to safeguard and support individuals vulnerable to radicalisation and extremism from engaging in or lending support to acts of terrorism. Within the PREVENT programme, extremism is defined as “extremists of all kinds [who] use malevolent narratives to justify behaviour that contradicts and undermines the values that are the foundation of our society.” The Counter-Terrorism and Security Act 2015 (Chapter 1) introduced a general ‘Prevent Statutory Duty’, which requires local authorities, schools, colleges, higher education institutions, health bodies, prisons, probation services and the police to consider the need to *safeguard people from being drawn into terrorism*. This duty requires the implementation of clear policies to prevent radicalisation and extremism and/or report individuals who may engage in extreme speech.

The UK government also published a draft ‘Prevent Duty Guidance’ trying to address the specific difficulties arising of the general Prevent statutory duty in the higher and further education sector.¹⁹⁸ The Guidance requests that universities take seriously their responsibility to exclude those promoting extremist views that support or are conducive to terrorism from campus. What universities thus need to engage in active risk assessment, active engagement with partners such as the police, staff training and pastoral care. The Guidance also asked universities to implement policies about the type of speakers and events that should and should not be hosted on campus. Under the Prevent duty, an event should not be allowed to proceed if the only way to fully mitigate the risk of radicalisation or extremism is a cancellation of the event. Academic objections to the Prevent Duty were rejected in *Butt v Secretary of State for the Home Department*.¹⁹⁹ On 22 January 2019 Ben Wallace, the UK Security Minister, announced that the PREVENT programme is to be independently reviewed.²⁰⁰ No further details were provided.

Overall, the UK counter-terrorism and counter-extremism legislation and prevention strategy is very comprehensive – arguably the most extensive within the European Union. The tendency, post 9/11 in particular, has been to err on the side of over-legislation in order to address as many preparatory, inchoate and other terrorism related activities as possible.

Concluding Remarks and Conclusions

Regularly supplementing and adjusting counter-terrorism, immigration and criminal legislative toolkits is a clear trend across all five countries assessed within this report. These frequent legislative changes in addition to the introduction of wide-ranging administrative measures and other strategies have been justified as follows: updating legislation and applying new measures are necessary in order to combat more effectively the fast changing and complex nature of various security threats. This trend however tends to obscure the fact that by now most states have extensive criminal law, immigration and counter-terrorism provisions in place. Many of these provisions have been adopted in the aftermath of acts of terrorism or

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¹⁹⁸ HM Government, Prevent Duty Guidance for England and Wales.

¹⁹⁹ [2017] EWHC 1930 (Admin).

²⁰⁰ The Guardian, “Prevent Strategy on Radicalisation faces Independent Review”, 22 January 2009.

similar national exigency and as such are already quite comprehensive. The examples of France and the UK are quite illustrative of this point. Yet, advocates for any new legislation rarely discuss whether the existing legislation could be used in a more effective and productive manner and instead over-emphasise the necessity for new legal rules and measures.²⁰¹

Conclusion 1 – an alternative to this approach would be a thorough exploration of the wide range of legal powers already available in existing legislation; in particular, an examination of how these powers can be used in conjunction with one another in order to better capture the full range of criminality both at present and in the future.

The vague and all-encompassing language of many domestic provisions targeting incitement, encouragement and glorification of terrorism has been criticised as enabling the criminalization and punishment of expression that should not be subject to restriction.²⁰² Further, these domestic provisions have also been criticised for employing “broad terms that grant authorities significant discretion to restrict expression and provide individuals with limited guidance about the lines dividing lawful from unlawful behaviour.”²⁰³ As explained at the start of this report, freedom of expression is a qualified right – both under the ICCPR and the ECHR regimes. As such, states can restrict the right on the basis of public order and/or security considerations. However, as noted by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, “states often treat national security or public order as a label to legitimate *any* restriction.”²⁰⁴ More significantly, public order reasons are often used by states to justify (very) far-reaching measures to counter (violent) extremism.

Conclusion 2 – as explained by the Special Rapporteur on the right to freedom of opinion and expression, governments should address the problems of extremism and extreme speakers with precise legislative definitions and proportionate measures.²⁰⁵ Therefore, domestic legislation should be reviewed and, where necessary, revised to include clearer and more narrow terminology.

Another trend in recent years has been the adoption of overly broad definitions of other core terms such as terrorism, national security and hate speech that fail to restrict the discretion of executive authorities.²⁰⁶ The lack of definition of the term ‘extremism’ across countries such as France and the UK further compounds this particular problem i.e. certain far-reaching legislative definitions or lack thereof allow too much discretion to governments to impose, at times, onerous administrative measures. More balanced and proportionate application of legislative provisions can be achieved through, for example, allowing the judiciary or an independent and public body to play a bigger oversight role. As noted previously, the UK has arguably the most extensive counter-terrorism and counter-extremism toolkit across Europe. This toolkit is matched by an equally comprehensive monitoring, evaluation and oversight

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²⁰¹ UNGA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/71/373, 6 September 2016, para. 57.

²⁰² Ibid.

²⁰³ Ibid., para. 13.

²⁰⁴ Ibid., para. 19.

²⁰⁵ Ibid., para. 23.

²⁰⁶ The very wide definition of terrorism in the UK contained within Section 1 of the Terrorism Act 2000 is a good example.

framework, which comprises of various Parliamentary oversight committees and the Independent Reviewer for Terrorism Legislation (amongst other relevant bodies).

Conclusion 3 – expansive criminal law, immigration and counter-terrorism measures targeting incitement, encouragement, glorification and apology for terrorism should be subjected to regular monitoring, evaluation and oversight by appropriate governmental and independent bodies. Proposed new legislation should also be evaluated against the standards of necessity and proportionality.

The most recent common development across all countries discussed in the report is legislation or proposals for legislation addressing extreme speech online. One of the main shared challenges in regulating extreme speech online is the establishment of a causal connection between accessing, viewing and/or disseminating extreme materials (images, videos, text, etc.) and the commission of acts of terrorism; in other words, demonstrating that the accessing or viewing of certain materials has resulted in prohibited criminal behaviour. Offences such as inciting or encouraging terrorism tend to require proof of intent (and/or recklessness within the UK), context or public environment in which the extreme message has been spread and impact (commission of criminal offence). Thus, any additional or new legislation should reflect these evidentiary requirements too rather than focusing exclusively on content. This is particularly important to ensure that the right to freedom of expression is not disproportionately restricted across various online platforms. Further, this is a significant consideration in light of the proposed Regulation of the European Parliament and of the Council on Preventing the Dissemination of Terrorist Content Online.

Conclusion 4 – states should beware the pitfalls of over-regulating online space and overly restricting the right to freedom of expression. In addition, provisions should be made to ensure that any online evidence of criminalised behaviour is not removed too quickly and without trace by online platforms as to where it is difficult to successfully prosecute an individual. Legislation which criminalises the mere viewing of inciting materials without further causal nexus should be seen as excessively restricting freedom of thought and expression.

Summary of adopted measures targeting extreme speakers

1. Criminal Law Provisions

Belgium	a. Incitement to commit terrorist acts (Article 140bis Criminal Code)	pp. 10 – 11
	b. Incitement to hatred, discrimination or violence (Article 22 Anti-Discrimination Law) and possibility to prosecute legal persons that repeatedly spread racial hatred	pp. 11 – 12
	c. Participation in a terrorist organisation (Article 140 Criminal Code)	p. 12
Denmark	a. Incitement to commit a criminal offence (Section 136(1) Criminal Code)	pp. 15 – 16
	b. Explicit condoning (or approval) of certain criminal offences (such as terrorism) in religious teaching ((Section 136(3) Criminal Code))	p. 16
	c. Hate speech (Section 266b Criminal Code)	p. 16
	d. Promoting the activities of a person, a group or an association committing or intending to commit terrorist crimes (Section 114e Criminal Code)	pp. 16 – 17
France	a. Direct provocation to terrorism or public apology of terrorism (Article 421-2-5 Penal Code's Chapter on terrorism)	pp. 19 – 20
	b. Provocation to, or apology of, terrorism (art. 421-2-4 Criminal Code)	pp. 20 – 21
	c. Use of online public communication services to incite to terrorism (Law of 2014 on the Fight Against Terrorism)	p. 21
	d. Association in relation with a terrorist enterprise (Article 421-2-1 Penal Code)	p. 22
	e. Offers or pressure to engage in terrorist activities (Article 421-2-4 Penal Code)	p. 22
	f. Incitement to (racial or religious) hatred (Article 24 of the Law on the Freedom of the Press and Article R625-7 Penal Code)	p. 22
	g. Dissemination of inciting materials that have been subject to a removal order (Article 421-2-5-1 Penal Code)	p. 24
Germany	a. Incitement to criminal offences (Section 111 Federal Criminal Code)	p. 25
		p. 26

- b. Approval of certain criminal acts committed (Section 140(2) Federal Criminal Code) p. 26
- c. Symbols of prohibited organisations (Section 9 Federal Law on Associations) p. 26
- d. Uniforms (art. 3 jo. 28 Law concerning Processions and Assemblies) pp. 26 – 27
- e. Participation in a terrorist organisation (Section 129a Criminal Code)

2. Immigration Law Provisions

- | | | |
|----------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Belgium | a. Denying entrance or deporting persons for public order and national security reasons (Belgian Aliens Act) | p. 13 |
| | b. Loss of Belgian nationality (art. 23 and 23/2 Law on the Belgian Nationality) | p. 13 |
| Denmark | a. Revocation of Danish citizenship for persons who are convicted of crimes against national security or terrorist crimes and who are sentenced to deportation (Section 8B Citizenship Act) | p. 17 |
| | b. National exclusion list involving religious preachers who are denied entry to the country | pp. 17 - 18 |
| | c. Rules for denying residence permits against a person who incites terrorist violence (Section 9f of the Aliens Act) | p. 18 |
| France | a. Administrative interdiction to enter the territory (Articles L214-1 to L214-7 Code of Entry and Residence of Foreigners and the Right to Asylum) | p. 23 |
| | b. Expulsion orders (Articles L521-1 to L521-5 Code of Entry and Residence of Foreigners and the Right to Asylum) | p. 23 |
| Germany | a. Denial of passport or passport revocation (Section 7(1) sub 1 Passport Act (Paßgesetz)) | p. 27 |
| | b. Expulsion (Section 53 and Section 58a of the Federal Residence Act) | pp. 28 – 29 |

3. Administrative Measures

- | | | |
|----------------|----------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Belgium | a. Powers to act against public order and public nuisance issues; demonstrations; gatherings (Article 134-135 of the New Municipalities Act) | pp. 13 – 14 |
| | | p. 14 |

- b. Closure of venue in case of serious indications that terrorist offences are being conducted (Article 134septies of the New Municipalities Act) p. 14
- c. Area prohibitions (Article 134sexies of the New Municipalities Act)

France Individual measures of administrative control and surveillance (The Law of 30 October 2017 Strengthening Internal Security and the Fight Against Terrorism) pp. 23 – 24

Germany Prohibition of Demonstrations and/or Public Meetings p. 28

4. Terrorism related Content Online

Belgium	a. Making websites unavailable in the context of a criminal investigation (art. 139bis par. 6 Criminal Code)	p. 15
	b. Internet Referral Unit monitoring extreme and radical expressions	p. 15
Denmark	Blocking of websites containing terrorist propaganda (art. 791d Administration of Justice Act)	p. 19
France	Withdrawal or blockage of inciting content (linked to Article 421-2-5 Penal Code)	p. 24
Germany	Netzwerkdurchsetzungsgesetz obliges certain social networks to remove illegal online content	p. 29

5. Counter-Terrorism Measures (UK specific)

A. Prohibited Extreme Speech under Terrorism Act 2000

a. Inviting support for a <i>proscribed</i> organisation (Section 12 Terrorism Act 2000)	p. 31
b. Encouraging support for a <i>proscribed</i> organisation (Section 12 (3) Terrorism Act 2000))	p. 31
c. Extraterritorial incitement to commit acts of terrorism (Sections 59 and 60 Terrorism Act 2000)	pp. 31 – 32

B. Prohibited Extreme Speech and Activities under Terrorism Act 2006

a. New offences of encouragement and incitement (addressing neighbourhood terrorism) (Section 1 Terrorism Act 2006)	pp. 32 – 33
b. Distribution or circulation, which results in encouragement or incitement (Section 2 Terrorism Act 2006)	p. 33
c. Online incitement, encouragement or distribution of extreme materials (Section 3 Terrorism Act 2006)	pp. 33 – 34

6. Bespoke Measures (UK specific)

- a. Notification scheme/regime for convicted extreme speakers (Part 4 of the Counter-Terrorism Act 2008) pp. 36 - 37
- b. Special Prison Separation Regime for Extremist and Radical Speakers (Prison (Amendment) Rules 2017, SI 2017/560) p. 37
- c. The PREVENT Programme and the Prevent statutory duty pp. 37 - 38

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A comparative research study on radical and extremist (hate) speakers in European member states

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