Securitisation of Religious Freedom: Religion and Limits of State Control

Sécurisation de la liberté religieuse : La religion et les limites du contrôle de l'Etat

Merilin Kiviorg
(Ed.)

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En hommage à José de Sousa e Brito
pour sa fidélité aux travaux du Consortium.

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PREFACE

There is an anxiety and tension in Europe and beyond. Some see everything in terms of civilizational conflict, be it, robustly termed, conflict between Christian Europe and Islam; or even between liberal rights and cultural/religious identity. The truth is probably that the social and political situation and atmosphere is changing very quickly and it has become increasingly more complex to rationalize over the processes that take place. And for sure, it can be said that we live in an age of insecurity as reflected on in the opening chapter of this volume by Professor Silvio Ferrari.

Several factors have been contributing to the tension. Besides actual threats to physical security, tension has been flared up by factors such as migration, developments in countries immigration policies, economic concerns and not least, the rise of far-right movements and populism. The entire human rights framework has become more fragile than it has been since the end of Second World War. Tighter rules and policies have emerged in many parts of Europe to tackle both real and imagined threats to security. Freedom of religion or belief for all has started to get perhaps the most heightened negative attention. Proposed solutions to the tensions have varied from strong claims for more religion (also traditional religion/culture) in the public sphere to strong claims of no-religion in the public sphere.

It is perhaps correct to argue that both individual and collective freedom of religion or belief for all has become an endangered species of human rights in this atmosphere. Thus, it has become important to address some of these issues head on. As pointed out by Ferrari 'sounding the alarm about the dangers that unrestricted security concerns pose to freedom of religion or reaffirming that respecting freedom of religion is the best way to enhance security is praiseworthy, and we should not get tired of doing that'. He, however, also quite rightly points out that we need to go beyond this point and explore how the right of religious freedom needs to be reconsidered to face the challenges posed by the transformations that are taking place in Europe. Thus, there is a value to mapping the current legal-political-social responses

in the European Union to, what can be termed, securitization of rights and specifically freedom of religion or belief. Both security and religious freedom are important and need each other, and the aim of this volume is to discuss and analyse opportunities to advance both.

This volume contains updated papers presented at the XXIXth Annual Meeting of the European Consortium for Church and State Research, held in Tallinn, Estonia 16-19 November, 2017, titled: 'Securitization of Religious Freedom - Religion and Scope of State Control'. The 2017 meeting took place within a large international conference organized by the University of Tartu, School of Law together with the Estonian Ministry of Internal Affairs in connection to Estonia's EU presidency. The conference brought together about 300 participants from different fields and professions: academics, legal professionals, members of diverse religious communities, politicians and civil service from all European Union countries. The theme of the conference was and still is topical in Europe and beyond. The conference also facilitated seminars for doctoral students interested in the field.

The conference was divided into several theme blocks. Each session was introduced by a paper, making a comparative pan-European analysis on the basis of national reports. The updated versions of these comparative studies are published in the first part of this volume. These papers reflect on problematic definitions of extremism, fundamentalism and radicalisation and probe for acceptable limits to freedom of religion or belief and related rights in Europe for the sake of security. Professor Agustín Motilla provides a comparative paper on legislation on radicalisation and extremism in EU member states and its effects on freedom of religion. The restrictions on freedom of religion or belief may have consequences not only for individuals but also for religious communities. Thus, the autonomy of religious associations in contemporary Europe from the perspective of the European Court of Human Rights is reflected by Judge Vincent A. De Gaetano. Following the same logic, papers by Lina Papadopoulou and Jónatas E.M. Machado focus on controversies over hate speech in the context of collective and individual religious freedom. There are limits that legal measures can provide in dealing with challenges that are posed by security concerns. Francis Messner discusses in his paper educational tools and policies to tackle the problem. EU law plays a significant role at the pan-European and national level of the countries represented in this volume. Dr. Michał Rynkowski, in his paper, provides a valuable overview of the measures adopted at the EU level.

The second part of the volume is comprised of the national reports from the European Union countries discussing questions presented to authors in advance about the interplay between security and freedom of religion or belief. The papers facilitated the comparative studies in the first part of this volume and are valuable material for any future study that seeks to understand differences or similarities in national responses to securitisation of rights and specifically freedom of religion or belief. The papers provide in depth understanding of the legal and political responses to the phenom-

enon and discuss rationales underpinning these responses. The questions to authors (*grille thématique*) were roughly divided into following main blocks and are as such reflected in national papers in this volume:

I. Social Context
II. Political and Public Debate
III. Legal and Political Framework Adopted to Tackle Radicalisation and Extremism
IV. Effects of the Measures Tackling Radicalisation and Extremism to Religious Freedom
V. Educational Measures to Tackle Radicalisation and Extremism

Several people and institutions contributed financially and otherwise to the success of the aforementioned conference, including: Estonian Ministry of Internal Affairs, European Consortium for Church and State Research, Conference of European Churches and Estonian Council of Churches. Significant financial support for the conference and for the development of this volume was provided by the University of Tartu Development Fund and Estonian Research Council Institutional Grant No. IUT20-50 'The Evolution of Human Rights Law and Discourse in the Russian Federation, and its Interaction with Human Rights in Europe and the World', and by the European Consortium for Church and State Research. The doctoral seminars within the conference were organized under the Doctoral School in Economics and Innovation, and supported by the European Union, European Regional Development Fund (University of Tartu's ASTRA project PER ASPERA). Special thanks to Professor Francis Messner for translating the *grille thématique* of national reports in this volume into French and to Mrs. Aive Suik for significant organizational help. Last but not least I am grateful to the language editor Mr. Curtis Budden for his diligence and patience in preparation of this volume.

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THEMATIC OVERVIEW

FREEDOM OF RELIGION IN THE AGE OF INSECURITY

Silvio Ferrari[1]

I. Introduction

Recalling the 'Austria felix' from the years before World War I, Stefan Zweig wrote some memorable pages on the age of security[2]. We are still waiting for somebody to give us an equally insightful description of the post-9/11 years, our age of insecurity.

Insecurity affects religious freedom in many different ways and, although we cannot rule out that freedom of religion can flourish in times of insecurity, it is unlikely that a society based on an exasperated quest for security will provide a favourable environment for the development of religious diversity, which is an essential component of freedom of religion. What is happening now both in Europe and in many other parts of the world confirms this. We are in the middle of a process of securitisation of religion that primarily targets religions that do not accept liberal values but tends to extend to religions generally, considered as a potential source of social conflict.

In the age of security, our world of yesterday, we could afford the luxury of building a content-free system of religious freedom, inclusive of individuals and groups regardless of the values they upheld. With few exceptions (the most important of which is represented by the 'great sect scare'[3] that affected many European countries in the 1980s and 1990s), this was the rule in most Western European states. The Jehovah's Witness who objected to military service was jailed, but his church

[1] Silvio Ferrari was professor of Law and Religion at the University of Milan until 2017 and now teaches Comparative Law of Religions at the Faculty of Theology in Lugano, Switzerland.

[2] S. Zweig, *The World of Yesterday: An Autobiography* (London, Pushkin Press, 2013). The first chapter of Zweig's book, originally published in 1942, is titled 'The World of Security'.

[3] This expression is borrowed from S. Palmer, *The New Heretics of France: Minority Religions, la Republique, and the Government-Sponsored 'War on Sects'* (Oxford, Oxford University Press, 2011), p. 197.

was not dissolved due to his behaviour and could continue teaching that serving in the army was against God's law. Today, a Muslim group preaching disobedience to a state law would be likely to face much harsher consequences. As underlined by Laegaard, securitisation of religion can change the meaning of tolerance and, indirectly, of religious freedom: 'What was earlier a content-neutral mechanism for handling religious differences in a legitimate way turns in to a content-sensitive sorting of religious groups and practices into those that are liberal and hence approved and those that are illiberal and hence rejected'[4].

From a philosophical point of view, the dilemma posed by this development is far from new. It goes back at least to the end of World War II, when Karl Popper pronounced his famous paradox of tolerance:

> 'Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be unwise. But we should claim the right to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant'[5].

Popper's description is helpful to clarify the terms of the relationship between security and freedom of religion that is relevant to our analysis. The issue is not whether individuals and groups that commit crimes should face some kind of sanction. We can all agree about that. The issue is whether this sanction should be extended to individuals and groups that support radical, extremist, fundamentalist points of view and do not accept a rational discussion of their arguments. As Popper points out, they may—but also may not—end up answering rational arguments 'by the use of their fists or pistols'. Is a liberal and democratic state entitled to suppress these voices 'if necessary even by force' before they take the fatal step from 'the utterance of intolerant philosophies' to the recourse to violence? Is a law that criminalises these utterances still compatible with a liberal legal framework when they fall short of inciting others to hatred, discrimination or violence?

[4] See S. Laegaard, 'Religious Toleration and Securitization of Religion', <*http://www.academia.edu/31059407/Religious_toleration_and_securitization_of_religion*> (accessed 26 Mar 2018), p. 14.

[5] *The Open Society and Its Enemies* (London, Routledge & Kegan Paul, 1962), p. 265.

Confronted with this dilemma, opinions are divided. Some, like John Rawls, argue along lines that are close to Popper[6], while others (Michael Walzer among them)[7] are more hesitant to accept Popper's conclusion. However, the length of this debate and the lack of a consensus seem to indicate that Popper's tolerance paradox cannot find a definitive solution that would be valid in perpetuity. We should settle for a provisional answer, i.e. an answer that is most suitable to the needs and aspirations of an evolving society. The shift from an age of security to an age of insecurity is changing the meaning of tolerance and attitudes towards intolerants. How the right of freedom of religion is going to be affected by the new social and cultural landscape that is emerging in Europe is something that still has to be considered in depth. Sounding the alarm about the dangers that unrestricted security concerns pose to freedom of religion or reaffirming that respecting freedom of religion is the best way to enhance security is praiseworthy, and we should not get tired of doing that. However, we need to go beyond this point and explore how the right of religious freedom needs to be reconsidered to face the challenges posed by the transformations that are taking place in Europe.

II. The definition of 'extremism' and 'radicalisation'

This contribution aims to discuss just a few profiles of the complex relationship between freedom of religion and security, starting from the impact that security concerns have on the autonomy of religious communities. In the age of security, they enjoyed a generous share of autonomy that included both the doctrinal content of the religion and the internal organisation of the community. Now security concerns tend to reduce the scope of the autonomy granted to religious organisations. As far as their doctrine is concerned, the main concerns are raised by religious communities that embrace and teach doctrines that are considered 'extremist', 'radical' or 'fundamentalist'.

Up until now, EU countries refrained from enacting legal provisions explicitly aimed at limiting expressions of extremism and tackling radicalisation. No EU country has enacted measures that are comparable to the Russian law on extremism[8]. Radicalisation and extremism are dealt with through the general legal provisions protecting public order and the specific legal instruments that criminalise hate speech, defamation, hate crimes and terrorist acts. However, there are governmental directives, programmes, orders and regulations that are more specific and provide some definition of these notions. Most of them establish a clear link between extremism or

6 *A Theory of Justice* (Cambridge, Belknap Press, 1971), p. 220.

7 *On Toleration* (New Haven, Yale University Press, 1997), pp. 80-81.

8 Federal'nyi zakon 'O protivodeistvii ekstremistskoi deiatel'nosti' [Federal Law of the Russian Federation on Countering Extremist Activity (Extremism Law)], *Rossiskaia gazeta*, 25 July 2002.

radicalisation and violence[9]; however, a few tend to dissociate these two elements. In the United Kingdom, 'Prevent' (a document that explains one of the four strands of the government's anti-terrorism strategy) defines 'extremism' as 'vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs'[10]. In Poland, a 2015 report on state security describes extremist groups as groups that 'propagate ideology which is contrary to the law and standards of [a] democratic state, questioning constitutional order and democratic procedures'[11]. In the Czech Republic, the 'Report on the Issue of Extremism in the Territory of the Czech Republic in 2002', approved by the Government Resolution No 699/2003, provides the following definition of extremism: 'The term extremism should be understood as clear ideological attitudes which deviate markedly from the rule of law and constitutional law, show elements of intolerance, and attack democratic constitutional principles as defined in the Czech constitutional order'[12].

Different from other governmental documents[13], there is no clear link in these reports between extremism and violence. Extremism is defined in terms of 'ideology' or 'vocal or active opposition' to a set of values, and this could be seen as the prelude to legal measures that outlaw manifestations of 'extremist' ideas even when there is no real danger that they will be followed by violent actions.

Similar remarks also apply to definitions of 'radicalisation'. According to the Irish Ministry of Justice, 'the term "radicalization" describes the process of acquiring and holding extremist views. Although this activity is not necessarily illegal, some individuals have shown a propensity to move from simply believing in the righteousness of a specific cause to pursuing it violently'[14]. In the Netherlands, radicalisation is defined as 'an attitude that shows a person is willing to accept the ultimate consequence of a mind-set and to turn them into actions. These actions can result in the escalation of generally manageable oppositions up to a level [where] they destabilise society

[9] This is the case of Sweden: see the chapter written by Lars Friedner in this book.

[10] See the chapter written by Norman Doe and Rebecca Riedel in this book.

[11] See the chapter written by Piotr Stanisz in this book.

[12] The report continues by stating that 'Extremist attitudes are eligible to transform into destructive activities, and, whether directly or in terms of their long-term consequences, act destructively against the existing democratic political and economic system-i.e., they endeavour to replace the democratic system with an antagonistic one (a totalitarian or authoritative regime, dictatorship, or anarchy)'. See the chapter written by Jiří Rajmund Tretera and Záboj Horák in this book.

[13] In the 'Netherlands comprehensive action programme to combat jihadism. Overview of measures and actions', adopted by the government in 2014, extremism is defined as 'the designation of the phenomenon that involves people or groups breaking the law and executing (violent) illegal actions to influence political decision-making in an extra parliamentary manner' (p. 31). Also see the chapter written by Sophie van Bijsterveld in this book.

[14] See the chapter written by Stephen Farrell in this book.

due to the use of violence, in conduct that deeply hurts people or affects their freedom or in groups turning away from society'[15]. In both cases, a reference to violence is included as a possible outcome of the radicalisation process, but this does not exclude legal measures that also criminalise radical views that do not entail violent acts.

On this point, these definitions of extremism and radicalisation differ from those provided by international documents. Documents published by the Organization for Security and Co-operation in Europe (OSCE) adopt a formulation called 'violent extremism and radicalization leading to terrorism' (VERLT). Violent extremism means that '[s]imply holding views or beliefs that are considered radical or extreme, as well as their peaceful expression, should not be considered crimes. "Radicalization" and "extremism" should not be an object for law enforcement counter-terrorism measures if they are not associated with violence, or with another unlawful act (e.g., incitement to hatred), as legally defined in compliance with international human rights law. Extremist individuals or groups who do not resort to, incite or condone criminal activity and/or violence should not be targeted by the criminal-justice system'[16]. In more general terms, the same document states that '[r]adicalization is not a threat to society if it is not connected to violence or other unlawful acts, such as incitement to hatred'[17]. The Shanghai Declaration defines extremism as 'an act aimed at seizing or keeping power through the use of violence, as well as a violent encroachment upon public security'[18].

Although much more precise in linking extremism and radicalisation to violence, these documents are also not beyond criticism. Some wonder what their added value is, considering that there are already many legal provisions that criminalise not only violent acts but also speeches inciting others to violence, hatred or discrimination. Others, while accepting that these measures can be redundant from a strictly legal point of view, prefer to focus on their symbolic value and on the opportunity to make use of the law to send a strong signal to individuals and groups that oppose the basic values upon which the EU member states are founded.

Apart from the issue of the link between extremism, radicalisation and violence, a second remark is deserving of a brief mention. Extremism and radicalisation are terms without legal significance. Any attempt to provide a legal definition is inevitably elusive because they reflect political and sociological categories that cannot have definite legal content. This is not a new problem. We already faced this about forty

[15] Netherlands comprehensive action programme (see footnote 13).

[16] *OSCE, Preventing Terrorism and Countering Violent Extremism and Radicalization that Leads to Terrorism: A Community-Policing Approach* (Vienna and Warsaw, OSCE/Office for Democratic Institutions and Human Rights, 2014), pp. 42-43.

[17] Ibid, p. 39.

[18] The Shanghai Convention on Combating Terrorism, Separatism and Extremism (15 Jun 2001), Art. 1(3), <http://www.refworld.org/docid/49f5d9f92.html> (accessed 28 Mar 2018).

years ago when it seemed that 'sects' were going to spread all over Europe and there were strong political pressures in favour of enacting anti-sect laws. Unfortunately, 'sect' is a sociological notion with little legal meaning, as was immediately realised by the most perceptive scholars. Jean-François Kahn wrote that 'toute religion est une secte qui a réussi'[19], and the legal analysis of Jacques Robert in *La fin de la laïcité?*[20] confirms this judgment: a legal distinction between sect and religion is impossible. Apparently, we did not learn from this lesson and are following the same path, trying to give legal substance to notions that cannot have any.

III. A worrisome scenario?

Lending too much importance to the ambiguities of some national definitions of extremism and radicalisation would be a mistake. Most documents enacted by EU states contain a clear reference to violence and aim to repress behaviours and expressions that lead to violent acts only. However, the trend to dissociate extremism and radicalisation from violence and to criminalise them *per se* entails two worrisome possibilities.

First, it would mark a step towards a pre-crime society, where the traditional 'post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security'[21]. A pre-crime society is characterised by 'a shift in focus away from individual offending towards pre-emptive strategies that aim to identify threats and make interventions before crimes take place'[22]. The benefit of preventing harm before it occurs and in particular of avoiding the human costs of terrorist incidents is a powerful incentive to carry out a repressive intervention before a crime has been committed. The development of predictive technologies provides a scientific basis for this option and brings the future suggested in Dick's *Minority Report*[23] one step closer. However, the risks inherent in this perspective are there for all to see.

If we move from Dick to Orwell, the second worrisome possibility becomes clear. In *Nineteen Eighty-Four*, Orwell described a society where ideas, opinions and thoughts could be declared illegal even if they were not followed by any action[24]. Some definitions of 'radicalisation' focus on beliefs, attitudes and mindsets in a way that can be invasive in what canon lawyers call the 'forum internum' of an individual.

[19] *Dictionnaire incorrect* (Paris, Plon, 2005).

[20] J. Robert, *La fin de la laïcité* (Paris, Odile Jacob, 2004), pp. 103 ff.

[21] L. Zedner, 'Pre-Crime and Post-Criminology' (2007) 11 *Theoretical Criminology*, pp. 261-262.

[22] J. McCulloch and S. Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crimes in "The War on Terror"' (2009) 49 *British Journal of Criminology*, p. 628.

[23] P. K. Dick, *Minority Report* (London, Gollancz, 2002).

[24] G. Orwell, *Nineteen Eighty-Four* (Oxford, Clarendon Press, 1984) (the novel was written in 1949).

Again, it is the same path that was followed to fight the 'sects', which were accused of brainwashing their adherents and conditioning their behaviour. To face this danger, some states enacted laws on mental manipulation and psychological subjection that dealt with what happens in the mind and conscience of an individual. This is not a good precedent either in terms of effectiveness (which was limited) or of respect for human rights and particularly for freedom of religion.

IV. Conclusion

The new scenario I described raises a number of different questions, some of which have a deep impact on the way we have become used to conceiving of and implementing the right to freedom of religion. However, the securitisation of freedom of religion is just part of a wider, long-term process of securitisation of our entire social life that affects other freedoms, primarily freedom of association and expression. Therefore, consideration of the impact of security concerns on the right to freedom of religion needs to be included in a broader framework that encompasses many other rights. Taking into account this broader perspective, one might wonder whether a purely legal answer is capable of adequately addressing the problem. The law has it limits, which were highlighted by Lord Lloyd of Berwick a few years ago: 'it is an illusion to believe that the fanaticism and determination of well established terrorist organizations can be defeated by laws alone, even of the most severe and punitive kind …. There is no legislative "fix" or panacea against terrorism'[25]. If the limits of the law are forgotten, it is easy to give in to the dangerous temptation to extend its reach beyond its natural borders, entering the realm of the conscience, ideas and opinions. Even admitting that this strategy can win the war against violent extremism, radicalisation and fundamentalism, one question remains to be answered: at what price?

[25] This quotation is taken from Parliament of Australia, Research Paper No 12 2001-2002, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints', para. 2.2.1.

AUTONOMY OF RELIGIOUS ASSOCIATIONS IN CONTEMPORARY EUROPE FROM THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Vincent A. De Gaetano[1]

I. Introduction

While in many European countries the formal practice of religion —at least of the Christian religion as manifested through the various churches and other ecclesial communities— is in decline, the same cannot be said about interest in the concept, and in the actual manifestation, of freedom of thought, of conscience and of religion[2]. Indeed, in a number of recent high-profile cases, whether decided at the domestic level or at the level of the European Court of Human Rights (ECtHR), the principal issue has been the contrast or the alleged conflict between freedom of thought, conscience and/or religion on the one hand, and other equally fundamental rights —especially those of respect for private life, freedom of expression and the prohibition against discrimination— on the other. The purpose of this short paper is to shed some light on just one aspect of the many complex issues that the ECtHR has examined in light of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), namely that of the autonomy of religious associations. As happens in most cases, issues of freedom of thought, conscience and religion are often inextricably linked with other issues of fundamental rights and freedoms. As one author has stated, '[t]he particular context of many of the cases provides an insight

[1] Chief Justice Emeritus, Malta, judge of the European Court of Human Rights. Views expressed in this paper are the author's and do not necessarily reflect the views of the ECtHR or of the Council of Europe, of which the court is an organ.

[2] See V. A. De Gaetano, 'Riflessioni sulla libertà di religione e di coscienza: l'Articolo 9 della Convenzione europea dei Diritti dell'Uomo in I Quaderni Europei' (Università degli Studi di Catania in collaborazione con il centro di documentazione europea - Online Working Paper/ISSN 1973-7696, Febbraio 2014, no. 61), <http://www.cde.unict.it/sites/default/files/Quaderno%20europeo_61_2014_0.pdf> (accessed 1 Sep 2017).

into the rich tapestry of European … religious, historical and cultural diversity'[3]. He then goes on to add —and I believe that here he expresses in a very succinct way the approach of the ECtHR to the cases that raise issues under Article 9— 'the Court has sought to impress upon the Continent a unifying set of values which will help Europe to prepare for and be at ease with the challenges posed by an increasingly secular but also increasingly multi-faith society. The clarion call is to respect and to value pluralism and tolerance. The right of freedom of conscience cannot be taken for granted'[4].

1. **Preliminary Observations**

The number of cases coming before the ECtHR alleging a breach of Article 9 is relatively small when compared to the number of cases alleging breaches of some of the other provisions of the convention. The first judgment finding a violation under Article 9 was only delivered in 1993 in *Kokkinakis v Greece*[5]. According to the annual report for 2016 (published in March 2017), from 1959 to 2016 there were only 65 findings of a violation of Article 9, which is a tiny figure when compared to, for instance, the finding of a violation of Article 2 (1,190 instances), Article 3 (2,732), Article 6 (10,467) or Article 10 (656). The only other articles of the convention (excluding the protocols) with fewer violations are Article 4 (seven pronouncements), Article 7 (43) and Article 12 (nine)[6].

The structure of Article 9 is what one could call the classical structure. The first paragraph reiterates in a general way the nature of the right guaranteed or protected —'freedom of thought, conscience and religion'— and also gives some non-exhaustive examples of what falls within the general formulation. This right, we are told in the first paragraph, *includes* the 'freedom to change [one's] religion or belief and [the] freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance'. The second paragraph of the article goes on to identify the situations in which the right in question can be restricted. It is clear from the wording of the provision that only the *external* manifestation of religion and beliefs can be restricted, and for such a restriction to comply with the convention, it must satisfy the three (again classical) criteria adopted in respect of other provisions of the convention: the limitation of (or interference with) the right must (i) have a basis in law (which according to standard case law must be a law that is *adequately accessible*, as well as *clear*, i.e. one that

[3] J. Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention of Human Rights* (Strasbourg, Council of Europe, 2012), p. 8.

[4] Ibid.

[5] *Kokkinakis v Greece*, App no 14307/88 (ECHR, 25 May 1993).

[6] *Annual Report - European Court of Human Rights, 2016* (Strasbourg: Council of Europe, 2017), pp. 202-203.

allows a person to foresee with reasonable certainty the possibility of such a limitation); the limitation (ii) must also pursue one of the 'legitimate' aims specified in the article, that is to say public safety, or the protection of public order, health or morals, or the protection of the rights and freedoms of others; and finally (iii) the limitation of, or interference with, the right must be 'necessary in a democratic society', which implies that there must be a *pressing social need* for the limitation or interference and that the means adopted to limit or to interfere must be *proportionate* to the legitimate aim pursued.

Needless to say, the autonomy of religious associations can also be examined under, or in light of, Article 11 (freedom of assembly and association). In many cases, in fact, Article 9 has been specifically interpreted in light of Article 11. This is what the ECtHR did, for instance, in the case of *Supreme Holy Council of the Muslim Community v Bulgaria*[7], a unanimous chamber decision finding a violation of Article 9. I will revert to this case later. For the moment, suffice it to note what was stated in § 73 of that judgment, a paragraph that encapsulates the essence or the general tenor of the ECtHR's approach to autonomy of religious associations:

> 'In accordance with the Court's case-law, while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Participation in the life of the community is a manifestation of one's religion, protected by Article 9 of the Convention. The right to freedom of religion under Article 9, interpreted in the light of Article 11, the provision which safeguards associations against unjustified State interference, encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention'.

By roping in Article 11, the ECtHR has ensured that the same broad protection that this article confers with regard to the formation, maintenance and protection against dissolution of associations in general[8] also applies, and perhaps with even stronger force, to religious associations. One of the strongest expressions of this interplay between Article 9 and Article 11 can be found in the 2001 judgement of *Metropolitan Church of Bessarabia and Others v Moldova*[9]. In that case, the applicants had been prohibited from gathering together for religious purposes and had not been able to secure legal protection against harassment or legal protection for their church's assets. The Moldovan government argued that the registration of this new and autonomous Orthodox Church could lead to the destabilisation of both the traditional

[7] *Supreme Holy Council of the Muslim Community v Bulgaria*, App no 39023/97 (ECHR, 16 Dec 2004).

[8] See, passim, *United Communist Party of Turkey and Others v Turkey*, App no 133/1996/752/951 (ECHR, 30 Jan 1998).

[9] *Metropolitan Church of Bessarabia and Others v Moldova*, App no 45701 (ECHR, 13 Dec 2001).

Orthodox Church and of society as a whole. This argument was advanced against the backdrop of a dispute between the Russian and the Romanian Patriarchates, with the respondent government holding that recognition of the new autonomous church would have an adverse impact upon the very territorial integrity and independence of Moldova. The ECtHR, however, reiterated that:

> '[S]ince religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords …'[10].

The ECtHR even went so far as to state that since one of the means of exercising the right to manifest one's religion, especially for a religious community in its collective dimension, is the possibility of ensuring judicial protection of the very same community, of its members and of its assets —in effect the right of effective access to a court— Article 9 must also be seen not only in the light of Article 11 but also in the light of Article 6[11]. The ECtHR eventually found a violation of Articles 9 and 13, holding at the same time that it was not necessary to examine the case from the standpoint of Article 14 or Article 6.

Another article of the ECHR that, arguably, can be said somehow to interact with the autonomy of religious associations is Article 2 of Protocol No 1 (right to education)[12]. To date, the ECtHR has not really had a case that places this provision squarely at the centre of the debate on the autonomy of religious associations. The leading Grand Chamber judgment of *Folgerø and Others v Norway*,[13] which examined in detail and in light of previous case law the expression 'their own religious and philosophical convictions', gives, however, some clues as to the court's approach in matters pertaining to freedom of religion in general.[14] The court noted in particular that the state's duty to respect parents' convictions, be they religious or philosophical, was quite broad in its extent:

[10] Ibid, § 118.

[11] Ibid.

[12] Article 2 of Protocol No 1, ECHR: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

[13] *Folgerø and Others v Norway*, App no 15472/02 (ECHR, 29 Jun 2007).

[14] See in particular § 84 of that judgment.

> 'as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the state. The term "conviction", taken on its own, is not synonymous with the words "opinions" and "ideas". It denotes views that attain a certain level of cogency, seriousness, cohesion and importance'.

Moreover, it held that, although 'individual interests must on occasions be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.[15] It also held that the state is forbidden from pursuing an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions, a point taken up four years later by the Grand Chamber in the case of *Lautsi and Others v Italy.*[16].

2. **Aspects of Autonomy**

The theme of the autonomy of religious associations may be examined in terms of various aspects. For the sake of clarity, I propose illustrating in broad terms the ECtHR's position with reference to the more important cases under four headings: (i) the general principle of the autonomy of religious associations; (ii) the prohibition of state interference in both intra-denominational and inter-denominational conflicts; (iii) disputes between religious associations and their members; and (iv) disputes between religious associations and their employees[17]. Needless to say, there is a considerable element of overlap between these four aspects.

II. Principle of autonomy

The right of self-regulation of religious associations, organisations and communities seems self-evident. Problems arise, however, when a state presumes to interfere with this autonomy ostensibly in the interests of public safety, or for the protection of public order, heath or morals, or for the protection of the rights and freedoms of others. Muslim communities in mainly Christian Orthodox states have provided the ECtHR with the possibility of expanding upon this aspect of autonomy. In *Hasan and*

[15] Ibid.

[16] *Lautsi and Others v Italy*, App no 30814/06 (ECHR, GC, 18 Mar 2011). See in particular § 71 of that judgment.

[17] This classification is taken from the ECtHR's *Guide to Article 8* (Council of Europe/European Court of Human Rights, 2015), <http://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf> (accessed 12 Sept 2017).

Chaush v Bulgaria[18], what was at issue was the recognition by the state authorities of one of two rival leaderships of the Muslim community. The first applicant had been elected and registered by the state authorities as chief mufti, while the second applicant was the part-time secretary to the Chief Mufti's Office. In 1994, a rival faction of the Muslim community held a national conference and elected an alternative leadership, which proceeded to apply for registration with the state authorities as the legitimate representative of Bulgaria's Muslims. The government issued a decree apparently approving the statute adopted at this 'alternative conference', and registered the new person as chief mufti. The new leadership forcibly ejected the first applicant and his staff from the Chief Mufti's Office and took over all documents and assets. The prosecution authorities refused to take any action. When the first applicant appealed to the Supreme Court on behalf of the Chief Mufti's Office, his application was dismissed on the grounds that the Council of Ministers enjoyed full discretion with regard to the registration of religious groups. In 1995, following a national conference that he himself organised, the first applicant was re-elected chief mufti and, naturally, he proceeded to seek registration with the state authorities but never received any reply from them. Although the Bulgarian Supreme Court twice quashed the tacit refusal of the authorities to register the first applicant, the Council of Ministers continued to refuse registration. In a unanimous[19] decision, the ECtHR held that the failure of the authorities to remain neutral in the exercise of their powers in the field of registration of religious communities entailed interference by the state with the believers' freedom to manifest their religion. The court held that, except in very exceptional cases, the right to freedom of religion excluded any discretion on the part of the state to determine whether religious beliefs or the means used to express them are legitimate. State action favouring one leader of a divided religious community, or with the purpose of forcing the community to come under a single leadership against its wishes, also constituted such interference. The effect of the government's action, or inaction, was to favour one faction, granting it the status of the single officially recognised leadership, while depriving the first applicant of the possibility of continuing to represent at least part of the community. This amounted to interference with the internal organisation of the Muslim religious community and with both applicants' right to freedom of religion. Moreover, the relevant domestic law at the time did not provide for any substantive criteria for registration in a situation of internal division or divisions, and there were no procedural safeguards against the arbitrary exercise of the authorities' (in particular the Council of Ministers') discretion. The bottom line is that

[18] *Hasan and Chaush v Bulgaria*, App no 30985/96 (ECHR, GC, 26 Oct 2000). This case is sometimes referred to under the names *Hasan* and *Tchaouch.*

[19] The only disagreement —eleven votes to six— was in respect of whether the finding of violations of the convention constituted sufficient just satisfaction in respect of the second applicant.

the interference in the instant case was not prescribed by law, as it was arbitrary, was based on legal provisions that allowed the executive unfettered discretion and failed to meet the required standards of clarity and foreseeability. Of particular interest is, in my view, the following paragraph, which links the autonomy of religious associations with the pluralism that is indispensable in democratic societies:

> 'Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable'[20].

In a similar vein, punishing a person merely for acting as the religious leader of a group that willingly decided to follow him —even if that fact was not recognised by the state— was not compatible with the demand of religious pluralism in a democratic society. This was the central issue decided by a chamber of the Second Section of the ECtHR in *Serif v Greece*[21]. At the time, Greek law provided for the election of Muslim religious leaders by the members of the Muslim minority in Thrace. When the mufti of Rodopi[22] died, the president of the republic, following standard practice, appointed a replacement without any elections. When two independent Muslim members of parliament requested that the state organise elections, as it was, in their view, obliged to do under the 1913 Treaty of Athens between Greece[23] and others and the Ottoman Empire, the law was immediately changed so as to provide for the appointment of muftis by the president of the republic. In December 1990, a number of Muslims attending Friday prayers proclaimed the applicant, a Greek national, as the mufti of Rodopi. The applicant was subsequently convicted under Articles 175 and 176 of the then-Criminal Code of usurping the functions of a minister of a 'known religion' and of publicly wearing the robes of such a minister without being entitled to do so. His conviction was upheld by the Court of Appeal and by the Supreme Court. The ECtHR found a violation of Article 9, on the rather narrow and limited grounds

[20] *Hasan and Chaush v Bulgaria*, App no 30985/96 (ECHR, GC, 26 Oct 2000), § 62. The ECtHR expressed itself in very similar terms in many others cases. See, for example, footnotes 7, 9 and 10 above.

[21] *Serif v Greece*, App no 38178/97 (ECHR, 14 Dec 1999).

[22] Rodopi is the central prefecture of the district of Thrace.

[23] The Kingdom of Greece, as it then was.

that, although Serif had indeed taken part in a series of religious celebrations as mufti, he had never attempted to exercise the judicial and administrative functions laid down in Greek law on muftis and other persons of 'recognised religions'. This judgment is perhaps more noteworthy for what is stated, almost *obiter*, in § 53:

> 'It is true that the Government argued that, in the particular circumstances of the case, the authorities had to intervene in order to avoid the creation of tension among the Muslims in Rodopi and between the Muslims and the Christians of the area as well as Greece and Turkey. Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other … In this connection, the Court notes that, apart from a general reference to the creation of tension, the Government did not make any allusion to disturbances among the Muslims in Rodopi that had actually been or could have been caused by the existence of two religious leaders. Moreover, the Court considers that nothing was adduced that could warrant qualifying the risk of tension between the Muslims and Christians or between Greece and Turkey as anything more than a very remote possibility'.

In this paragraph, one finds the germ of the positive obligation under Article 9 to promote tolerance not only between different religious groups or denominations but also between factions of the same group or denomination. Otherwise restated, it is only *in extremis* that the state can, invoking public safety or public order, intervene in the internal organisation of a religious organisation, and then only after non-intrusive measures have first been applied in good faith to resolve the tension. This point was reaffirmed in another case coming from Greece, *Agga v Greece (no. 2)*[24], this time dealing with the person elected as mufti of Xanthi. The court pointed out that the theoretical possibility that the coexistence of two muftis might cause tension among the local residents was insufficient to legitimise the interference of the state[25], precisely because it was incumbent upon the state authorities to ensure mutual tolerance between opposing groups rather than take sides.

Finally, the case of the *Moscow Branch of the Salvation Army v Russia*[26] is worth mentioning. In 1997, a new law (the Religious Act) was enacted that required that religious associations established before 1997 bring their articles of association into compliance with it and resubmit them for state registration. Failure to submit an application for re-registration within the time limit entailed the termination of the organisation's legal-entity status. In August 1999, the applicant branch was denied

[24] *Agga v Greece (no. 2)*, App nos 50776/99 and 52912/99 (ECHR, 17 Oct 2002).
[25] Ibid, § 60.
[26] *Moscow Branch of the Salvation Army v Russia*, App no 72881/01 (ECHR, 5 Oct 2006).

re-registration. The Justice Department based its argument for the refusal on the fact that there was an insufficient number of founding members and that there were no documents to prove that the members were lawfully resident in Russia. It also held that the founders of the organisation were foreign nationals, and therefore the organisation was ineligible for re-registration under Russian law. When the branch challenged this refusal before the domestic courts, the Justice Department adduced, as a very curious afterthought, a further argument, namely that the branch was a 'paramilitary' organisation, contending that it was not legitimate to use the word 'army' in the name of a religious organisation[27]. A chamber of the First Section was of a totally different view. As to the 'foreign origin' of the applicant branch, the ECtHR found no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities. The court noted in particular that the Religious Act expressly provided for registration of Russian religious organisations subordinate to a central governing body located abroad. Therefore, this ground for refusal had no legal basis.[28]. As to the branch's paramilitary nature, the court's comment on the state's objection is almost caustic:

> 'The Court points out that, according to its constant case-law, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate … It is indisputable that, for the members of the applicant branch, using ranks similar to those used in the military and wearing uniforms were particular ways of organising the internal life of their religious community and manifesting The Salvation Army's religious beliefs. It could not seriously be maintained that the applicant branch advocated a violent change in the State's constitutional foundations or thereby undermined the State's integrity or security. No evidence to that effect had been produced before the domestic authorities or by the Government in the Convention proceedings. It follows that the domestic findings on this point were devoid of factual basis'[29].

The ECtHR found a violation of Article 11 read in light of Article 9[30], and held that it was not necessary to examine the issue under Article 14 of the Convention.

[27] There was no suggestion, however, that singing Baring-Gould's *Onward, Christian Soldiers* was illegal.

[28] *Moscow Branch of the Salvation Army v Russia*, App no 72881/01 (ECHR, 5 Oct 2006), §§ 81 to 86.

[29] Ibid, § 92.

[30] See, in a similar vein, the more recent judgment delivered by a chamber of the First Section of the ECtHR in the case *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy) v the former Yugoslav Republic of Macedonia*, App no 3532/07 (ECHR, 16 Nov 2017), and in particular §§ 106 to 120.

III. Intra- and inter-denominational conflicts

The key word here is 'neutrality', not necessarily the extreme neutrality associated with the French notion of *laïcité*[31], but the neutrality that must ensure that the state remains impartial and does not lend its support to one side or the other. While the ECtHR has always maintained that, where several religions co-exist, it may be necessary to place some restrictions on the external manifestation of religious belief —the latest example being the case of *S.A.S. v France*[32]— it has also repeatedly held that the state has a positive duty to remain neutral and impartial. In *Metropolitan Church of Bessarabia and Others v Moldova*, to which reference has already been made[33], the ECtHR held that in taking the view that the applicant church was not a new denomination (but a schismatic group) and in making its recognition dependent on the will of a recognised ecclesiastical authority, the Metropolitan Church of Moldova, the respondent government had failed to discharge its duty of neutrality and impartiality. The respondent government had argued that they had shown 'tolerance' to the new church; the court, however, did not accept that this was a valid or sufficient substitute for recognition, since recognition alone could confer rights on the applicants. Moreover, the ECtHR noted that on a number of occasions the applicants had been unable to defend themselves against acts of intimidation, since the authorities had ruled that only 'lawful activities', in the sense of activities that were legally recognised, could enjoy legal protection. Lastly, it noted that before recognising other religious denominations, the authorities had not applied the same criteria they made use of in order to deny recognition to the applicant church, and that no justification had been put forward by the Moldovan government for this difference in treatment[34]. Particularly striking are §§ 115 and 116:

> 'The Court has also said that, in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected … However, in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial … What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the [principal] characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome … Accordingly, the role of the authorities in such circumstances is not

[31] See, for instance, *Ebrahimian v France*, App no 64846/11 (ECHR, 26 Nov 2015).

[32] *S.A.S. v France*, App no 43835/11 (ECHR, GC, 1 Jul 2014).

[33] *Metropolitan Church of Bessarabia and Others v Moldova*, App no 45701 (ECHR, 13 Dec 2001). Also see footnote 9 above.

[34] As already noted, in this case the ECtHR was of the view that it was not necessary to examine the case from the standpoint of Article 14 of the convention taken in conjunction with Article 9.

> to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other …'.

Other instances in which the ECtHR found the state to have failed in its duty of neutrality in religious matters by taking sides in internal disputes, and, consequently, found a violation of Article 9, include *Miroļubovs and Others v Latvia*[35] (which concerned a split in the Riga Grebenščikova Old Orthodox Parish) and *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria*[36]. This last-mentioned case, vaguely reminiscent of the struggles between popes and anti-popes, concerned a dispute that at the time was tearing the Bulgarian Orthodox Church apart. In 1992, the government declared invalid the election of Patriarch Maxim to lead the Church in Bulgaria and instead appointed temporary leadership, the 'alternative synod'. The dispute before the Strasbourg Court was not so much concerned with the refusal to recognise a religious organisation as with the direct interference by the state in the internal affairs of the religious community torn apart between two hierarchies, each of which considered the other as non-canonical on the basis of arguments that could not be held to be either fabricated or unreasonable. The ECtHR held that by helping one of the parties to the dispute to obtain exclusive power of representation and control over the affairs of the entire Orthodox community, side-lining the other party and sending in the police to evict the adherents of the applicant synod from the places of worship they were occupying, the Bulgarian government had failed in its obligation of neutrality:

> 'It is not the Court's task, and indeed it is not the task of any authority outside the Bulgarian Christian Orthodox community and its institutions, to assess the validity under canon law of the opposing claims to legitimacy made by the rival leaderships. In the examination of the events under the Convention, however, the relevant fact is that by 2002, when the State authorities undertook the impugned action to "unite" the Church, it had been *de facto* and genuinely divided for more than ten years and had two rival leaderships, each of them considering, on the basis of arguments which were not frivolous or untenable, that the other leadership was not canonical … In such conditions, the legitimate aim of remedying the injustices inflicted by the unlawful acts of 1992 and the following years, could not warrant the use of State power, in 2003, 2004 and afterwards, to take sweeping measures, imposing a return to the *status quo ante* against the will of a part of the religious community … In the Court's opinion, in the circumstances that obtained in the Bulgarian Orthodox Church in 2002 and the following years, Article 9 of the Convention imposed on the State authorities a duty of neutrality'[37].

[35] *MiroĮubovs and Others v Latvia*, App no 798/05 (ECHR, 15 Sept 2009).

[36] *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria*, App nos 412/03 and 35677/04 (ECHR, 22 Jan 2009).

[37] Ibid, §§ 137 to 139.

The year 1992 seems to have been a particularly busy one for the Directorate of Religious Denominations of Bulgaria: it annulled not only the election of Patriarch Maxim but also that of Nedim Gendzhev as chief mufti of the Muslims in Bulgaria[38]. The national authorities later proceeded to organise a Bulgarian Muslim Unification Conference, ostensibly to put an end to the split in the Muslim community. The state intervened very actively in both the preparation and in the running of the conference, particularly where the selection of the participants was concerned. In effect, the Bulgarian authorities were exerting pressure on the split community with a view to forcing it to accept a single leadership instead of merely noting the differences and continuing to act as mediators in a spirit of dialogue. In the words of the ECtHR:

> 'In the present case, the relevant law and practice and the authorities' actions … had the effect of compelling the divided community to have a single leadership against the will of one of the two rival leaderships … As a result, one of the groups of leaders was favoured and the other excluded and deprived of the possibility of continuing to manage autonomously the affairs and assets of that part of the community which supported it … The Government have not stated why in the present case their aim to restore legality and remedy injustices could not be achieved by other means, without compelling the divided community under a single leadership. It is significant in this regard that despite the "unification" process in 1997 the conflict in the religious community continued …'[39].

The need for such measures had thus not been established. The ECtHR went on to point out that the measures undertaken by the state had, in any event, not been successful, since the conflicts in the community had continued. While the authorities did enjoy a certain 'margin of appreciation' in determining what measure should be taken in the circumstances, in the instant case the authorities had exceeded that margin. On the other hand, when in the long-standing dispute between the Greek-Catholic Parish and the Orthodox community in the tiny commune of Pesceana (in Romania)[40] it was shown to the satisfaction of the ECtHR that the state authorities had remained neutral and had done everything possible to assist the Catholics in using the only cemetery in the village —the cemetery was administered by the Orthodox Church— and the bailiff had only backed down from enforcing a court order when he was confronted by

[38] *Supreme Holy Council of the Muslim Community v Bulgaria*, App no 39023/97 (ECHR, 16 Dec 2004); also see footnote 7 above. The applicant in this case was representing the side opposed to that of Mr Hasan and Mr Chaush (see footnote 18 above). In effect, the Bulgarian government ended up being sued in Strasbourg by both parties.

[39] *Supreme Holy Council of the Muslim Community v Bulgaria*, App no 39023/97 (ECHR, 16 Dec 2004), §§ 94, 96-97.

[40] *Greek Catholic Parish Pesceana and Others v Romania*, App no 35839/07 (ECHR, (dec.) 14 Apr 2015).

a total lack of co-operation (and mild hostility) from the local Orthodox parishioners, it found no violation of Article 9[41]:

> 'The Court observes that the conflict concerning the use of the cemetery started in January 2005, when the community split into two faiths. The applicants obtained a favourable court order on 6 September 2005 and shortly thereafter instituted enforcement proceedings. The bailiff took prompt action and sought assistance from the police, which was granted. Furthermore, given the signs of violence between the two communities, the authorities correctly assessed the risk of escalation. Their decision not to continue the enforcement proceedings thus appears reasonable … The authorities took steps to accommodate the newly formed religious community by allocating funds to build a church and by creating a new cemetery for all faiths. The applicants did not contest the reality of those measures. Despite signs of animosity between the two religious communities, it appears that the Greek-Catholics currently have access to the cemetery and that no new incidents have been reported to the authorities … In this context, the Court considers that the State authorities acted diligently, with adequate means and in due time to assist the applicants. In addition, the State duly complied with its obligation to act as a neutral and impartial organiser of the exercise of the two religions in the community'[42].

IV. Religious associations v their own members

Article 9 of the ECHR does not secure any right to dissent within a religious organisation —this would fall under Article 10. Respect for the autonomy of religious communities implies, in particular, that the state should accept the right of such communities to react, in accordance with their own internal canons, rules and other interests, to any dissent or dissident movement, in much the same way as a member of any non-religious organisation or club will be dealt with according to the statutes of that organisation or club. It has thus been held by the ECtHR that Article 9 does not guarantee to members of a religious community the right to choose the leaders of their community or to oppose decisions by the religious organisation concerned regarding the election and appointment of ministers or pastors[43]. Where a member or, for that matter, a number of members disagree on administrative or doctrinal matters with the religious organisation, the religious freedom of that member or of those members is guaranteed by the freedom to leave the organisation or community in question. A decision of the old Commission on Human Rights, *X. v Denmark*[44], can be said to have sealed this issue:

[41] In effect, the application was declared inadmissible as being manifestly ill-founded.

[42] *Greek Catholic Parish Pesceana and Others v Romania*, App no 35839/07 (ECHR, (dec.) 14 Apr 2015), §§ 44, 46-47.

[43] *Kohn v Germany*, App no 47021/99 (ECHR, (dec.), 23 Mar 2000; *Sotirov and Others v Bulgaria*, App no 13999/05 (ECHR, (dec.), 5 Jul 2011.

[44] *X. v Denmark*, App no 7374/76, Commission decision 8 Mar 1976.

> 'A church is an organised religious community based on identical or at least substantially similar views. Through the rights granted to its members under Art. 9, the church itself is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters. Further, in a State church system its servants are employed for the purpose of applying and teaching a specific religion. Their individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings. In other words, the church is not obliged to provide religious freedom to its servants and members, as is the State as such for everyone within its jurisdiction. The Commission therefore holds that the freedom of religion within the meaning of Art. 9(1) of the Convention does not include the right of a clergyman, in his capacity of a civil servant in a State church system, to set up conditions for baptising, which are contrary to the directives of the highest administrative authority within that church, i.e. the Church Minister. It follows that the applicant's above complaint does not fall within the scope of Article 9 of the Convention'.

V. Religious associations v their employees

Here the debate widens and the issues get more complicated, as aspects of domestic (i.e. state) law tend to intertwine with the canons, rules and statutes of the organisation in question. Until recently, the two leading cases both came from Germany, and they highlight the importance that the ECtHR attaches to the way in which the domestic courts handle issues involving the dismissal of employees of religious associations. They are *Obst v Germany* and *Schüth v Germany*, both decided on 23 September 2010 by a chamber of the Fifth Section of the ECtHR. Although dealing primarily with Article 8 of the Convention, the religious backdrop is inescapable. In a nutshell, in both cases we have the right of a religious community to manage its own affairs, on the one hand, and an employee's right to respect for their private life, on the other.

Mr Obst was a senior member (an elder) of the Mormon Church in Germany and was employed by that church as director of public relations for Europe. At some point in time, his immediate superior became aware of the fact that his matrimonial life was in crisis and that he had committed adultery. A few days later, he was dismissed without notice. He was subsequently also excommunicated by his church. He applied to the German labour courts, and they, in essence, held that his dismissal was justified because, through his behaviour, he had failed to observe the contractual obligations he had assumed when signing his employment contract, foremost being his duty of loyalty to the Mormon community. The domestic courts also held that his dismissal was necessary to maintain the credibility of the church in view of the fact that he occupied a senior post (director of public relations for Europe) and was also an elder of the church and therefore knew very well what the consequences would be in the event of an extramarital affair. Consequently, no warning or notice was necessary for his dismissal.

Mr Schüth, on the other hand, was a Catholic and had been the organist and *maestro di cappella* for the Catholic Parish of St Lambert in Essen since 1980. In 1994, he separated from his wife and a year later began to cohabit with a female friend. One of his sons, who attended a nursery school, revealed to his classmates that his father was soon going to have another baby boy, and from there the information made its way up to the parish priest. Schüth was summoned by the dean of the parish, and after a meeting of the parish council, he was dismissed from his post. After an interminable series of referrals from one labour court to another, the German Federal Constitutional Court in July 2002 confirmed the judgment of the Federal Labour Court to the effect that the dismissal was justified.

Both men applied to the ECtHR. At face value, one might assume that the outcome in Strasbourg would have been the same in both cases. But it was not. Why did the Fifth Section find a violation of Article 8 in the case of Schüth but not in the case of Obst? The reason is quite simple and perfectly legitimate. In the *Obst* case, the German labour courts had examined in great detail all the circumstances of the case, including the contrasting rights of the Mormon community, on the one hand, and of the applicant, on the other. They had, as already noted, given particular weight to Obst's high-profile and delicate role in that community. In the case of Schüth, on the other hand, the domestic tribunals —probably exhausted, if not, indeed, exasperated by the numerous referrals on procedural matters from one court to another— had, on the merits, limited themselves to noting that the applicant had not adhered to his employment contract in respect of an obligation of a general nature. They never examined or took into consideration the fact that Schüth was not employed in a catechetical role, or as a counsellor or in some other role intimately linked with the faith of the parish. They did not consider the effect that his dismissal would have on his family or the fact that throughout the 14 years in which he had served as organist and choir master, he had never challenged or criticised the church's teaching on marriage. Reading the judgment in the *Schüth* case, the almost inescapable conclusion is that, had the domestic courts taken into consideration and weighed all these factors, a decision on their part that the dismissal had been justified would, in all likelihood, have been upheld by the ECtHR and its finding would also have been of non-violation of Article 8.

Two more recent Grand Chamber judgments —*Sindacatul 'Păstorul Cel Bun' v Romania*[45] and *Fernández Martínez v Spain*[46]— shed further light on this somewhat controversial issue of the dismissal of employees by religious associations. Again, in both these cases, the issue was examined not under Article 9 but under Articles 11 and 8, respectively. In the Romanian case, the ECtHR had to decide whether the refusal

[45] *Sindicatul 'Păstorul Cel Bun' v Romania*, App no 2330/09 (ECHR, GC, 9 Jul 2013).
[46] *Fernández Martínez v Spain*, App no 56030/07 (ECHR, GC, 12 Jun 2014).

to register a trade union formed mainly by priests of the Romanian Orthodox Church (most of whom fell under the jurisdiction of the Archdiocese of Craiova) but that also included some lay people was in breach of Article 11. The first-instance domestic court had allowed the registration, notwithstanding the objections of the archdiocese, which had submitted that the establishment of the union without the archbishop's consent and blessing was prohibited by the Statute of the Romanian Orthodox Church. The archdiocese appealed. Relying on Article 29 of the Romanian Constitution, it contended that the principle of religious freedom could not be overridden by other constitutional principles such as freedom of association and trade-union freedom. The appellate court agreed, and the registration of the union was revoked.

The ECtHR began by observing that the duties discharged by the union's members entailed many of the characteristic features of an employment relationship. Under the bishop's leadership and supervision, they carried out the tasks assigned to them, namely performing liturgical rites, maintaining contact with parishioners, teaching, managing parish assets and selling liturgical items. Moreover, domestic law provided for a specific number of posts for members of the clergy and laity that were largely funded by the state and local-authority budgets, and the post-holders' wages were set with reference to the salaries of Ministry of Education employees. The Romanian Orthodox Church paid employer's contributions in respect of the wages paid to its clergy, and priests paid income tax, contributed to the national social-security scheme and were entitled to all the welfare benefits available to ordinary employees: health insurance, a pension on reaching the statutory retirement age and unemployment insurance. These were, therefore, features in favour of Article 11 § 1 and therefore in favour of the right 'to form and join trade unions'.

However, a particular feature of the work of members of the clergy was that it also pursued a spiritual purpose and was carried out within a church enjoying a certain degree of autonomy. The question was therefore whether such particularities were sufficient to remove the relationship between members of the clergy and their church from the ambit of Article 11. While acknowledging their special circumstances, the court considered that members of the clergy fulfilled their mission in the context of an employment relationship falling within the scope of Article 11 of the convention. Accordingly, the refusal to register the applicant union amounted to interference by the respondent state with the exercise of the rights enshrined in that article. Such interference had to be 'prescribed by law', to pursue one or more legitimate aims and to be 'necessary in a democratic society'.

The court agreed with the respondent government that the interference complained of had a basis in the provisions of the Statute of the Romanian Orthodox Church and had pursued a legitimate aim under Article 11 § 2, namely 'the protection … of the rights and freedoms of others', specifically those of the Romanian Orthodox Church as an institution or organisation. Having regard to the arguments put forward before the domestic courts by the representatives of the Archdiocese of Craiova, the

ECtHR considered that it was reasonable for the second-instance domestic court to take the view that a decision to allow the registration of the trade union would create a real risk to the church's autonomy. In Romania, the principle of the autonomy of religious communities was the cornerstone of relations between the state and recognised religious denominations. Members of the Romanian Orthodox clergy performed their duties by virtue of their ministry and their undertaking towards the bishop. Having regard to the aims set forth by the union in its constitution, the ECtHR considered that the judicial decision refusing to register the union with a view to respecting the autonomy of religious denominations did not appear unreasonable, particularly in view of the state's role and duty in preserving such autonomy. Of particular interest is what is stated in § 159 of the judgment, which underscores the delicate interplay between the freedom of association and the autonomy of religious associations that underpins Article 9:

> 'Where interferences with the right to freedom of association are concerned, it follows from Article 9 of the Convention that religious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and that this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake'.

The *Fernández Martínez* case in reality follows that of *Obst*, even if the Grand Chamber thought fit to express itself at considerable length and with a certain amount of circumlocution. Here we have the non-renewal of the employment contract of the applicant, a laicised Catholic priest who had obtained the necessary dispensation from celibacy from the Holy See and was married. He had previously been employed as a teacher of Catholic religion and ethics at a state secondary school. The non-renewal of his contract had been based on a memorandum from the local diocese mentioning that press coverage of his family situation and his belonging to the Movement for Optional Celibacy for priests had caused a scandal within the meaning of canon law. The ECtHR held in particular[47] that it was not unreasonable for the church to expect particular loyalty from religious education teachers, since they could be regarded as

[47] *Fernández Martínez v Spain*, App no 56030/07 (ECHR, GC, 12 Jun 2014), § 137.

its representatives. Any divergence between the ideas to be taught and the personal beliefs of a teacher could raise a problem of credibility when the teacher actively challenged those ideas. The court also noted that a less restrictive measure for the applicant would certainly not have had the same effectiveness in terms of preserving the credibility of the church; moreover, the consequences of the decision not to renew his contract did not appear to have been excessive (the proportionality requirement) in the circumstances of the case, having regard in particular to the fact that the applicant had knowingly placed himself in a situation that was completely at variance with one of the church's precepts. Finally, the ECtHR found that the Spanish courts had sufficiently taken into account all the relevant factors and weighed up the competing interests in a detailed and comprehensive manner:

> 'As to the Church's autonomy, it does not appear, in the light of the review exercised by the national courts, that it was improperly invoked in the present case, that is to say that the Bishop's decision not to propose the renewal of the applicant's contract cannot be said to have contained insufficient reasoning, to have been arbitrary, or to have been taken for a purpose that was unrelated to the exercise of the Catholic Church's autonomy'[48].

Finally, the Grand Chamber judgment of *Károly Nagy v Hungary*[49] is authority for the proposition that when, under domestic law, issues involving 'internal laws and rules of [a] church' are relegated to be decided exclusively by ecclesiastical courts, the fact that the minister of religion in question does not have access to the domestic courts to enforce a pecuniary claim against his church does not entail a violation of Article 6 of the ECHR. The ECtHR noted that in the applicant's case all the national courts had discontinued the proceedings he had initiated, holding that his claim could not be enforced in national courts since his pastoral service (in the Reformed Church of Hungary) and his letter of appointment on which that service was based had been governed by ecclesiastical and not by state law[50]. However, the ECtHR also sounded a note of caution against unfettered discretion by religious associations:

> 'Moreover, the Court is satisfied that section 15 (2) of the 1990 Church Act was limited to issues involving "internal laws and rules of the church" … and did not provide churches or their officials with unfettered immunity against any and all civil claims. To the contrary, as demonstrated by the example of the Supreme Court's guiding judgment (referred to by the Government …), other claims, such as those involving the protection of personality rights, could be lodged against church officials since they did not concern "internal laws and rules of a church" within the meaning of Article 15 (2) of the 1990 Church Act'[51].

[48] Ibid, § 151 *in fine*.
[49] *Károly Nagy v Hungary*, App no 56665/09 (ECHR, GC, 14 Sept 2017).
[50] Ibid, § 72.
[51] Ibid, § 74.

VI. Tentative conclusions

The autonomy of religious associations has never been placed in doubt in the case law of the ECtHR. On the contrary, it has been held to be pivotal for pluralism in a democratic society, thus overriding the popular (and false) idea that democracy means mainly, if not exclusively, free elections that make the will of the majority prevail over that of the minority. Of the various matters that fall within the ambit of Article 11, that of the autonomy of religious associations can be considered to have been, to date, the least controversial. Closely associated with the notion of a religious association's autonomy is that of one of the purposes, if not the very *raison d'être*, of the existence of such associations, namely the spreading of a particular belief. Here, the court's approach has been more nuanced, distinguishing between preaching or proper proselytism[52] and improper proselytism[53]. This notwithstanding, the passage in *Kokkinakis* guaranteeing the right to proper proselytism has never been challenged or put in doubt:

> 'According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter'[54].

This right to properly proselytise clearly belongs not only to individual members but also to religious associations.

The ECtHR has also recognised that where a state (or official) church exists, this may be granted special privileges, particularly in fiscal matters, provided nothing is done that impinges upon the rights and freedoms of others. On the other hand, even in countries that have a state church, a decision taken by that church in fields for which it is responsible does not incur the state's responsibility under the convention. In a rather obscure case decided by the old Commission on Human Rights towards the end of its existence, *Finska Församlingen i Stockholm and Hautaniemi v Sweden*[55], a complaint had been lodged by a Finnish-language parish of the Church of Sweden[56] concerning a decision taken by the Assembly of the Church prohibiting it from using the liturgy of the Finnish Lutheran-Evangelical Church and imposing the use of the Swedish liturgy translated into Finnish. The commission held that the church and

[52] *Kokkinakis v Greece*, App no 14307/88 (ECHR, 25 May 1993).

[53] *Larissis and Others v Greece*, App no 140/1996/759/958-960 (ECHR, 24 Feb 1998), § 45.

[54] *Kokkinakis v Greece*, App no 14307/88 (ECHR, 25 May 1993), § 31.

[55] *Finska Församlingen I Stockholm and Hautaniemi v Sweden*, App no 24019/94, Commission decision 11 Apr 1996.

[56] Until 2000, it was a state church.

its parishes were 'non-governmental organisations' and that the state could not be held responsible for an alleged violation resulting from the decision of the assembly. Moreover, given that the applicant parish was not prevented from leaving the Church of Sweden, the respondent government had in no way failed in its obligation to protect the parish's freedom of religion.

As Harris, O'Boyle and Warbrick observe in the third edition of their work *Law of the European Convention on Human Rights*[57]:

> 'Article 9 may have been criticised in the past for being of only "limited importance", but today such a characterisation is no longer accurate. With matters pertaining to religion and belief of increasing significance in European public life, the last two decades have witnessed the development of an influential and significant body of case law on Article 9. That said, in some areas the Court has seemingly been loath to make reference to Article 9. Thus, for example, on a range of issues, including the regulation of religious broadcasts, the legal personality of churches, conscientious objection to trade-union membership, the legality of blasphemy laws, and inter-faith child custody disputes, the Strasbourg judges have chosen not to utilise Article 9, preferring instead to adjudicate on the basis of other Convention provisions. It is of course perfectly understandable that the Court, already burdened with a heavy case load, may simply quite wish to resolve the case before it as quickly as possible - and that this may be best achieved by avoiding having to examine an article that is as (frequently) controversial as Article 9. But, equally, such an approach is regrettable, for it may mean leaving some key issues unresolved, as well as potentially limiting the opportunities for Article 9 being interpreted in such a way as to realize its full potential'[58].

[57] D. Harris *et al.*, *Law of the European Convention on Human Rights* (3rd[rd] edn, Oxford, Oxford University Press, 2014).

[58] Ibid, pp. 611-612.

LEGISLATION ON RADICALISATION AND EXTREMISM IN EU MEMBER STATES AND ITS EFFECTS ON FREEDOM OF RELIGION

Agustín Motilla[1]

I. Introduction

Violence as a means of achieving political aims has been a constant throughout human history. Following the French Revolution, this long-standing social scourge also became a regular part of politics, with many believing that social changes could be achieved only through violence, or, as Lenin pointed out, 'A revolution without firing squads is meaningless'. Violence is also present in nationalism and colonialism and in the secular ideologies of anarchism and communism. The radicalisation of these doctrines led to massacres in the contemporary age. They manifested themselves, via an action-reaction process, in the First and the Second World Wars.

The 21st century began with a kind of violence that seemed to have been completely eradicated following the 16th and 17th centuries, i.e. religious violence[2]. This violence is partly caused by religious radicalisation: a process by which individuals or groups carry out violence against society as a way of achieving, through force, the changes that they desire[3]. Religious radicalisation can be found in every religion: Christianity, Buddhism, Hinduism, Sikhism, etc.[4] However, Islamic extremism and radicalisation have attained a special notoriety because of the frequency and cruelty of

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[2] The conflicts in Northern Ireland and the former Yugoslavia were rooted in struggles between different religious communities whose aim was independence and the building of their own state.

[3] P. Bramadat, 'The Public, the Political and the Possible: Religion and Radicalization in Canada and Beyond' in P. Bramadat and L. Dawson (eds), *Religious Radicalization and Securitization in Canada and Beyond* (Toronto, University of Toronto Press, 2014), p. 3 ff.

[4] E. Keeble, 'Immigration, Civil Liberties and National/Homeland Security' (2005) 60 *International Journal*, p. 259.

the actions of radicalised Muslims. We can certainly claim that, since 9/11, religious terrorism and jihadism have frequently been used as equivalent terms[5].

As others have stated[6], we must emphasise the religious essence of this kind of terrorism. The goals of Al Qaeda and other terrorist groups are to conduct a war against Zionism or Christianity and, general speaking, against Western values, which they consider anathema to Muslim values[7], meaning that they must therefore be replaced by Islamic principles. Their speech is certainly religious, but it has a remarkable political impact: both religious and political aspects are unified in Islam, where there has not been a secularisation process, as has taken place in Christian countries. It is true that other elements, like economic and social discrimination against Muslims, may also contribute to creating an atmosphere where future violent jihadists are born and raised. However, this does not hide their real and fundamental motivation, i.e. imposing Islam on everyone throughout the world as the one true religion.

Numerous security measures have been adopted in response to the threat of terrorism. These fall into two different classifications: internal measures, i.e. measures aimed at terrorist groups acting inside countries; and external measures, i.e. conducting a war against those countries that are suspected of protecting or feeding terrorism, such as in Afghanistan and Iraq in the past. This chapter focuses on the former measures, i.e., the internal ones.

Countries that have been hit by terrorist attacks have used that fact to adopt extraordinary measures in response, with the aim of eradicating terrorism. Generally speaking, these measures focus on increasing government powers of surveillance of individuals or groups operating inside the country —their communications, financial activities, banking information— as well as in the field of immigration. Consequently, several fundamental rights have been affected, including the right to free speech, the inviolability of one's residence, the right to privacy —especially communications— and the freedom of assembly and, due to the nature of the goals of the groups under

[5] It should also be pointed out that in the 1980s and the 1990s some religious cults provoked terrorist attacks, like the one carried out in the Tokyo subway by the so-called Supreme Truth.

[6] Bramadat, 'The Public', p. 14 ff.; J. Cesari, 'Introduction' in J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State* (Aldershot and Burlington, Ashgate, 2006), p. 4; W. C. Durham and B. D. Liggett, 'The Reaction to Islamic Terrorism and the Implications for Religious Freedom after September 11: A United States Perspective' (2006) 1 *Derecho y Religión*, p. 50; I. Reader, 'Beating a Path to Salvation: Themes in the Reality of Religious Violence' in P. Bramadat and L. Dawson (eds), *Religious Radicalization and Securitization in Canada and Beyond* (Toronto, University of Toronto Press, 2014), p. 57-58.

[7] The name of the main terrorist group in Nigeria is Boko Haram, which literally means 'Western education is a sin'. They also attack Islamic countries because, in their opinion, their governments have betrayed Sharia principles. See R. Mazzola, 'Religion and Security in Europe after September 11' (2006) 1 *Derecho y Religión,* pp. 21-22.

suspicion, i.e. jihadists, the right to religious freedom as well. This chapter will take a look at these measures in more detail.

In addition to direct security measures against terrorism, some countries have adopted other, less specific measures that consider Islam as a whole to be a threat to Western values. Some anti-Islamists claim that the social presence and ideology of Islam —a fanatical, violent and anti-liberal religion— must be restricted if not eradicated. This claim contradicts Christianity with Islam similarly to the views of Al Qaeda. It is present in the theory of a clash of civilisations[8], a thesis supported by Europe's extreme-right parties and by some high-ranking government officials, e.g. former US President George W. Bush, who, on 16 September 2001, described the war against terrorism as a new 'crusade', and thus the president, just like American evangelical fundamentalists, expressed his conviction that 9/11 was an attack on America —a country blessed by God— carried out by the external threat of Islam, thereby reviving an episode from the Middle Ages[9].

By taking this approach, the plurality of Islam is denied. It claims that all Muslims, despite their nationality, ethnicity or beliefs, represent, as a whole, a potential threat to the Western way of life. It is used to justify restrictive policies against the 'visualisation' of Islam —such as the prohibition of some Islamic garments or mosques and minarets— or restrictive measures against immigration by Islamic true believers.

II. General anti-terrorism measures: laws, surveilance and immigration control

UN Security Council Resolution 1373, adopted days after 9/11[10], allows countries to adopt various measures to fight terrorism, such as denying asylum or residence to those suspected of terrorist acts; freezing funds belonging to organisations suspected of supporting, directly or indirectly, terrorist groups; monitoring financial transactions carried out by such groups, etc. The resolution also called for an active exchange of information between states in knowledge of the fact that terrorist attacks are mainly perpetrated by foreign countries, groups or individuals.

New anti-terrorism laws were enacted in Western countries immediately, changing old ones or promulgating new texts. The first laws adopted in 2001 in the United

[8] S. Huntington, *The Clash of Civilizations and the Remaking of a New Order* (New York, Simon and Schuster, 1996).

[9] S. Norton and A. Upal, 'Narratives, Identity, and Terrorism' in P. Bramadat and L. Dawson (eds), *Religious Radicalization and Securitization in Canada and Beyond* (Toronto, University of Toronto Press, 2014), p. 293 ff.

[10] On 29 September 2001.

States (the Patriot Act)[11], the United Kingdom (Terrorist Act)[12], and Canada (Anti-Terrorist Act) were followed by others in France, Germany, Italy and Spain.

As mentioned, the general aim of these laws was to expand governmental powers —and to weaken the oversight powers of the judiciary[13]— in order to prevent acts of terrorism: giving the police or security forces special powers to monitor individuals or groups without the approval of a judge. Governmental powers are expanded by the discretionary determination (and vague definitions) of the main objective of an investigation: an 'individual terrorist or terrorist action' can be any act carried out by an individual who could be a threat to society or a danger to national security, in an active or a passive way, with the goal of achieving political, religious or ideological aims[14].

Actions permitted in Western security laws can be classified in two different categories.

Public authorities were given extraordinary powers to investigate or detain individuals suspected of committing or planning to commit an act of terrorism.

The US Patriot Act, adopted several months after 9/11, went much further.[15] In addition, it has also served as a model for laws in other Western countries. On the issue of surveillance, the Patriot Act gives the US government the power to monitor, without restriction, personal communications, especially online; bank accounts and transactions; and also to find out what books readers check out of libraries. Far more exceptional are the range of measures affecting free movement and inviolability of residence. Security forces can record what is happening inside people's homes, take

[11] The USA Patriot Act is the short name of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. In 2002, the law was complemented by the Homeland Security Act.

[12] These laws have been amended several times. In 2015, the Patriot Act was replaced by the Freedom Act, which is basically the same law. The British Antiterrorist Law was amended in 2003, 2006, 2008 and 2013. Today, it is the Counter-Terrorism and Security Act of 12 February 2015.

[13] As Mazzola points out in reference to British laws, the substantial feature of the legislation is 'a preference for the Government to act *de facto* to defend public security in the execution of its duty to avoid the destruction of the State'. See R. Mazzola, 'Religion and Security in Europe', p. 13.

[14] Section 1 of the British Act. Or, as the Patriot Act defines this in Section 802, terrorist acts are 'acts dangerous to human life that are a violation of the criminal laws of the U.S. or any State' that 'appear to be intended to influence the policy of the government by intimidation or coercion'. Every protest with some kind of violence, e.g. blocking traffic, could be a violation of the Patriot Act. See Durham and Liggett, 'The Reaction', p. 53.

[15] See, among others, J. Cesari, 'Islam, Secularism and Multiculturalism after 9/11: A Transatlantic Comparison' in J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State* (Aldershot and Burlington, Ashgate, 2006), p. 40 ff.; M. Monshipouri, 'The War on Terror and Muslims in the West' in J. Cesari (ed), *Muslims in the West after 9/11: Religion, Politics and Law* (London and New York, Routledge, 2010), p. 57; J. I. Smith, 'Islam in America' in J. Cesari (ed), *Muslims in the West after 9/11: Religion, Politics and Law* (London and New York, Routledge, 2010), pp. 32-33.

items and erase the contents of personal computers without judicial authorisation or even the resident's knowledge. They can also arrest citizens indefinitely on the generic grounds of being suspected of terrorist acts. Those detained do not have the right to be informed of the evidence against them if said evidence is considered secret or affects national security. As Stern has pointed out, 'The Patriot Act … [is] a loaded gun lying on the table, aimed at the heart of American democracy, ready for the hand of anyone … who would fire it'[16].

European anti-terrorism laws are similar but do not go as far as the Patriot Act. We will consider three examples below[17]. In 2005, a new chapter was added to the French Security Act of 2001. In countering terrorism, police have the right to unlimited access to individuals' and groups' financial, electronic and postal information. Information may be arbitrarily tracked and stored without the knowledge of the interested party. The law also gives the police the power, without judicial authorisation, to search a residence while its occupants are out and to take items related to an investigation. The 29 July 2005 Act increases governmental powers in the effort to combat terrorism, allowing the relevant authorities to follow individuals suspected of radicalisation, and extremist associations and groups can be dissolved by a presidential decree.

The United Kingdom's Antiterrorism Act permits the surveillance of all kind of means of communication, as well as the freezing or seizing of funds suspected of being used for terrorist purposes. In addition, the authorities have the right to enter private residences, to set up surveillance equipment and to seize items of personal property. The police can arrest any individual who might be considered violent, who can then be detained without charge for up to 14 days[18]. At that point, they have to appear before a judge. The process before the courts involves serious limitations of personal freedom: information about the reason for the arrest and the grounds for the charges are not provided to the defence lawyer if they do not have the necessary security clearance[19]. A new 2005 law aimed at preventing terrorism introduced a new administrative category called 'control orders'[20], which can place certain obligations

[16] M. Stern, 'Civil Liberties Have Been Compromised by the Patriot Act' in A. Nakaya (ed), *America's Battle Against Terrorism* (New York, Thompson Gale, 2005), p. 103.

[17] See E. Brower, 'Immigration, Asylum and Terrorism: A Changing Dynamic, Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.9' (2003) 4 *European Journal of Migration and Law*, p. 402 ff.; J. Cesari, 'Securitization of Islam in Europe' in J. Cesari (ed), *Muslims in the West after 9/11: Religion, Politics and Law* (London and New York, Routledge, 2010), p. 20 ff.

[18] Following the 2006 amendment of the law, after seven days of police detention, a judge has to approve another seven days. Police can deny access to a lawyer in the first 48 hours of detention if allowing such access could affect the collection of evidence or alert other individuals suspected of having collaborated in terrorist acts.

[19] Mazzola, 'Religion', p. 33.

[20] Part IV, already developed by other antiterrorism laws.

on individuals suspected of radicalisation without arresting them: they can be subject to certain obligations such as localisation (individuals have to inform the police about their movements, and the police can subject the individual to surveillance); travel limitations; and restrictions on access to some zones, work and studies (individuals may not stay in some places, perform certain works or apply for certain studies). Control orders are issued by the Home Department and can be appealed before the courts. The law also obliges some institutions, including schools and universities, to report all cases of suspected radicalisation based on observations of supposed extremist or fanatical conduct.

In Italy, the anti-mafia law of 1965 is applied, with certain amendments that increase police powers to fight terrorism. These expanded powers allow the police to arrest people suspected of participating in violent acts, to search private residences for evidence, to monitor bank accounts and to freeze funds that are suspected of being used to finance terrorism.

Security measures have also affected immigration policies. From the European and US perspective, the entry of foreigners could affect internal security, as such people might be linked, directly or indirectly, to terrorist acts. Thus, the restriction of immigration flows poses a challenge to the survival of Western values. In this field, US legislation has once again provided a model for other Western laws. Nevertheless, these laws may encroach on fundamental rights in liberal democracies. In the Patriot Act, amended by the 2013 Act[21], individuals suspected of some kind of role in acts of terrorism can be deported. All that is required is the decision of a special court after a trial during which the defence counsel may not see evidence against their client because it is considered classified and could affect national security. Moreover, immigrants must register their address at a civil registry office and must declare any change of address. They could be arrested or deported if they fail to do this. The measure that with no doubt has the most profound effect on fundamental rights is the right to arrest and imprison indefinitely non-citizens who are reasonably suspected of being a threat to national security[22].

The restrictions[23] that are permitted in Europe are found in European Union law. The European Union's competencies in the areas of border control, asylum and immigration are shared with those of its member states. The European Union allows the

[21] See Cesari, 'Islam, Secularism and Multiculturalism after 9/11', p. 41 ff.; Keeble, 'Immigration', p. 368 ff.; Monshipouri, 'The War on Terror', p. 41.

[22] A government power that, as we will see further on, US courts have declared unconstitutional. The Council of Europe has also criticized US detentions of foreigners at Guantanamo Bay.

[23] See, among others, Brower, 'Immigration, Asylum and Terrorism', p. 300 ff.; Cesari, 'Islam, Secularism and Multiculturalism after 9/11', p. 43 ff.; J. M. Porras Ramírez, 'El sistema europeo común de asilo y la crisis de los refugiados. Un nuevo desarrollo de la globalización' (2017) 175 *Revista de Estudios Políticos*, p. 207 ff.

deportation of foreigners that individual states consider a danger to national security. The European Union has also made it more difficult for applicants to obtain asylum by tightening up the Geneva Convention requirements: only individuals who suffer direct persecution in their home country may be granted refugee status in Europe. Without doubt, the most polemical EU measure in recent years has been the mass expulsion of immigrants: an agreement with Turkey signed on 18 March 2016 allows for the expulsion of immigrants without checking their identity or determining the risk, if any, they might pose to national security.

Individual countries are implementing EU laws in a restrictive manner, giving extraordinary powers to governments: foreigners can be deported if their behaviour disturbs public order[24]; domestic laws have expanded the requirements that need to be met in order to enter some countries —those suspected of terrorist actions can be deported immediately— or to obtain a residence permit, even in the case of family reunification; and some countries have increased the amount of time that an individual can be held in legal temporary detention —in Italy, this period has been increased to 60 days. Furthermore, some countries have adopted measures similar to those found in the US Patriot Act: in Germany, there is a system of compulsory registration of immigrants in public files; and in the United Kingdom, foreigners suspected of involvement in terrorism —because they have been to a terrorist war zone— may be prohibited entry or detained indefinitely if the state secretary approves their detention. The first effect of European immigration policy has been to decrease entry, as well as asylum and residence applications[25]. Based on a quick consideration of these dispositions, one might conclude that European's immigration policy, influenced by the issue of terrorism, may encroach on important values, raises concerns about its compatibility with international law and infringes human rights, such as the right to a fair trial, the right to privacy and the right to freedom of movement.

III. Anti-terrorism laws and islam: the securitisation of muslims in western countries

Up to a certain point, it is logical that domestic security laws adopted by Western countries in recent years should be aimed at Muslims. This can be explained by the nature and aims of terrorist attacks of recent years, along with their links to jihadism. In some ways, the relationship between Western countries and Islam has changed from an element of foreign relations with Muslim countries to a domestic

[24] Mazzola wonders about the usefulness of expelling foreigners and the process of doing so not only from a human rights perspective but also from the point of view of utility: deportation merely shifts the problem from one country to another without solving it. See Mazzola, 'Religion', p. 31.

[25] In the Netherlands, for example, the number of applications has decreased to a quarter of the number received before the state put the restrictive measures in force.

matter: after the attacks in New York on 11 September 2001, Madrid in 2004, London in 2005, Paris in 2015, Nice in 2016 and Barcelona in 2017, to name but a few examples, governments became aware of the fact that they have to monitor Islam within their own borders as a necessary step in the preservation of Western values and living standards[26]. Given the exponential increase in the number of Muslims living in Western countries due to immigration and the high birth rate among the Muslim population, this problem will not be easy to resolve[27].

After 2001, an operation called Green Quest was carried out in the United States under the Patriot Act[28]. According to reports by the Attorney-General and the Justice Department, some 5,000 Muslims were arrested in 2002 and 3,000 more in 2003. About 2,000 immigrants, most from Arab countries, were imprisoned for months without access to a lawyer or even knowing the basis of the charges against them. Only 20 of them were formally accused of terrorism. Some of these detentions were extended indefinitely[29]. The fingerprints of all male immigrants from Islamic countries were taken. Muslim charity associations were subjected to surveillance, and more than 10 million USD of their funds was frozen because it was alleged that it was intended to finance terrorism. In relation to US immigration policy, thousands of people from Islamic countries were deported; others inside the country were detained because they were not properly registered[30]. Such measures have only expanded in the wake of President Donald Trump's decree banning entry to the United States of all citizens from countries suspected of supporting terrorism, including Iran, Iraq, Libya, Sudan, Syria and Yemen.

[26] See V. Amiraux, 'Discrimination and Claims for Equal Rights Among Muslims in Europe' in J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State* (Aldershot and Burlington, Ashgate, 2006), p. 29.

[27] There are about 7 million Muslim residents in the United States, 4.5 million in France, 3.5 million in Germany and 2.5 million in the United Kingdom.

[28] J. Cesari, 'Securitization of Islam in Europe' in J. Cesari (ed), *Muslims in the West after 9/11: Religion, Politics and Law* (London and New York, Routledge, 2010), p. 41 ff.; D. H. Davis, 'The USA Patriot Act and Counter-terrorism's Potential Threat to Religious Freedom' (2002) 44 *Journal for Church and State,* p. 67 ff.; Durham and Liggett, 'The Reaction to Islamic Terrorism', p. 55 ff.; J. Fox and Y. Akbaba, 'Secularization of Islam and Religious Discrimination: Religious Minorities in Western Democracies' (2015) 13 *Comparative European Politics*, p. 179 ff.; Monshipouri, 'The War on Terror', p. 57 ff.; Smith, 'Islam in America', p. 31 ff.

[29] In *Padilla v Bush*, the president of the United States ordered the arrest of a presumed jihadist fighter, who then spent three and a half years in a military prison. He later appeared before a civilian court, where he was charged with terrorism and conspiracy. In this and other cases, the Supreme Court stated that the executive decree allowing people to be detained for an unlimited time violated the constitutional right to a fair trial. See Monshipouri, 'The War on Terror', pp. 58-59.

[30] Two hundred Muslim immigrants were detained in California in 2002 for this reason. See J. Cesari, 'Islam, Secularism and Multiculturalism after 9/11', p. 42.

Anti-terrorism measures in Europe have followed a similar path, as they have also been aimed at monitoring the Muslim population[31]. The surveillance of activities at mosques has been especially intense in countries like the United Kingdom, France and Germany, including monitoring people who attend mosques[32] and the money they receive. Police surveillance has increased in the wake of recent terrorist attacks. More than 3,000 searches of Muslim homes, businesses and places of worship have taken place in France since November 2015, and a presidential decree declaring a state of emergency was prolonged until November 2017. Only five investigations of the 3,000 searches mentioned above, all in the area of Paris, were directly related to terrorist actions or groups[33].

IV. The enforcement of measures affecting the Muslim population not directly related to security: the implicit criminalisation of Islam

The picture presented above would be incomplete if other measures related to Islam were not explained: those adopted not to fight jihadist groups and their final aim of subverting the social order and imposing Islamic or Sharia law over Western values, but against Islam as a whole and its presence in Western society. From the point of view of this position, Islam is a religion and an ideology that is incompatible with the values and social standards of Western civilisation. This thesis is defended overwhelmingly by extreme-right parties in the United States and in Europe, but it is also reflected to a degree in the laws and proposals of European governments. In brief, they identify Islam with fundamentalist groups —Al Qaeda or ISIS— that support violence as a means of achieving their goals. In doing so, they ignore the pluralism that exists within this religion of more than 1.6 billion believers[34]. This 'bipolar' thesis[35], in which all Muslims are seen as fanatics entrenched in the past and enemies of other civilisations[36], has very important consequences.

[31] Ibid, p. 43 ff.; Fox and Akbaba, 'Secularization of Islam', p. 179 ff.

[32] More than 600 Muslims were arrested in Mannheim and Freiburg, Germany, in 2003. See Cesari, 'Islam, Secularism and Multiculturalism after 9/11', p. 45.

[33] T. Saeed, *Islamophobia and Securitization: Religion, Ethnicity and the Female Voice* (Switzerland, Palgrave Macmillan, 2016), p. 176.

[34] Four forms of Islam can be distinguished from the point of view of behaviour and organisation: moderate liberal, moderate traditionalist, *Salafist-shaykist* and Salafist jihadist. Only the last one can be linked to terrorist acts. See Mazzola, 'Religion', pp. 15-16.

[35] P. Mishra, *La Edad de la Ira. Una Historia Presente* (E. Rodríguez Halfter and G. Vázquez Rodríguez trans. Barcelona, Galaxia Gutemberg, 2017), p. 15.

[36] Supporting this position is Huntington's well-known thesis of 'the clash of civilizations', first published as a paper in *Foreign Affairs Review* in 1993 and, after that, in the book *The Clash of Civilizations and the Remaking of World Order*, published in 1996. In Huntington's view, recent wars have not been caused by national, ideological or economic factors but by differences between civilisations. In the context of the clash between them, he qualifies Islam as the most violent one. Under the title 'the

First, some Islamic acts or practices of a religious nature have acquired a political meaning; they are stereotypically seen as expressions of an ideology that undermines Western values. Headscarves and minarets are seen as symbols of a rampant Islam, of a 'Muslim tide' aiming to change democracy, pluralism, human rights and the secularisation of the state with the aim of imposing the medieval rules of Sharia.

Second, Western governments are seen to need to stop this Islamic tide by restricting acts or practices of a religious nature. Following this policy, the supporters of this thesis confuse international problems like jihadist terrorism with national or local ones. For example, during a Swiss referendum held in November 2009, a propaganda poster produced by the People's Party in favour of a ban on minarets showed four minarets in the shape of missiles over a Swiss flag. In the foreground, there is a woman dressed in a black burqa, with the text: 'Stop. Say yes to the ban!'[37].

Third, those who are opposed to Islam try to use the extreme practices of a minority of Muslims to condemn every Muslim even if such practices are not found in the country in question. That is the case of the burqa. In Switzerland, despite what was suggested by the above-mentioned poster, the burqa is rarely worn: most of the country's Muslim population is of Bosnian or Turkish origin, and for them the burqa is as odd a garment as it is for non-Muslims. However, laws banning Muslim practices are being enacted even when they are unnecessary. For example, the prime minister of Iceland proposed a burqa ban in 2012 despite the fact that there was not a single reported case of a woman wearing a burqa in the country[38].

We have already discussed two issues where legal actions have been taken to limit religious Islamic practices: certain garments and places of worship. These restrictions can be seen as a representation of anti-Islamic attitudes.

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blood borders of Islam', he defends the notion that most conflicts are born in the divide between Muslims and non-Muslims in Eurasia and Africa. From the point of view of international policy, he claims that the main clash is between the Western world and others and in a local sphere between Islam and others. This is, he concludes, because Islam is more likely to cause violent conflicts. See Huntington, *The Clash of Civilizations*, p. 255 ff. After 9/11, Huntington thinks his arguments have been confirmed by the facts. He states: 'contemporary policy can be defined as the era of Islamic Wars … These wars include terrorism, guerrilla wars, civil wars and interstate conflicts. These expressions of Islamic violence could be converted in a clash between Islam and the West, or between Islam and the rest of civilizations'. See S. Huntington, 'The Age of Muslim Wars', *Newsweek*, 17 December 2001. It is a false simplification of reality, as we have said, to consider Islam as a homogeneous whole. Moreover, as Mamdani has pointed out, wars are more likely conducted within a civilisation than between civilisations. See M. Mamdani, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror* (New York, Pantheon Books, 2004), p. 22.

[37] Mentioned in V. Amiraux and J. Araya Moreno, 'Pluralism and Radicalization: Mind the Gap' in P. Bramadat and L. Dawson (eds), *Religious Radicalization and Securitization in Canada and Beyond* (Toronto, University of Toronto Press, 2014), p. 97.

[38] Ibid, p. 98 ff.

Regarding the first issue, some women's religious garments are seen as being linked to radicalisation or fundamentalism or at the very least that women are forced to wear such garments by men. There is a presumption that Muslim women wear religious garments because they are forced directly by men or indirectly by their upbringing in a patriarchal society. Therefore, the Islamic headscarf is banned in French public schools because it is seen as a 'communitarian element' that is opposed to the country's values of equality and non-discrimination. Similar reasons have been used to justify banning the burqa in countries like Austria, Belgium, France, Germany and the Netherlands[39].

Restrictions on places of worship have three problematic aspects. On many occasions, the real reason for banning the construction of a place of worship is the opposition of the local population, which politicians are afraid to ignore[40]. Second, in terms of financial issues, European countries oppose foreign funding from, e.g. countries in the Persian Gulf, for construction of places of worship. They fear that this funding may cause a drift towards fundamentalist positions due to the imposition of the *wahabi* vision of Islam. And lastly, minarets are visually identified with Islam in cities and thus opposed as both aesthetically and architecturally foreign[41].

To these issues we can add a fourth one: the surveillance of imams and the influence of imams on believers. This is certainly sometimes carried out more to avoid anti-European messages (especially discrimination against women on religious grounds) than strictly for security reasons (avoiding speech in favour of violence or *jihad*)[42]. Two types of actions have been taken in policies about imams. The first one is extreme: immediate deportation from the country, as is the case in France and

[39] Edmunds points out that denying that Islamic garments are worn by women of their free will as an expression of their cultural identity and thus effectively banning women from public spaces echoes colonialist stereotypes claiming that we should free women from 'Muslim brutality and misogyny'. See J. Edmunds, 'The "New" Barbarians: Governmentality, Securitization and Islam in Western Europe' (2012) 6 *Contemporary Islam*, p. 75.

[40] Problems surrounding the construction of Muslim places of worship have been reported in France, Germany, the Netherlands and Spain. Cesari claims that, in some cases, Europeans have even sprayed the ground with the blood of a pig to make it *haram* so as to prevent the construction of a mosque. See Cesari, 'Securitization of Islam', p. 16.

[41] The Swiss referendum aimed at banning minarets was supported by 57.5% of the population, although there was no real social need for this. Out of the approximately 150 Muslim places of worship in Switzerland, there are only four minarets, and there were plans to build only two more mosques with minarets. Once again, we can conclude, as Amiraux and Araya Moreno did, that the minaret polemic was probably another stereotype used to support an anti-Muslim position. See Amiraux and Araya Moreno, 'Pluralism and Radicalization', p. 97.

[42] Since 2016, France has closed many mosques because of the violent speech of their imams and the risk of radicalisation of their members. We must not forget that, for example, Barcelona's terrorist attacks were directed by the imam of the mosque in the village of Ripoll (Girona), who was the leader of a terrorist cell where several young people of Moroccan origin were radicalised.

Germany. The second one is preventive: imams have to take and pass special courses where they are taught, among other matters, about European values and human rights, with a particular focus on gender equality and free speech[43].

European immigration policies have also been used as a tool to limit Islamic doctrines presumed to be against Western traditions: through compulsory integration courses for Muslim immigrants and the final tests they have to pass[44]. These courses are designed, not for security reasons, but to test immigrants' acceptance of European values. Their aim is to determine the success of the assimilation of individuals into European society. Anti-Islam and assimilationist doctrines see in such courses a way to achieve social cohesion that is threatened by the increasing tide of immigrants, i.e. they attempt to avoid the creation of new social ghettos[45]. However, and as we will see, these methods raise doubts about respect for minority cultural identities and freedom of conscience and discrimination since they only affect Muslims.

The Netherlands established compulsory courses for immigrants who wanted to enter the country according to the standard procedure or for the purpose of family reunification: in both cases, they were only able to get a visa after attending these courses and passing exams. They are also required to obtain permanent residence in the country or Dutch nationality. The point is that individuals who are citizens of Islamic countries have to pass these tests, while citizens of other countries like Canada, New Zeeland, South Korea or the United States, for instance, do not[46]. Their ultimate purpose is to monitor the degree to which Muslim immigrants accept the values and customs of Dutch society, especially in matters related to sex and gender. For example, immigrants have to share their opinion about certain images: nudism at a beach, a same-sex couple kissing or women dressed according to Western fashions. The consequences of failing these tests are significant: if they want to enter the country, their visa application is denied; if they are applying for residence or nationality, they can lose all or part of the social benefits provided by the government[47].

Other countries, like Austria and France, also use assimilation tests. In France, immigration laws have become more stringent since 2006. Then-President Nicolas Sarkozy stated at the time that the ultimate goal of the reforms was for Muslims to accept offensive newspaper articles or cartoons or for Muslim women not to wear

[43] This is the case in the Netherlands. In France, a diploma is required to work as an imam in a prison chaplaincy.

[44] See Cesari, 'Securitization of Islam', p. 9; Monshipouri, 'The War on Terror', pp. 50-54.

[45] They may also be a way to prevent immigration by people with a cultural background that is different from the typical European Christian background, as admitted by the Hungarian government in order to close the country's borders to new immigrants.

[46] Monshipouri, 'The War on Terror', p. 51.

[47] Ibid.

a headscarf in their identification card photographs or to refuse treatment by male doctors[48]. A foreigner's residence time can be limited if they do not pass this test.

In Germany, there was a shift in terms of monitoring elements related to ideology. Before 2008, regional naturalisation tests asked Muslims questions about their moral or religious beliefs. Consequently, they required the acceptance of Western standards on these issues[49]. After the adoption of the Federal Law of 2008, questions focused on German history or policy; questions about individuals' conscience or beliefs were forbidden.

We may conclude that compulsory courses only for Muslims could be considered discrimination on religious or ethnic grounds. They also spread a clear message: people from certain countries and cultures will not be welcome in our country[50]. Certainly, such tests are used to question Muslims' beliefs. They are not applied to individuals of other religions with similar beliefs on moral or sexual matters, like Roman Catholics who follow a strict conception of Catholic beliefs on homosexuality or nudity. It can be discerned that, in enforcing these kinds of tests, which affect the freedom of conscience of Muslims, the state is adopting an ideological position against a single confession. It is thus breaching a basic rule of liberal-democratic systems of government.

V. Effects of measures directly or indirectly justified for security reasons on religious freedom, especially related to the Muslim population

According to research by Fox and Akbaba, religious discrimination has increased worldwide since 1990, and Islam has been the main focus of this discrimination since 9/11[51]. The term 'Islamophobia' was coined in Europe to describe those doctrines that consider Islam as a whole to be a religion that is essentially opposed to Western values and that uses violent or terrorist means to achieve its goals. This position is held both by Europe's extreme-right parties and Christian Evangelicals in the United States.

[48] Cesari, 'Securitization', p 11.

[49] In Baden-Württemberg, for example, an applicant must give their opinion about mixed-sex swimming classes in schools, Jews, the situation of women in public life, homosexuality, women's rights and religious diversity. See Monshipouri, 'The War on Terror', p. 52.

[50] Conclusion of a report by Human Rights Watch (see in J. Fox and Y. Akbaba, 'Secularization of Islam and Religious Discrimination: Religious Minorities in Western Democracies' (2015) 13 *Comparative European Politics*, p. 175 ff). In fact, entries with visas in, for example, the Netherlands fell 70% between 2002 and 2004. Is that, we may ask, the main effect desired?

[51] Fox and Akbaba, 'Secularization of Islam and Religious Discrimination', p. 175 ff. Fox and Akbaba's paper exposes the results of data from *Religious and State Minorities Round 2* (RASZ). The latter report includes studies of causes of different kinds of religious discrimination in different Western democratic states between 1990 and 2008.

National security laws in response to terrorism have created an Orwellian climate[52] of generalised suspicion that has undoubtedly had an impact on the essential values of liberal democracy: equality, human rights, state neutrality and secularism. This also affects the free exercise of religion by Muslims, the principal subjects of surveillance.

Islamic beliefs are sometimes limited by actions directly related to security measures. For example, by freezing or seizing funds belonging to Islamic charity organisations, governments are interfering with the Muslim obligation to pay *zakat*, i.e. the portion of one's personal income that every believer has to give to help the poor of the *umma*[53].

Beyond actions taken for security reasons, other actions are justified by their goal of limiting the expansion of Islam, either in terms of its visibility in Western cities —such as the ban on Muslim headscarves, burqas or minarets— or in terms of their doctrines, which is why countries monitor what imams say.

In this sphere of Islamic ideological control, it needs to be stressed that control of Islam is carried out not only by restrictive measures, but also by financing, through public budgets, certain kinds of Islamic activities. We are speaking about the state's financing of training for imams (e.g. in France or the Netherlands) or of Muslim chaplains who work in prisons (as seen in Belgium), the construction of places of worship (in France), the publication of Islamic religious books that are studied in public schools (in Spain) or even organising, using public funds, the election of Muslim representatives in order to deal with the government (in France or Belgium). Obviously, these are not merely altruistic measures. They pretend to sift through the Muslim population to distinguish between 'good Muslims' —those who accept Western values and are socially integrated— and 'bad Muslims' —those who reject Western standards and modernity and who could presumably shift to radical or violent positions as a way to achieve their goals[54]. Individuals and groups in the former category must receive public assistance, while those in the latter category are monitored or even deported.

Once again, certain doubts about these policies should be underlined. Their compatibility with the right of religious freedom, the autonomy of religious denominations and the neutrality of public powers must be questioned. And, we should keep in mind again that these are values at the very core of liberal democracies.

[52] According to Saeed, Islamophobia and Securitization, p. 169.

[53] Cesari, 'Introduction', p. 4. The lack of the clarity of the meaning of collaboration with terrorist groups as a crime places a heavier burden on Muslims. In the United States, the PA interprets this crime broadly: a person can even be accused if they did not know the terrorist nature of the association they supported; a donation to an Islamic charitable association could be considered terrorist collaboration if the association is considered a terrorist organisation either before or after the donation was made. The donor's knowledge and intentions are not taken into account. See Durham and Liggett, 'The Reaction to Islamic Terrorism', p. 53.

[54] M. Mamdami, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror* (New York, Pantheon Books, 2004).

We should also examine the measures described above from the point of view of their practical effects, i.e. from the perspective of their efficiency in fighting against jihadist terrorism. As was mentioned[55], discrimination against Muslims and limitations on important aspects of their culture and religion, added to economic and social inequalities[56], foster a certain resentment that could enhance radicalisation. If European authorities put pressure on orthodox Muslims, then pious conservative Muslims could transform into violent terrorists. Moreover, prohibitions and limitations have the paradoxical effect of reinforcing the communitarian feelings and dignity of the Muslim population, i.e. reinforcing their sense of belonging to a religious *umma* over the particular dress or traditions of ethnic groups or nationalities that divide Islam[57]. We have seen this in the headscarf affair. The feeling of being harassed can bring people together. Headscarves and other garments have become symbols of Islamic identity, over the ethnic or nationality division.

European security laws and the enforcement thereof also have an important impact on the political system. Countries that have a tradition of governing according to the principles of multiculturalism and respect for minority identities, like the United Kingdom and the Netherlands, have shifted to positions similar to the assimilation policies of France[58]. This may be, as in the case of the Netherlands, because of a desire to reinforce a policy of secularism. This has certainly come about because of the increasing influence of populist, extreme-right parties —the Netherlands is paradigmatic of this. As a matter of fact, minorities pretend to accept a sort of 'culture of the majority' based on secularisation and human rights but also on vague traditional elements (whether derived from nationalism or Christianity). Policies pursuing cultural homogeneity derived from assimilationist positions are more emblematic of the birth of modern states in the 15th and 16th centuries than of contemporary democratic, pluralistic states. We can clearly see this tendency described in European immigration policies: some European countries pretend that foreigners accept our values and leave their own beliefs at home.

[55] See, among others, V. Amiraux, 'Discrimination and Claims for Equal Rights Among Muslims in Europe' in J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State* (Aldershot Burlington, Ashgate, 2006), p. 29 ff.; Cesari, 'Securitization', p. 9; Edmunds, 'The "New" Barbarians', p. 8 ff.; Monshipouri, 'The War on Terror', p. 47.

[56] The unemployment rate among European Muslims is three times higher than that of the rest of the population. Certainly, unemployment can cause marginalisation.

[57] One more effect can be added to those mentioned above: the fight against Islamophobia has contributed to the organisation of Western Islam and to increasing the number of Muslim associations dedicated to fighting for their fundamental rights. For the situation in the United States, see J. I. Smith, 'Islam in America' in J. Cesari (ed), *Muslims in the West after 9/11: Religion, Politics and Law* (London and New York, Routledge, 2010), p. 33 ff.

[58] Cesari, 'Securitization', p 14.

VI. Closing remarks: positive statements on the development of the European Union framework

In the background is the old and never-resolved question of balancing freedom and security as principles at the core of modern democracies. From the perspective of liberal doctrine, where human rights and social pluralism are the main values of the political order, the answer to this question must integrate security within those values, i.e. security should be at the service of individual freedom and the exercise of human rights[59]. Following on from this idea, the following remarks need to be made:

1. In human rights declarations, security is recognised in the individual sphere as the right of individuals to not be detained or imprisoned without a justified cause and always with judicial oversight. Security as a guarantee on the part of public authorities against violence or physical or psychological harm is conceived of as a limit on the exercise of human rights. Thus, it must be interpreted in a restrictive way and most of all taking into account the superiority of the fundamental values of equality and liberty.
2. General security in this meaning is neither a fundamental right nor a supreme value of the law. It is a relational concept, i.e. it is only applied in a specific circumstance where the state must guarantee the exercise of individual human rights. From the perspective of the security role in liberal democracies, it must be said that we should suffer a certain degree of insecurity in order to exercise our fundamental rights.

Summarising these ideas, we can conclude that anti-terrorism laws may and should limit human rights in some circumstances but not annul or erode them, because they are part of the fundamental framework of liberal democracy. From this point of view, some laws have gone too far[60].

Then, what would be a fair policy for Western countries to implement against Islamic violence and radicalisation?

In the international sphere, the righteous and necessary fight against terrorism has to implement preventive measures too. We must remain sensitive to the fact that

[59] L. Lazarus, 'The Right of Security: Security Rights or Securitising Rights' in R. Dickinson (ed), *Examining Critical Perspectives on Human Rights* (Cambridge, Cambridge University Press, 2012) pp. 87-106. The author of this chapter agrees with conclusions reached in the Lazarus paper.

[60] Mazzola, 'Religion', p. 22 ff. Also see M. Vargas Llosa, 'Sangre derramada', *El País*, 20 August 2017. These conclusions are, regrettably, contrary to public opinion. According to the chapter on France published in this volume, more than 90% of the population agrees with toughening public measures in the struggle against terrorism and radicalisation; 71% accept the monitoring of telephone and Internet communications without judicial oversight; 67% accept the search of a private residence without a judge's authorisation; and 61% agree with police interrogations without the presence of a lawyer.

young people are being uprooted and lack prospects for future employment because they constitute a perfect source of followers for terrorist groups[61].

In Europe, measures aimed at integrating Muslims —based on secularisation, human rights and fundamental liberties— should prevail. Of course, it is fair to demand that Islamic communities accept the rule of law in the countries where they are residing. Nevertheless, quoting Todorov, 'the possibility to practise their own culture without discrimination does not impede their loyalty to the country they are living in … one common law does not mean one culture … If we dispossess human beings of their particular culture, they simply stop being humans'[62]. Religion is a distinctive feature of Islamic culture. Thus, safeguarding religious practice in the framework of European values must be a priority for public authorities, not only as a guarantee of religious freedom but also for social cohesion and peace. On the contrary, the criminalisation of Islam will nourish exclusion and, in the end, violence. The peaceful integration of Muslims in European society can only be accomplished through dialogue with Islamic communities in order to facilitate their religious practices and to make sure Muslims do not feel like second-class citizens. And, of course, we should not forget prevention and the repression of crimes motivated by religion[63].

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[61] This is one of the conclusions of the US 9/11 Commission report, which recommends that public authorities rebuild the scholarship, exchange and library programmes that reach out to young Muslims. 'Education that teaches tolerance, the dignity and value of each individual, and respect for different beliefs is a key element in a global strategy to eliminate Islamic terrorism'. *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (authorised edition, New York and London, W. W. Norton and Company, 2004), pp. 377-378.

[62] T. Todorov, *El miedo a los bárbaros. Más allá del choque de civilizaciones* (trans. N. Sobregués, Barcelona, Galaxia Gutemberg, 2008), pp. 196-197.

[63] See the reasoning of European Union discourses about this issue, summarised in A. Motilla, 'Problemas y retos de la inmigración islámica en Europa; la posición de la Unión Europea' (2011) 9 *Revista Electrónica del Departamento de Derecho de la Universidad de la Rioja*, p. 14 ff.

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HATE SPEECH AND INDIVIDUAL RELIGIOUS FREEDOM

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I. Introduction

Hate speech is a concept that is being used and abused all the time as an accusation or a stigma to try to silence some forms of expression that are considered inconvenient or offensive by the dominant sensibilities, be they religious or secular. The same is true of other structurally and functionally similar concepts, such as insults, religious insults, insults to religious feelings, defamation, defamation of religion, hurtful comments, group defamation, blasphemy or disturbing the peace[2]. They are all too frequently accompanied by social and legal references to all kinds of socially constructed phobias (e.g. homophobia[3], transphobia[4], Islamophobia[5], Christophobia)[6]. Together, they suggest the presence of some form of *inquisitorial nostalgia*. Name-calling is slowly replacing honest critical debate.

Each of these concepts is a product of a political, ideological, religious and cultural context and may have its own specific worldview-related meaning. In some cas-

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[2] R. F. Haigh, 'South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms Into the Destruction of Freedom of Expression' (2006) 5 *Washington University Global Studies Law Review,* p. 187.

[3] G. Weinberg, *Society and the Healthy Homosexual* (New York, St. Martin's Press, 1972).

[4] J. Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Berkeley, Seal Press, 2007).

[5] C. T. Madu, 'Killer Cartoons: Islamopobia, Depictions of the Prophet Muhammad, and the Possible Limitations of Free Speech' (2006) 14 *First Amendment Law Review,* p. 489 ff.

[6] G. Weigel, *The Cube and the Cathedral: Europe, America, and Politics without God* (New York, Basic Books, 2005); C. J. Russo, 'Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of their Children' (2007) 32 *University of Dayton Law Review,* pp. 361 ff.

es, the proponents of some of these and other equivalent concepts seem to be claiming for themselves a special political, ideological, religious or scientific authority that allows them to advance their particular views while silencing those who oppose them[7]. One of the main dangers of these concepts is that they tend to treat honest political, social, cultural, religious, ideological or moral disagreements and divergences as if they were evidence of a decayed spiritual condition, a frail and ignorant intellect, a psychiatric disorder or a mental health problem. But the fact is that there is no real *a priori* reason to accept any of these terms without questioning their legitimacy, authority, validity and scope since they were all created with the purpose of advancing and protecting a particular agenda. When these concepts are over-interpreted and combined with one another, they may create a dangerous barrier to free expression.

Although purporting to protect human dignity, equality and sensibility, these concepts are to a large extent strategically and ingeniously fabricated concepts, conceived, designed or co-opted as weapons of political and legal warfare in order to obtain a silencing and paralysing effect directed at opponents in ideological debates. Either linked to criminal law or to tort law, these and other concepts are used in different ways and in different contexts as functional equivalents, at the service of censorship, intimidation, bullying and silencing strategies, with a significant impact on individual and collective liberties. Although this chapter will not discuss the relative merits of the criminal- or civil-law use of these concepts, it warns against their abuse in both realms of law.

In some cases, hate speech and concepts having an equivalent effect are used by the political establishment to harass the opposition and silence all criticism that comes from civil society. In other cases, dominant religious denominations use these concepts to restrict criticism of their religious doctrines and practices. Sometimes, they are used by some ideologies to silence their critics, be they religious or secular. Criticism directed at ideas or conduct is all too often depicted as hateful, insulting, offensive, disturbing, blasphemous, defamatory or phobic.

Because of these trends, the spiritual freedoms of conscience, religion, opinion and expression have come under threat from different sides. This is because these freedoms protect a level of individual rational and moral autonomy that challenges the various attempts to impose a comprehensive and closed religious or secular worldview. These attempts include the use of censorship concepts in order to capture

[7] R. K. Collins, 'And Yet It Moves - The First Amendment and Certainty' (2018) 45 *Hastings Constitutional Law Quarterly,* p. 229, 237-8, saying: 'Today, much of the liberal ire is once again directed at hate speech. And why all this liberal animus against protecting speech rights? The answer is, there is a perception that such protections place other liberal values (e.g., equality) in jeopardy. In other words, when the risk factor entered the liberal tent, many of those who once defended it turned into the ones who sought to cabin it'.

criminal law or tort law to significantly restrict freedom of expression in general and freedom of religious expression and freedom of expression on religious matters in particular.

If these concepts are not carefully disarmed, deactivated, neutralised or narrowly used in both criminal law and tort law, they become 'conceptual bombs' that can explode in the face of their creators and severely harm the values and principles of liberal democratic societies, rendering them unrecognisable or even inflicting lethal damage on them. In fact, a whole *censorship discursive complex* has emerged, encompassing a considerable arsenal of conceptual weapons, arms and ammunition with different shapes, sizes and purposes that vastly increase censorship capabilities.

The freedoms of conscience, thought, opinion and speech are under serious attack[8]. This means that freedom of religious speech and freedom to speak about religion are also under attack. The purpose of this chapter is to help in mounting a strong defence of these spiritual freedoms of conscience, thought, opinion and expression, in dealing with both religious and secular matters, and to uphold their role in protecting critical thought within a free and democratic society.

When stressing the importance of these liberties, some authors overtly deny any duty to respect the dignity, feelings or sensibility of their opponent. Others even go as far as to defend a right to insult, a solution that they deem necessary to protect an *uninhibited, robust and wide-open*[9] freedom of conscience and expression, devoid of self-censorship and chilling effects. Still others are willing to ensure minimum levels of civility and respect, in the name of equal dignity, while stressing that in a free and democratic society all people, ideas, religions, ideologies, values and behaviour, of the majority or of the minority, must be subject to honest if sometimes vehement, caustic and unpleasant criticism.

Such criticism cannot be forbidden through the use of concepts such as hate speech, insult, offence, defamation, religious defamation, group defamation, blasphemy or phobia. What's more, these concepts should be seen not as mere formal and technical legal concepts, but as ideological constructs developed within particular religious or secular worldviews and as such not immune to criticism. What they

[8] A. Clooney and P. Webb. 'The Right to Insult in International Law' (2017) 48 *Columbia Human Rights Law Review,* p. 1 ff.

[9] This is a quote from the landmark decision *New York Times v Sullivan*, 376 U.S. 254 (1064), dealing with political issues, written by Justice Brennan, who said: 'we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'; see L. C. Bollinger. *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century* (Oxford, Oxford University Press, 2010), p. 1 ff.; H. Kalven Jr., ' "Uninhibited, Robust, and Wide-Open": A Note on Free Speech and the Warren Court' (1968) 67 *Michigan Law Review,* p. 289 ff.

purport to characterise and stifle is, in many cases, a legitimate use of freedom of critical thought and expression. If they may be of any use by lawyers and judges, it should be only in those cases of deliberately provocative, intimidating, humiliating and potentially violent forms of speech.

II. Freedom of conscience, religion and expression

Before we enter into a discussion of the concept of hate speech and its impact on individual religious freedom, it is important to consider the origin and meaning of the rights of freedom of conscience, thought, religion and expression. It is important to understand the historical context that led to their defence and promotion. These rights have been understood as structural principles of modern Western constitutionalism, as it developed in Europe and the United States of America from the 17th century onwards and spread throughout the world after World War II through the international human rights movement.

However, these structural principles have recently been suffering harsh attacks on various fronts and from different doctrinal currents. One of the most radical lines of thought, militant secularism and atheism, attempts to promote the idea that all religion is hate speech, meaning that in order to put an end to hate speech one must put an end to all religion. In order to understand whether and to what extent spiritual freedoms, in their individual and collective dimensions, retain their central position in constitutional law and international human rights law, we must confront their relationship with hate speech.

III. Challenging dominant paradigms

In the West, religious freedom is to a large extent the result of several centuries of struggle for the affirmation of freedom of conscience and expression in religious affairs, which had one of its most important moments in the Protestant Reformation in the 16th century. Little by little, Christendom had been transformed into a highly corrupt elitist system of religious, political, financial and military power that oppressed the peasants with all kinds of civil and ecclesiastical burdens and taxes and violently repressed all criticism through the Inquisition courts. In its zeal to promote and protect objective truth as it was understood, Christendom had developed its own means of censorship, which was used for the naming and shaming of dissenting voices. Such voices were labelled, in different times and places, as heretics, schismatics, apostates, blasphemers, infidels, Hussites, bohemians, to give a few examples. Since religion was inseparable from politics, these epithets carried important political overtones.

This *status quo* was boldly and fearlessly challenged and disrupted by the criticism levelled at political and religious authorities by men like Jan Hus, Martin Luther and John Calvin. This challenge represented a significant claim to individual moral, religious and political freedom. However, it was totally dependent on the measure

of tolerance that these authorities were willing to grant to the reformers. When they were not murdered, dissidents could be forced to retract or, alternatively, to seek exile abroad, to publish their works posthumously, to fake being abducted or to flee hidden in boxes of books. This was the reality lived by men as diverse as William Tyndale, Galileo Galilei, Roger Williams, Hugo Grotius, John Locke and Isaac Newton. It was not easy to challenge dominant Catholic or Protestant orthodoxy. The free expression of critical thinking could have important consequences from the point of view of life, liberty and subsistence.

This challenge to dominant political and religious orthodoxy gave rise to a sustained fight for basic intellectual and moral freedoms. The Protestant paradigm was based on the notion that every human being should develop the intellectual and spiritual capacity for conscientious and informed religious choice. The decision to believe or not to believe should be entirely personal and free. Faith was a matter of personal conviction and could not be delegated to another person or institution. The individual should be given the tools to engage in religious thought. Direct access to the Bible in a language that simple people could understand was a logical conclusion. The same happened with the possibility of assembling with those who shared the same convictions.

Over time, the first legal instruments aimed at ensuring individual and collective religious freedom, including freedom of religious expression and association, began to emerge. The Peace of Westphalia (1648) introduced a measure of tolerance towards the reformed faiths. A little earlier, the colony of Rhode Island had passed a series of laws, the first in 1636, which prohibited religious persecution, including against non-Trinitarians. Maryland approved the Toleration Act (1649), directed at Trinitarian Christians. These documents were accompanied by the influential pronouncements of men such as Bayle, Locke, Voltaire and Mirabeau[10]. The liberal revolutions took important steps in this direction, with a greater consecration of religious freedom.

Virginia enshrined freedom of press and religion in its Declaration of Rights of 1776[11]. In France, the Declaration of the Rights of Man and Citizen (1789) enshrined freedom of opinion, including of religious views, and freedom of the press[12]. In 1791,

[10] C. Walter, *Religionsverfassungsrecht* (Tübingen, 2006), p. 39 ff., 50 ff.

[11] Section XII: 'That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments'. Section XVI: 'That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other'.

[12] Article 10: 'No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law'; Article 11: 'The free communication of ideas and opinions is one of the most precious of the rights of man. Every

the United States approved the First Amendment to the 1787 Constitution, protecting freedom of speech, freedom of the press and the free exercise of religion[13]. These documents point to the existence of strong persecutory and censoring tendencies, while emphasising the freedom and independence of individual conscience. They had a lasting impact on modern liberal constitutionalism in the 18th and 19th centuries. But it was mainly after the Holocaust and World War II, which represented a massive violation of human rights, that the international community felt the need for constitutional and international-legal consecration of religious freedom. The guarantee of religious freedom was inextricably linked to the ideal type of the Western constitutional state and to international human rights law. It represents a legally relevant value of civilisational scope.

1. Incorporation in the Modern Catalogue of Fundamental Rights

The freedoms of conscience, religion, opinion, expression, assembly and association developed as freedoms of the spirit, understood, according to Protestant assumptions, as capable of a direct relationship with divinity regardless of ecclesiastical or state mediation. They were largely the product of theistic liberalism, a conception that acquired significant influence in the 17th and 18th centuries[14].

However, with new conceptual clothes and subject to a more rigorous constitutional and international-legal codification, they re-emerged after World War II and the Holocaust as a reaction to positivist, statist, naturalistic and scientific ideologies. They are enshrined in Articles 18 to 20 of the Universal Declaration of Human Rights (1948) and reiterated in Articles 18 to 22 of the International Covenant on Civil and Political Rights. They claim to go back to liberal constitutional assumptions, while protecting against the rise of authoritarian ideologies[15].

On the one hand, these provisions protect the right to freedom of thought, conscience and religion. This right includes freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching. It encompasses the right to develop and expound comprehensive religious teachings on the various topics relevant to human existence, such as

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citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law'.

[13] First Amendment to the United Sates Constitution: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances'.

[14] Walter, 'Religionsverfassungsrecht', pp. 39 ff.

[15] Haigh, 'South Africa's Criminalization', p. 187.

origins, meaning, destiny, society, politics, government, law, economics, science, nature, environment, religion, culture, art, family or sexuality. They protect the right to freely develop or adhere to a religious or secular worldview and to assess all reality and experience on that basis.

Freedom of religion encompasses the freedom to display religious symbols, books, rites or apparel. It also includes the freedom to revise one's opinions and change one's religion or belief when confronted with new information, ideas or impressions. Freedom of religion cannot be understood as the freedom to remain in one particular religion or the spiritual or theological freedom one might experience for doing so. The above provisions also protect the right of the non-adherent or non-believer not to be forced to observe or obey the doctrines, commands or taboos of a secular or religious worldview [16].

On the other hand, these provisions also protect the right to hold opinions without interference along with the freedom to express those opinions, unpleasant or inconvenient as they may be. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of one's choice. Finally, the above-mentioned provisions protect the right to peaceful assembly and association.

Nowadays, these freedoms constitute a set of human and fundamental rights aimed at the protection of individual autonomy against the powers that be. When we read this catalogue of human rights, we can see that these rights presuppose a society where ideas and opinions are freely and openly exchanged and cross-examined and where individuals are given the opportunity to examine, debate, criticise, adopt or reject ideas and opinions, religious or non-religious. The search for existential or ethical truth and knowledge plays an important role, since rational and moral human beings should not be forced to stick to ideologies, beliefs, theories or opinions, religious or secular, that are based on faulty assumptions or are factually wrong, illogical, incoherent or incongruent with reality.

2. **Political and Legal Significance**

Freedom of conscience and religion is linked to the central and core dimensions of individual and collective existence. Systematic violations of freedom of conscience and religion can have political, social and legal consequences that largely transcend the immediately affected individuals. The history of the Protestant Reformation, whose 500th anniversary was marked in Europe and around the world in 2017, shows how the struggle for freedom of conscience, religion and expression took on

[16] A.T. Uddin, 'Speech and Public Order Exceptions: A Case for the U.S. Standard' (2015) 3 *Brigham Young University Law Review*, pp. 727, 753 ff.

such an intensity that it tore the theological and political structure of the *res publica Christiana* apart and shook Europe's foundations, causing a tectonic shift. Even today, the impact that the struggle for freedom of conscience and religion can have on the structural stability of seemingly solid political units such as the United States, the European Union, China, Russia or India cannot be underestimated, underlining the importance of seeking reasonable and sensible political and legal compromises between different worldviews.

Spiritual freedoms are incompatible with the imposition of totalitarian metanarratives or politically correct ideologies. They presuppose the moral and rational autonomy of individuals and their ability to confront, select, absorb, analyse and critically process information from the environment in which they find themselves and even from outside it. They assume that different religious and secular worldviews, along with beliefs, theories or opinions, are in a relative position of spiritual, cultural and political competition and that open and critical examination is the best way to sort out which ideas should be individually or collectively embraced. These freedoms are ideologically neutral in the sense that they can be claimed to promote both conservative and liberal, religious and secular worldviews[17].

Individuals are not seen as the property of a state, nation, religion, ideology or party. Rather, they are free to collect and analyse generally accessible information, to confront the ideas and opinions of others and to form, express, revise and change their ideas and opinions on the most diverse topics, limited only by the requirements of the collective good.

These freedoms affirm the democratic self-government of the people, understood as the sum of the majority and minorities, and the value of individual freedom. They decentralise authority to the smallest decision-making unit, the individual. They assume that individuals are morally autonomous and responsible entities and presuppose insufficiency, limitation and fallibility of the constitutional state and its openness to a metaphysical and transcendent dimension.

In this sense, they are opposed to a naturalistic reduction of human existence, which (albeit in a self-refuting way) conceives of the human being as the mere product of random brain states and sees their ideas and opinions as mere self-generated and self-replicating memes. They manifest the hostility of the liberal state to any form of tyranny against the spirit of man, be it religious or secular. On the other hand, they remain open to the idea that there can indeed be an objective moral law the validity of which is manifest to the human spirit. In doubt as to what this moral law is, the liberal state should refer as much as possible to the conscience of each individual and adopt a method of reasonable and proportionate consideration of rights and interests.

[17] J. R. Bambauer and D. E. Bambauer, 'Information Libertarianism' (2017) 105 *California Law Review*, p. 335, 338 ff.

3. **Freedom of Religious Expression**

Those who first defended freedom of conscience, religion and belief also defended the right to criticise religious orthodoxy and to be very vocal about it, publishing and publicly expressing the result of their reflection, however unfamiliar or inconvenient that might be. This point was made by, among others, Levellers and Puritans such as William Walwyn[18] and John Milton[19]. There could not be a democratic challenge to political or religious power without freedom of thought and speech[20]. According to this view, the best way to empower minority, marginalised and vulnerable groups is to grant them broad freedom of expression by allowing them to put forward their arguments and challenge dominant conceptions. This can also create a social atmosphere conducive to the development of critical and argumentative skills by an ever-increasing number of community members.

Since then, freedom of expression became a structural principle of a free and democratic society. It is considered a fundamental right in the Western tradition of constitutional law and international human rights law. Freedom of expression plays a central role because it serves different individuals and groups, as well as diverse purposes of great individual and collective relevance.

This fundamental right is important for the affirmation of individual autonomy, the search for truth and knowledge, the promotion of democracy, the rule of law, the fight against corruption, the proper functioning of a free market of ideas and the existence of an open and plural public sphere of discourse. It ensures the diversity of ideas and allows the existence of an escape valve for the expression of anguishes, complaints and indignations of individuals and groups. For these reasons, it is

[18] W. Walwyn, *The Compassionate Samaritan* (1646), where we read: 'Adversaries certainly are not competent judges. Again, in matters disputable and controverted, every man must examine for himself — and so every man does, or else he must be conscious to himself that he sees with other men's eyes and has taken up an opinion not because it consents with his understanding but for that it is the safest and least troublesome as the world goes, or because such a man is of that opinion … and verily believes would not have been so, had it not been truth. I may be helped in my examination by other men, but no man or sort of men are to examine for me, insomuch that before an opinion can properly be said to be *mine* it must concord with my understanding'.

[19] J. Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England. (1644), which reads: 'Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'

[20] D. Williams, *Milton's Leveller God.* (London-Chicago, McGill-Queen's University Press, 2017), p. 6 ff.

believed that freedom of expression makes possible the peaceful transformation of society[21]. Of all these functions of freedom of expression, we highlight just a few.

One of the main goals of freedom of expression is the search for truth and knowledge. The question is, in the first place, about the existential truth about the origin, meaning and destiny of life, and the moral truth about the goodness and wickedness of human behaviour. Equally important is the discovery of factual truth about past or present political, economic, scientific and social reality, however inconvenient, uncomfortable or counter-majoritarian it may be. The search for truth requires the pursuit of knowledge of all relevant facts and the formulation and discussion of interpretations, inferences, theories and arguments. Particularly important is the possibility of challenging dominant paradigms, theories and narratives and the generation of new ideas.

The European Court of Human Rights had the chance to address some of these topics in *Paturel v. France*[22], a case concerning a book (*Sects, Religions and Public Freedoms*) written by an individual Jehovah's Witness against a publicly funded private French anti-sect association. In this case, the Strasbourg court underlined the importance of open debate of subjects of public interest, which requires the protection of offensive speech and of the inevitable personal animosity that may ensue. In its view, the search for truth, objectivity and rigour does not require an absolute proof of truth. Value judgements can be protected as long as they have a sufficient factual basis.

The notion of a free marketplace of ideas is based on an image of the competition of ideas in the public sphere, in a context of an open and robust cross-examination of ideas. It combines the influences of John Milton, John Stuart Mill[23] and Oliver Wendell Holmes[24]. It presupposes the freedom to supply and demand ideas together

[21] H. Rose, 'Speak No Evil, Hear No Evil, Do No Evil: How Rationales for the Criminalization of Hate Speech Apply in Transitional Contexts' (2015) 22 *Williamette Journal of International Law & Dispute Resolution*, pp. 313, 315 ff., presenting asynthesis of the purposes of freedom of speech.

[22] *Paturel v France,* App no 54968/00 (ECHR, 22 Dec 2005).

[23] J. S. Mill, *On Liberty and Other Essays* (Oxford, [1859], 1991), p. 21, Mill famously wrote: 'If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error'.

[24] *Abrams v United States*, 250 U.S. 616 (1919), 'But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their

with the possibility of decentralised evaluation and selection. The state must assume a position of relative neutrality, intervening only in exceptional cases in order to correct communicative market failures. The free marketplace of ideas is incompatible with the imposition of politically, ideologically, religiously or scientifically correct ideologies immune to competitive challenge. It aims to defend the openness of the sphere of public discourse even in the presence of potentially disruptive ideas. Participation in public discussions often results in being subject to harsh, vehement and public criticism.

A free and democratic society implies communicative democracy and political legitimacy. The free discussion of public policies, criticism of the conduct of the political class and a discussion of the cultural and moral standards on which legislation depends form one of the constitutive dimensions of democracy. Freedom of expression allows the discussion of controversial issues, having in mind the anticipation, diagnosis prevention and therapeutic resolution of social problems. Democracy not only guarantees the right to speak freely but imposes this as a civic duty. Freedom of expression is essential for the formation of public opinion and political will. Without it, the act of voting has no democratic value.

Freedom of expression plays an indispensable role of control and oversight, ensuring permanent monitoring of social powers, de facto monitoring of the law, and uncovering and denouncing the pathologies of the exercise of power, such as arrogance, incompetence or corruption. It enables the emergence of alternative proposals and protects minority perspectives.

The above-mentioned roles of freedom of expression will not necessarily create a harmonious society. On the contrary, the end result will most probably be one characterised by debate, antagonism and tension. People will very often strongly disagree on very important matters. Because of this, the European Court of Human Rights has repeatedly stressed that the right to freedom of expression 'is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb'[25]. This point must be stressed because 'rough and tumble of public discourse inevitably will cause psychological distress'[26].

Having understood the importance of freedom of expression in a broad sense, it should be noted that freedom of religious expression is a sub-part or sub-case of

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own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution' (O.W. Holmes dissenting).

[25] *Handyside v the United Kingdom, A*pp no 5493/72, (ECHR, 7 Dec 1976), [49].

[26] D. T. Coenen, 'Freedom of Speech and Criminal Law' (2017) 97 *Boston University Law Review*, pp. 1533, 1548.

the right to freedom of expression. To understand the internal connection between freedom of religion and freedom of expression, one just has to take into account the cultural and social impact of the publication of the Gutenberg Bible in 1454, and the nailing of Martin Luther's 95 Theses to the door of the Castle Church in Wittenberg in 1517. The writings of Martin Luther were sometimes very rude, sharp and corrosive, renouncing the rhetorical elegance of the classic Renaissance style. His writing reflected his crude origins, his monastic sobriety and his aggressive and reformist attitude. If they were considered offensive, this was considered to be an effect inherent in the intensity of the theological debate. They would set the tone for the theological, philosophical, political and juridical debates of the following centuries.

Ever since then, the defence of freedom of religious expression has been intimately related to: a) the manifestation of individual conscience; b) the search for truth about the origin, meaning and destiny of the universe, life and human beings; c) the identification of objective and universal moral values regulating human behaviour; d) the free examination of religious tenets, doctrines and conduct; f) the formulation, teaching and dissemination of religious doctrines, ideas and opinions; g) the comparative assessment of competing religious and non-religious claims; h) the subjection of religious doctrines and conduct to criticism and cross-examination before public opinion; and i) oversight over personal and institutional abuse of power and corruption by religious authorities.

The search for truth and knowledge is important when discussing topics such as the accidental origin of life or the process by which single-celled organisms evolved into human beings —alleged events with no direct eyewitnesses— or the life, miracles, death and resurrection of Jesus Christ —alleged events with only several written narratives claiming to be direct eyewitness accounts. The critical discussion of these and other similar topics, concerning other religious and nonreligious topics, must flow in a way entirely devoid of censorship. From the inquiry and debate about the truth or falsehood of claims with potential metaphysical implications, religious or non-religious worldviews may emerge, with implications and ramifications in the various dimensions of human existence and conduct. The discourse about these worldviews and the comprehensive forms of life that they may lead to must be prima facie protected, since it allows for individual autonomy, critical thinking and self-expression.

The connection between freedom of expression and a free and democratic society is especially important when discussing topics such as the role that Sharia law and Sharia courts should play in a political, legal and institutional setting built on the constitutional principle of separation of church and state. Since Sharia law will have a direct impact on matters such as politics, foreign affairs, armed conflict, jihad, economics, finance, family structures and the social and legal status of women and children, it is obvious that it will affect society as a whole, becoming a central question of democratic self-government. Hence, it is understandable that the topic will

inevitably attract significant controversy[27]. It may prompt some to mount a comprehensive attack on Islam altogether, mobilising their rights of association, assembly, opinion and expression[28]. It may even encourage satiric and caustic speech, as in the *Jyllands-Posten* Danish cartoon controversy and in the French *Charlie Hebdo* sequel[29]. Non-Muslims are not legally bound by Islamic doctrines or proscriptions. Opinions about these different topics should be openly and freely expressed without the fear of being labelled hateful, blasphemous, offensive, racist, xenophobic or Islamophobic. The same would apply, *mutatis mutandis*, if the discussion were on the role the Bible should play in public discourse, law, policy and institutions.

The notion of the free marketplace of ideas remains important, because in some cases discussions may go on for centuries, without a particular claim generating universal assent. One may think, for instance, of topics such as the alleged divine revelations to Muhammad or to Joseph Smith or the divine determination of the authentic successor to the Apostle Peter or to the Prophet Muhammad. Discussions about these controversial theological issues should be carried out peacefully in a free and democratic society. Whenever the preponderant element of the debate is about historical facts, sacred texts, interpretations, public religious or secular figures, opinions, doctrines or moral commands, and not about targeting a specific group for humiliation or persecution or violent confrontation, the discussion should go on free and unabated.

The notion of democratic oversight over the misuse of social and institutional power can be highly relevant when controversial topics are concerned, such as when a university persecutes someone for disagreeing with a scientific paradigm or theory (e.g. evolution, the big bang, the Standard Model of particle physics or climate change), no matter how widely accepted in the scientific community or popular culture they may be. The same is true when individuals or groups intend to denounce the cover-up of child sexual abuse by the Catholic Church or the violence and terrorism associated with Islamic extremism and with pseudo-Christian white supremacy.

From the point of view of religious denominations and their individual members, freedom of expression has a positive function of formulating, expressing and disseminating religious beliefs and doctrines along with a negative function of supporting religious beliefs against the critical attacks that may be directed at them. For the wider public, freedom of expression about religion allows for a critical analysis of religious and nonreligious beliefs and for identifying and denouncing the implications and ramifications of their doctrines and practices that may be considered socially undesirable.

[27] M. Mohammad, 'The Evolution of Sharia Divorce Law: Its Interpretation and Effect on a Woman's Right To Divorce' (2014) 7 *Albany Government Law Review*, p. 420.

[28] Madu, 'Killer Cartoons', p. 489.

[29] *Charlie Hebdo*, Court d'Appel de Paris, Dossier n°07/02873, Arrêt du 12 Mars 2008.

4. Context of Public Debate

Religion has played an important role in the political, legal, economic, social and cultural affairs of different communities[30]. Speech about religion can sometimes be caustic and even offensive. Religion may not be of this world, but it is in this world, having many times been corrupted by money, sex and power, and bringing upon itself numerous criticisms formulated in a hard, vehement, caustic and acidic way. In these cases, the discursive and controversial context in which criticisms are inserted should assist the courts in formulating a judgment as to whether the element of public criticism, even if scathing, is preponderant over that of public insult.

A case in point is *Hustler Magazine v. Falwell*[31], which arose in the context of the intense confrontation in terms of ideologies and worldviews between Larry Flynt, the publisher of *Hustler Magazine*, and Jerry Falwell, a moral conservative Baptist minister. *Hustler* satirised Reverend Falwell by suggesting that he had incestuous sexual relations with his mother (a not very subtle way of insulting him). Falwell sued *Hustler* for damages, alleging emotional distress. The Supreme Court denied compensation, taking into account the importance of freedom of discussion in the public sphere. It was faithful to the tenet that public discussion of controversial subjects should be uninhibited, robust and wide open. This wide-open discussion would certainly be difficult and hurtful for some participants. But public figures should not be able to ask for compensation for emotional distress when involved in public discussions of controversial matters of public interest.

Besides, the court was of the opinion that the satirical content of the advert, insulting as it was, did not purport to be descriptive of facts relating to Falwell's private life. It held the view that satire and political cartoons are very important and would be easy targets for legal action, with great loss for the sphere of public discourse if public figures could sue for damages. The court wanted to prevent the use and abuse of concepts such as 'offensive', 'insulting' or 'distressing', in a totally subjective and emotive manner, to limit freedom of expression in relevant issues of public interest. Although this is not a hate-speech case, the intensity of the insult, vilification and humiliation are very similar to that of many hate-speech cases. Although the court mounted a strong defence of freedom of expression, this case could have been decided in a different way if the court had taken into account that the principal test was to determine whether *Hustler* was more interested in insulting and humiliating a public figure or advancing a specific ideological point.

[30] *Cantwell v Connecticut*, 310 U.S. 296 (1940).
[31] *Hustler Magazine, Inc. v Falwell*, 485 U.S. 46 (1988).

Slightly different is the *Otto Preminger Institute* case, based on events that took place in Austria[32]. The case involved a screening of the film *Das Liebeskonzil* (Council of Love) at the Otto Preminger Institute's art cinema. The movie offered a highly satirical take on the sinful relationship between religion, money, sex and power in Christianity. It made fun of Christian figures and doctrines. It was based on an 1894 stage play by Oskar Panizza, a man who was arrested in Italy in 1895 for crimes against religion. Promotion of the film took place in a relatively discreet way. It would be screened for a select audience with a minimum age limit of 17 and would be followed by a debate. The Catholic Church in Innsbruck sued the director of the institute for 'disparaging religious doctrines'. The movie was banned in Austria. When called on to decide on the alleged violation of freedom of expression, the European Court of Human Rights, invoking the doctrine of margin of appreciation of the states, deferred to the Austrian courts instead. The court was sensitive to the notion that the religion and religious sentiments of others must be respected. Factors such as the right not to be insulted, the prohibition of gratuitous insults and the special status of the majority religion were also taken into account.

The *Hustler Magazine* and *Otto Preminger* cases are interesting for a discussion of hate speech and individual religious freedom, albeit with doubtful outcomes. In the first case, insult was the preponderant element, and free speech was protected, whereas in the second case, the ideological debate was the preponderant element, and free speech was not protected. Our point is that it should be the other way around. When there is a real interest in openly debating (criticising, accepting or rejecting) assumptions, presuppositions, theories, doctrines, opinions and conduct, be it on the part of majorities or minorities, freedom of conscience, thought, religion, opinion and expression should enjoy broader protection. A dogmatic assertion, when accompanied by a claim of immunity to criticism and debate, should be less protected.

Intense debate about ideas, doctrines or conduct dear to the faithful is not always pleasant. Freedom of speech should protect not only those who agree with us, but also those whose views we find wrong, distasteful or even hateful[33]. It implies a significant degree of content neutrality, so that all views can be *prima facie* protected, particularly those that society detests. In a free and democratic constitutional order, this content neutrality can never be absolute, since government must seek the common good and promote equal dignity and freedom. However, the basic principle is still one of content neutrality and broad freedom of speech.

[32] *Otto Preminger Institut v Austria*, App no 13470/87 (ECHR, 20 Sep 1994).

[33] *United States v Schwimmer* 279 U.S. 644 (1929), Justice Holmes, dissenting: 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of thought, not free thought for those who agree with us but freedom for the thought that we hate'.

Think, for instance, about Richard Dawkins' famous quote about the God of the Old Testament:

> 'The God of the Old Testament is arguably the most unpleasant character in all fiction: jealous and proud of it; a petty, unjust, unforgiving control-freak; a vindictive, bloodthirsty ethnic cleanser; a misogynistic, homophobic, racist, infanticidal, genocidal, filicidal, pestilential, megalomaniacal, sadomasochistic, capriciously malevolent bully'[34].

With these words, Dawkins, an atheist who has spent his entire life attacking a God he does not believe in, reveals what seems to be a deep, visceral and even pathological hatred of a character he himself considers to belong to the world of fiction, which is a curious phenomenon from a psychological and psychiatric point of view. Dawkins' vitriolic words could easily be considered offensive by many Jews and Christians, while at the same time denoting a quick and superficial reading of the relevant texts. In fact, Dawkins has been prevented from speaking on the radio out of fear that he might offend the Islamic community[35].

However, this is no reason to silence Dawkins by censoring his books or preventing him from participating in radio or television talk shows. Much less is it a reason for starting a criminal or civil lawsuit against him based on hate speech or other concepts with equivalent effect. Although there have been some recent shootings targeting churches that were allegedly perpetrated by self-proclaimed atheist preachers[36], it would sound far-fetched to blame the dean of atheism for those crimes. Misinformation is a real danger, and causality can be a very complex issue. In Dawkins' works, the ideological argument against theism of any sort is clearly the preponderant element.

In all their emotional intensity, Dawkins' words have the merit of showing his state of mind in a way that helps to better situate the playing field in which the discussion that atheists intend to provoke must be carried out. From the beginning, Judaism and Christianity have been the targets of such attacks. The best approach to take is to present a respectful, well-founded and reasoned defence, avoiding a complacent attitude and repudiating religious faith based simply on the uncritical acceptance of tradition, doctrine and ritualism[37].

[34] R. Dawkins, *The God Delusion.* (London, 2006), p. 51.

[35] F. Dinkelspiel, 'KPFA cancels Richard Dawkins' speech because of his tweets about Islam', *Berkeleyside*, 21 Jul 2017, <http://www.berkeleyside.com/2017/07/21/kpfa-cancels-richard-dawkins-speech-tweets-islam/> (accessed 19 Dec 2017).

[36] M. Jaeger, 'Texas Shooter was a Militant Atheist', *New York Post,* 6 Nov, 2017, <http://nypost.com/2017/11/06/ex-friends-say-shooter-was-creepy-atheist-who-berated-religious-people/> (accessed 19 Dec 2017).

[37] T. Morgan, *Thank God for Atheists: How the Greatest Skeptics Led Me to Faith.* (Eugene, Oregon, Harvest House, 2015), p.15 ff.

Equally relevant is the above-mentioned case of caricatures of the Prophet Muhammad. They arose in the context of an intense public debate that had been going on before the terrorist attacks of 11 September 2001. The debate intensified after that, with growing criticism directed at some Islamic doctrines and behaviour (e.g. polygamy, treatment of women, child marriage), as well as at radical Islamic violence. The publication of 12 cartoons of Muhammad in the Danish newspaper *Jyllands-Posten*, followed by their republication in newspapers in 50 different countries, including by *Charlie Hebdo* in France, was meant to be a denunciation of Islamic violence and the risks of self-censorship. When some Muslims accused *Charlie Hebdo* of Islamophobia, racism and blasphemy, the Paris Appeals Court correctly held that freedom of expression protects even a newspaper with a 'satirical, caustic and of a disrespectful spirit', such as *Charlie Hebdo*. It ruled that the caricatures were not an insult, as they targeted only a part of the Islamic population, i.e. Islamic terrorists. It thus concluded that cartoons do not constitute an attack on a religious group and should be protected by the normative scope of freedom of expression[38].

Individual believers and religious denominations are often attacked in the public sphere when they expound theological doctrines and ethical practices that qualify certain ideas or types of behaviour as sinful. For example, some people are criticised for allegedly being bigoted for their moral censorship of incest, adultery, polygamy, polyamory, homosexuality, promiscuity or zoophile practices. According to their worldviews, these types of behaviour are not simply orientations or preferences but are considered contrary to objective and absolute moral law, as divinely revealed, and therefore non-negotiable. Adherence thereto and the dissemination thereof are seen as resulting from categorical imperatives and not mere options. In a world with different colliding worldviews, without an impartial authority to decide which one is right, it is important that the freedoms of conscience, thought, religion, opinion and expression protect the right of individuals and communities to hold, express and openly debate these and contrary views[39].

In addition, although these moral valuations are largely based on theological assumptions and convictions, they are concerned with the biological, sexual and social relationships between men and women and the conditions for the birth and healthy physical and psychological development of children. The central question to be publicly debated is: should the state officially recognise and protect only the type of relationship (one man and one woman) from which all human beings, without discrimination, naturally derive their origin and identity? Or should it recognise and protect all (or at least some) possible combinations and permutations that human

[38] *Charlie Hebdo*, Court d'Appel de Paris, Dossier n°07/02873. Arrêt du 12 Mars 2008.

[39] G.P. Magarian, 'Religious Argument, Free Speech Theory and Democratic Dynamism' (2011) 86 *Notre Dame Law Review,* p. 119 ff.

beings may devise and derive from their sexual, emotional, social or religious orientations, feelings, preferences or convictions? This question has so many ramifications and implications that even non-religious people from largely non-religious countries (e.g. Estonia, China) have strong moral views on these subjects. This is because they are not relevant solely to the private sphere of individuals but are of fundamental and systemic importance to society as a whole in the short, medium and long runs. Rational, critical and open debate about matters concerning sexuality, family structures and the development of children is an important social good even in the most secular society based on the assumption that God does not exist (*etsi Deos non esset*). To be open, strong and vocal about this should not be considered hateful.

Freedom of religion and religious expression is violated in its essential content if adherence to religious doctrines on ethical conduct is forbidden to religious denominations. Doctrines such as 'God created the universe, life and man rationally', 'the Jews are the chosen people', 'the Church is the new Israel', 'Jesus is not the Messiah', 'Jesus is the only way to God', 'Only Allah is God and Muhammad his Prophet' may be considered exclusive and divisive by some, if not offensive or hateful by others, at least according to some hyper-inclusive sensibilities. However, in a world in search of truth, including religious truth, freedom to believe or not to believe in these and other doctrines and to proclaim or contest and debate them openly and critically is part of the core, or essential nucleus, of the freedoms of conscience, thought, religion and expression.

Individuals and religious communities are often accused, in places as diverse as the media, schools, colleges or universities, of being exclusive, divisive, hateful and even dangerous whenever they assertively expound theological and ethical commitments that go beyond the simple manifestation of religion as part of a given cultural identity. When individuals and religious denominations attempt to defend themselves and respond to such criticism with their own counter-criticism, they are often denied this possibility in the name of laicism, secularisation, the systemic differentiation between religion and politics or the constitutional principle of separation of religious denominations and the state.

However, freedom of expression of religious denominations should be widely protected in a free and democratic society in accordance with the principles of human dignity, reciprocity, equality of communicative opportunities and due process. Individuals and entities should be able to present their ideas and opinions in the public sphere wherever their theological and ethical tenets are called into question[40]. If they are exposed to vehement attacks in the sphere of public discourse, then they should be able to vehemently respond in kind. Secular and religious worldviews should always

[40] G.P. Magarian, 'Religious Argument', pp. 173 ff.

be in a relationship of critical interaction[41]. Robust and vehement discussion should not be considered hate speech, as we will demonstrate below.

IV. Hate speech

1. Authoritarianism and Militant Democracy

The concept of hate speech developed in the aftermath of the fall of the Weimar Republic and the rise of Nazism in Germany. It was introduced after World War II and the Holocaust as a way to resist the possible recurrence of Nazism, fascism and anti-Semitism. According to the proponents of the concept, there is sometimes a need to restrict freedom of speech in order to protect democracy. Speech that is deliberately designed to promote hatred on the basis of race, religion, ethnicity or national origin is not welcome in a democracy since it undermines the foundational values of equal dignity and freedom. Democracy should defend itself by restricting opportunities to disseminate totalitarian discourse, the advance of extremist or paramilitary groups and the use of labels to identify, defame and humiliate an entire ethnic or religious group. This was, in essence, the notion of *militant democracy*.

It assumed that antidemocratic discourse should be forcefully resisted by liberal democracies, with full awareness that totalitarian forces can use freedom of expression systematically with the aim of subverting democracy, freely defaming its leaders and institutions, inciting public opinion, spreading falsehoods, attacking the character of ethnic communities or vilifying whole groups. The ultimate aim of these totalitarian forces is to establish a dictatorship and subsequently to neutralise freedom of expression. In order to resist and survive attacks of authoritarianism and intolerance, democracy would legitimately and paradoxically have to internalise some measure of authoritarianism and intolerance[42]. The extent to which this perspective should be accepted is itself a matter of liberal democratic discussion[43].

2. Legal Implementation

Hate speech is condemned by the International Covenant on Civil and Political Rights (1966), an instrument of international law aimed at giving legally binding force to human rights, based on the principles of dignity, freedom, equality and non-discrimination and on the need to balance the rights of all individuals. Its Article 20 reads:

1. Any propaganda for war shall be prohibited by law.

[41] Ibid, pp. 165 ff.

[42] R.A. Khan, 'Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post' (2013) 41 *Hofstra Law Review,* pp. 545, 557.

[43] G. P. Magarian, 'Religious Argument', pp. 167 ff.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The words of this precept immediately take us to contexts like the period from Kristallnacht (9-10 November 1938) to the end of World War II, in 1945, which we never want to see repeated. This provision refers to a discourse of annihilation and extermination. It is a conscious reaction to the evils of Nazism and totalitarianism[44]. It has nothing to do with the open discussion of political, religious, scientific, philosophical or moral divergences that desirably and inevitably exist in a democratic and pluralistic society. On the contrary, it assumes that a democratic society must provide a forum in which all relevant topics can be openly debated by free and equal citizens. International covenants signed after World War II are based on the assumption that freedom of conscience, thought, religion and expression should be understood as instruments of individual and social liberation and not as tools for dehumanisation, oppression and annihilation. They assume that freedoms are not absolute and unlimited, as they place certain obligations on others and the community[45].

The contemporary human rights catalogue is based on the axiomatic assumption of the inherent dignity and the equal and inalienable rights of all members of the human family, as the foundation of freedom, justice and peace in the world. Thus, it should be possible to offer broad protection for freedom of speech without validating extreme, hateful speech[46].

Hate speech is also prohibited by Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965/69). This international instrument develops and concretises the concept of hate speech. It reads:

> 'States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group

[44] M. Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 *Cardozo Law Review,* pp. 1523, 1525.

[45] S. J. Catlin, 'A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights' (1994) 69 *University of Notre Dame,* pp. 771, 796.

[46] Catlin, 'A Proposal for Regulating', pp. 771, 774.

of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination'.

This international norm associates the discourse of hatred with the organised and systematic defence of the superiority of one race over another based on criteria such as skin colour or ethnicity and with apologies for discrimination and violence. A growing number of countries have criminal- and civil-law provisions restricting hate speech.

3. **Content and Functions**

It is important to reflect on the definition of hate speech. According to Eric Neisser, the concept should include 'all communications (whether verbal, written, or symbolic) that insult a racial or ethnic group, whether by suggesting that they are inferior in some respect or by indicating that they are despised or not welcome for any other reason'[47].

Constitutional and human rights have to take into account different dimensions of the legal concept of hate speech. The first is the psychological dimension. This is concerned with the profound, destabilising, debilitating and destructive effects that some discourse has on individuals and social groups. It worries about the destruction of the individual's sense of dignity and self-esteem and the physical and emotionally destructive impact of certain discourse. It recognises the individual feeling of inferiority and impotence that certain epithets and insults can produce when systematically repeated.

Hate speech has a political dimension. Equal citizenship assumes a universal claim to status and respect. The concept of hate speech is premised on the notion that totalitarian philosophies are born as a legitimate expression of political thought, flourish within a culture and can be embraced by sophisticated people in a free and democratic society. It recognises how the political power of majority discourse can leave social minorities totally helpless. It is concerned with the political context of majority-minority relationships and power balances[48]. It recognises, however, that

[47] E. Neisser, 'Hate Speech in the New South Africa: Constitutional Consideration for a Land Recoverying From Decades of Racial Repression and Violence' (1994) 3 *Journal of International Law and Practice,* p. 336.

[48] Rosenfeld, 'Hate Speech', p. 1526.

political controversy and conflict must not simply be avoided or suppressed by labelling all speech coming from one's political or ideological opponents as hate speech, even if they are the dominant majority.

Hate speech has a historical dimension. It is frequently directed at a historically repressed or persecuted group. It does not abstract from the historical, social and cultural context in which discourse is produced and received, especially when it comes to centuries of discrimination, oppression and persecution[49]. As Scott Catlin puts it, 'hate speech directed at minorities carries with it past degradations and deprivations to such an extent that it cannot but conjure up those images again'[50]. Limiting hate speech is a way to protect human dignity, enhance democracy and heal old historical wounds[51].

4. Some Problems with the Concept of Hate Speech

Coined as a conscious reaction to the excesses of the Holocaust and anti-Semitic persecutions, the concept of hate speech was quickly captured by ideologies that saw in it an important concept of political, religious and cultural struggle, easy to handle and with great plasticity. Because of its nature and characteristics, the concept of hate speech presents some serious substantive problems from the point of view of a democratic constitutional order, which cannot in any way be concealed or devalued. Hate speech and other concepts of equivalent effect are often invoked by those who 'always suppose themselves to be competent examiners and judges of other men differing in judgement from them'[52]. In the following lines, we will try to draw attention to some of the substantive problems posed by the concept of hate speech. Many of the considerations presented here are valid, *mutatis mutandis*, for other similarly vague concepts, such as Holocaust denial, fighting words, blasphemy, defamation of religion, Islamophobia, homophobia and all other phobias.

5. Love Speech and Hate Speech

Hate speech is generally associated with the practice of the most serious and ignoble acts of violence, including crimes against humanity and genocide[53]. This understanding relativises the distinction between expression and conduct, thinking of the expression of thought as preparation for conduct. It also neglects the root po-

[49] Catlin, 'A Proposal for Regulating', pp. 771, 775 ff.
[50] Ibid, p. 776.
[51] Neisser, 'Hate Speech', pp. 335 ff.
[52] W. Walwyn, *The Compassionate Samaritan* (1646).
[53] D. F. Orentlicher, 'International Criminal Tribunals in the 21st Century: Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana' (2006) 21 *American University International Law Review,* p. 557.

litical, social and emotional problems that may lead individuals and groups to hatred. However, reality is more complex.

On the one hand, hatred can be an understandable emotion when it results from behaviours considered repugnant and unacceptable. For example, peasants may feel hatred towards a dynasty of oppressive princes that leaves them almost starving. Slaves may understandably feel hatred towards their masters when they perceive in them a total lack of humanity. Hate can arise in this context as an expression of feelings of injustice, revolt and indignation. Hatred can be a precursor to reform and revolution. The history of modern constitutional law is full of examples. In this case, it would be better to express hatred by 'letting off steam and channelling it in ways that are consistent with law and order'[54]. If hatred is not expressed adequately and in a timely manner, it may accumulate and explode.

On the other hand, there is a long history of violence derived from love speech. In many cases, religious violence has been justified by the doctrine that the elimination of false doctrine is a manifestation of love for the community and for the advocate of false doctrine itself. Neo-atheist Sam Harris stresses this point:

> 'Once a person believes —really believes— that certain ideas can lead to eternal happiness or to its antithesis, he cannot tolerate the possibility that the people he loves might be led astray by the blandishments of unbelievers'[55].

There have been, indeed, many instances in history in which serious abuses against individual religious autonomy have been committed out of love, based on the notion according to which these abuses were the lesser of two evils, when compared to, say, saving individuals from eternal damnation. Likewise, domestic violence has often been seen, both by men and women alike, as a result of intense love and passion that frequently generates pathological and uncontrollable feelings of possession, jealousy and bitterness[56]. There is, unfortunately, a lot of violence associated with dating and marital relationships. The discourse of love has served to conceal and mask this reality for centuries.

In fact, there is an immense literature based on fictional or true love stories that end in homicide or in homicide followed by suicide. In some cases, the defence of paedophile practices has been based on a discourse of love for children or between children and adults. Besides this, the generalisation of a free-love discourse can

[54] T. I. Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal,* pp. 877, 885.

[55] S. Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (New York, W. W. Norton,
2005), p. 13.

[56] V. Goldner, P. Penn, M. Scheinberg and G. Walker 'Love and Violence: Gender Paradoxes in Volatile Attachments' (1990) 29(4) *Fam Process*, p. 343 ff.

have consequences from the point of view of the stability of family structures that are important for the healthy development of children and of the spread of sexually transmitted diseases, with an impact on public health. There are those who say that there are more cases of violence based on love than on hate.

This reality shows that not all hate speech can be dismissed as illegitimate and undesirable and not all love speech can be immediately accepted as socially desirable. The relationship between strong emotions and human conduct is more complex than commonly understood. A hasty and uncritical association of hate speech with socially undesirable behaviour can be detrimental to the free discussion of controversial issues. The same is true of the hasty association of the discourse of love with socially desirable behaviours. The distinction between love and hate is not easy, and in some cases we are faced with two sides of the same coin. Hence, judges should maintain an attitude of prudent critical detachment in this area, which is especially important when discussing controversial issues that are ideologically polarised.

Within certain limits, the expression of strong emotions is an essential dimension of human existence that must be legally protected. Taken in isolation, it does not establish an obvious or automatic connection with socially desirable or undesirable behaviours. Hence, it is premature to establish abstract and devoid-of-context relationships between emotions and behaviours.

6. **Vagueness and Drifting**

The concept of hate speech is vague (the same being true about other functionally equivalent concepts), indeterminate and imprecise, casting a wide net over many different forms of speech[57]. Building on the analogy of a fishing net, we can compare these vague terms to drift nets, that is, nets that are left hanging vertically in the water column and that drift with the current. Any fish that crosses the path of a drift net in the ocean may be caught in it. Drift nets are effective at bringing in large numbers of fish in one catch. However, they are controversial precisely because they have a large *by-catch*, that is, they catch too many individuals not specifically targeted. Likewise, the use of vague, imprecise concepts, drifting with the dominant political, religious or ideological currents, to target speech deemed undesirable and harmful ends up having a strong by-catch. That is, it captures speech that is important for individual autonomy; the search for truth and knowledge; democratic self-government; control of social powers; the accommodation of different worldviews, perspectives, rights and interests; and the peaceful transformation of society.

These concepts do not adequately meet the requirements of legal certainty, protection of trust and predictability embedded in the principle of the rule of law. As

[57] Uddin, 'Speech and Public Order', pp. 727, 761 ff.

Amal Clooney and Patricia Webb put it, 'vague and inconsistent bases for restricting speech are inherently open to abuse by undemocratic authorities, and even for well-meaning bodies they lead to decision making that is unpredictable and muddled —leaving citizens confused as to what speech may result in a prison term being meted out'[58]. This problem becomes worse once people start to suspect that national and international courts restrict speech because the majority of its judges do not agree with the ideologies, ideas, opinions or values being expressed.

Given its openness, indeterminacy and subjectivity, there will inevitably be many attempts to characterise a given discourse as hate speech whenever the intention is to silence it. As in other areas of law —think of tax law, intellectual property law or competition law, where the characterisation of conduct such as aggressive tax planning, infringement of a patent or a cartel may have significant legal consequences— there is a tendency within the scope of freedom of expression to characterise any vehement manifestation of political, religious or moral disagreement as hate speech, with the aim of censoring its dissemination.

A broad interpretation of the concept of hate speech could have unexpected consequences. For instance, let's go back to that part of Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination, which says that states 'shall declare an offence punishable by law all dissemination of ideas based on racial superiority'. If states were absolutely zealous in the interpretation and application of this provision, the education system of most countries in the world could face serious legal problems. Although this is not very well known, even among evolutionary scientists, the fact is that the subtitle of Charles Darwin's seminal book *On the Origin of the Species by Natural Selection* (1859) is *The Preservation of Favoured Races in the Struggle for Life*. Although Darwin personally abhorred slavery, his theory advanced the premise that different races are not equal in intellectual or physical capacity, some being closer to apes than others, and that the 'wonderful instinct of making slaves'[59] is really an unavoidable result of the process of natural selection.

In a free and democratic society, it is intended that the debate of ideas be carried out in a competitive way, testing the strength of ideas and opinions in a fair confrontation with opposing ideas. This is the liberal ideal espoused by John Milton[60] and John Stuart Mill. A free and open encounter between ideas is the best way to test their relative value. However, as with sporting competition or economic and commercial competition, many will try to advance their ideas without subjecting them to competition and cross-examination.

[58] Clooney and Webb, 'The Right to Insult', pp. 1 ff.

[59] C. Darwin, *On the Origin of the Species by Natural Selection.* (London, 1859), p. 229 ff., 223.

[60] J. Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England (1644).

They will try to cheat, engage in unfair conduct, abuse their culturally dominant position, persecute, assault and silence those who advocate opposing ideas and opinions, thereby gaining an advantage in the marketplace of ideas. As in the case of sports referees or competition authorities, the courts must ensure a free and fair confrontation of opinions, especially where controversial issues of concern to society as a whole are involved. Judges must be attentive to the struggle between worldviews and ideologies; affirm, with maximum impartiality, the rights and principles that guarantee the existence of an open and plural public sphere of discourse; and enable freedom of conscience and free expression of ideas and opinions in a democratic society.

More than a legal concept, the concept of hate speech was quickly captured by ideologies that saw in it an important concept of political, religious and cultural struggle, easy to handle and with great semantic plasticity. The concept of hate speech is above all a concept of political struggle and a cultural battle. It is not easily compatible with the requirements of legality and criminality and with the principle of *nulum crimen sine legem certa*. Its usefulness as a legal concept of criminal law is only feasible if it is understood in a very restricted and precisely circumscribed way; otherwise, it should be considered void for vagueness.

7. **Manipulation and Instrumentalisation**

Being an indeterminate concept, hate speech is particularly exposed to the risk of capture by interest groups, religiously correct or politically correct ideologies (e.g. Catholicism, Christian Orthodoxy, Islam, gender theory, Neo-Marxism, LGBT movements) or even by cultural and moral relativism. In the latter case, we consider those situations in which the simple affirmation of belief in moral absolutes is considered prejudiced, offensive and expressive of feelings of hatred and intolerance.

In some cases, the concept of hate speech is used to support a self-victimisation strategy developed by self-constituted minority groups to pursue their causes and to put themselves, as far as possible, on the fringes of public discussion and criticism. The concept of hate speech is often employed to convey the idea that the majority is always bad and oppressive, and minorities are always good and oppressed. Just as it is possible for a totalitarian ideology or with authoritarian impulses to try to use freedom of expression to promote its subversive ideas, it is also possible for the same ideology to use crimes of expression, such as hate speech, in a strategic manner, widening their scope as much as possible in order to try to silence the free critique of their ideas and weaken their opponents' position in the sphere of public discourse.

Hate speech is used to characterise the slightest expression of political, religious or moral disagreement. This is often the case when discussing issues of relevant social interest such as family structure, sexual conduct, gender, rape culture, violence against women and children, jihad and radical Islamic terrorism, historical heritage,

social integration of ethnic groups, immigration, crime and delinquency and work ethic, among other possible examples.

Many ideological groups and movements aim to promote their own different worldviews along with their implications for the understanding of concepts such as human dignity, human nature, freedom and equality. Some authors go as far as to say that hate speech restrictions are justified whenever they support equality[61]. In a democratic society, however, it must be recognised that even concepts such as dignity, freedom, equality and justice do not have a self-evident meaning. They are largely worldview- or ideology-dependent, which means that they are highly disputed concepts. For instance, it has been affirmed since Aristotle that equality means to treat equally what is equal and differently what is different, although the discussion of what this really means has lasted to the present day. The identification of the baselines or the criteria of similarity and difference that one needs to know in order to determine when two realities are equal, to be treated equally or are different, thus deserving a different treatment, is a complex question that is far from evident and free of controversy. One cannot simply label all conceptions of equality or justice that are different from our own as hate speech.

Two examples will help make this point. Mao Zedong justified his totalitarian communist dictatorship in the name of the socialist democratic ideals of equality and social justice, which, according to his understanding, implied equal participation in the economy along with the denial of all autonomous thinking and the imposition of maximum uniformity, including gender suppression and uniform dress[62]. Saudi Arabia justifies restrictions on the individual freedom of women with the idea that women have a special dignity and specific characteristics and are worthy of special protection[63]. The restrictions imposed on their freedom are actually presented as attempts to restrict the conduct of most men, excluding their parents and siblings, in their relations with them. Besides, some say, in the most general terms, that women around the world should be free to experiment with their own femininity within their own culture and tradition[64].

The mere promotion of dignity, freedom, equality or non-discrimination is insufficient to justify the broadening of the concept of hate speech and the restriction of

[61] R. Edger, 'Are Hate Speech Provisions Anti-Democratic?: An International Perspective'. (2011) 26 *University International Law Review,* pp. 119 ff.

[62] A. C. Hu, 'Half the Sky, But Not Yet Equal' (2016) *Harvard International Review*, <http://hir.harvard.edu/article/?a=13799> .

[63] A. E. Mayer, 'The Ethical and Legal Issues Surrounding Systematic Gender and Race Discrimination: Article A 'Benign' Apartheid: How Gender Apartheid Has Been Rationalized' (2000-2001) 5 *UCLA Journal of International Law and Foreign Affairs,* pp. 437 ff., 451.

[64] T. Monforte, 'Broad Strokes and Bright Lines: A Reconsideration of Shari'a Based Reservations' (2017) 5 *Columbia Journal of Gender & Law,* p. 1 ff.

freedom of expression. The mere fact that a religious community, a social group or a political party aims to promote the values of dignity, freedom or equality, endorsed in a particular sense, cannot mean that any criticism that may be levelled at that particular or parochial meaning or understanding of the values of dignity, freedom or equality should automatically be characterised as hate speech. These values and principles are, to a large extent, worldview-dependent concepts, compatible with different understandings.

Their meaning is not above discussion. In fact, as assumptions, presuppositions, worldviews and ideologies are subject to public dispute and controversy, so are the values, principles and norms that logically derive from them. The proliferation of 'discursive crimes', with an indeterminate, elastic and manipulable reach, such as hate speech, racism, sexism, offence, insults, phobias, blasphemy, fighting words and other similar concepts, threatens to place significant restrictions and impediments on the open and uninhibited conversation that should be taking place within a free and democratic society, calling into question the people's capacity for self-government.

The hate-speech clause has been used to censor otherwise legitimate expressions of opinion, in the context of public debate, concerning controversial topics such as immigration, abortion, religion and sexuality. The concept of hate speech is exposed to the risk of manipulation and may be selectively applied to ideas considered inconvenient and placed in a position of excessive dependence on dominant feelings. It is a broad concept that can easily lead to the censorship of the freedom to openly discuss controversial issues in need of public debate.

8. **Ideological Overinterpretation: Religion as Hatred?**

Recently, there has been a tendency, in no way ideologically neutral, to advance the idea that religion is unavoidably based on a discourse of hatred and that it engenders hateful and hideous conduct[65]. According to this view, religion is humanity's original sin, inherently abusive and repulsive[66]. This understanding, popular as it is, can be said to be based on a simplistic reading of reason, religion, science and human history.

On the one hand, religion deals with the most important questions concerning the origin, meaning and destiny of life, involving highly controversial ethical and moral questions, in a world marked by the existence of high ideals involving the search for good and, simultaneously, the reality and persistence of evil, calamity, suffering, cruelty and conflict. In seeking conclusive answers to all these questions of human

[65] S. Harris, *The End of Faith: Religion, Terror,* p. 11 ff.

[66] C. Hitchens, *God Is Not Great: How Religion Poisons Everything* (New York, Twelve, 2009), pp. 1 ff, 205 ff.

existence, religion becomes indisputably involved in all of them. But this does not allow for a simplistic reduction of religion to hatred or evil. Religion offers *ex post facto* explanations for the existence of evil, as many philosophers and scientists have been trying to do. On the other hand, universal history clearly demonstrates the existence, in all times and places, of violent conflicts between peoples, tribes, nations, states, social classes, families and households, often linked to the struggle for power, wealth, fame and ambition and the desire for conquest and domination.

To think that these problems will end if religion were to cease to exist is to have a naive and simplistic view of history and to forget the contribution of moral and religious axioms of human dignity, freedom, freedom of conscience, social justice, peaceful resolution of conflicts, love of one's enemies and the search for truth and justice to efforts to resolve these conflicts or mitigate their effects. We can find important contributions from religious thought in areas such as peaceful conflict resolution, humanitarian law, just war, respect for international treaties, natural law, natural rights, democracy, separation of powers, rule of law, international free trade, protection of the environment or the fight against corruption.

9. **Censorship**

Throughout the ages, people have tried to promote certain ideologies through the persecution and censorship of opposing ideas and not through direct confrontation. Think of Catholicism, fascism or Marxism, for instance. On the contrary, freedom of expression aims to create a free marketplace of ideas, where opinions can be confronted with one another in a process of free, open and critical democratic dialogue. The proliferation of discursive crimes of undoubtedly vague, indeterminate and imprecise content (e.g. hate speech, fighting words, group defamation, defamation of religion, Holocaust denial, denial of crimes against humanity, blasphemy and all kinds of phobias) contributes to inhibiting the debate concerning multiple issues of public interest, creating a climate of censorship, self-censorship and judicial and online harassment.

Matters are further complicated since taking legal action against speakers may leave the courts with a difficult choice: acquittal means enhanced prestige for the accused, while demonstrating democratic weakness; conviction risks turning the accused into a martyr, especially if the sentence is short[67]. To what extent this is the case, however, is still a matter of debate[68]. Freedom of expression, established and built in the fight against censorship *ex ante* and *ex post*, ends up suffering the death of a thousand qualifications. A stable successful democracy will never ban

[67] This point was made by D. Riesman, 'Democracy and Defamation: Control of Group Libel' (1942) 29 *Columbia Law Review,* pp. 727, 755.

[68] K. Gelber and L. Mcnamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia' (2015) 49 *Law & Society Review,* p. 631 ff.

hate speech entirely. Hate speech is part of the price a society has to pay in order to secure democracy.

V. Religious freedom and the sphere of public discourse

1. The Importance of Freedom of Conscience, Religion and Expression

Freedom of conscience, opinion, religion and expression take centre stage in the formation of a free, open and democratic society. They affirm the existence of an untouchable reservation of individual sovereignty that presents itself as a limit to state power and an antidote against any form of tyranny over the spirit of man, as Thomas Jefferson put it. They do not guarantee the absence of dialectical tension or moral, cultural or political conflict in society. However, they prevent the development of a totalitarian social order built on religiously, philosophically or politically correct social tenets. Freedom of conscience, religion and expression are a strong defence against governmental imposition of religious or secular totalitarian ideologies.

2. Discussing Controversial Subjects

It is important that issues of public interest and social relevance be openly and critically discussed. These issues may cover controversial topics such as ideological assumptions, political institutions, government, policymaking, environmental issues, religious doctrines and practices, scientific concepts and theories, immigration policy, historical heritage, life, health, family structures or sexual behaviour. These are examples of subjects whose conceptual and practical contours may have important ramifications and social implications and should therefore be widely discussed. Individual freedom of opinion and expression, including freedom of religious expression and freedom of expression about religion, will always involve the discussion of controversial subjects where truth is considered entirely relevant albeit not always immediately self-evident.

This discussion will almost inevitably include hearing and accepting severe and potentially offensive criticisms. Some expressions and statements may even be subjectively interpreted as insulting because they are so antagonistic to the ideas advocated by their recipients. Think, for instance, of comparing the Quran to *Mein Kampf* as a way of stressing the link between some religions or ideologies and violence, as Geert Wilders did in Holland[69]. The same may be said in the comparison of the

[69] R. A. Kahn, 'The Acquittal of Geert Wilders And Dutch Political Culture', University of St. Thomas School of Law Legal Studies Research Paper No. 11-31, (2011) *Working Paper,* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956192> (accessed 06 Feb 2019).

Catholic Church and the mafia when it comes to covering up paedophilia scandals[70]. The discussion of the true political, legal, social and cultural impact of the advance of a given religious or secular worldview can certainly be a controversial topic[71], but it is nonetheless one that warrants public debate.

Another example may be the claim of a connection between homosexual behaviour or promiscuous heterosexual behaviour, on the one hand, and the promotion of paedophilia or the dissemination of sexually transmitted diseases, on the other[72]. Controversial or problematic as these comparisons or connections may be, they may be a legitimate part of a broad political and legal debate. They should not be subjected to censorship and criminalisation, but fought only through critical examination, factual demonstration, argumentative discussion and refutation[73]. The case of sexual behaviour is a case in point. Considering the fact that sexuality has complex individual and social and sanitary implications and ramifications, sexual behaviour can never be immune to a serious, if at times uncomfortable, discussion at a systemic level. People may disagree with the positions being expressed or with the moral assessment of conduct and lifestyles, but that is not grounds for censoring them.

As European Court of Human Rights Justice and legal scholar András Sajo put it:

> 'Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go "against the spirit" of the Convention. But "spirits" do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our

[70] K. L. Morris, 'Cardinal Law and Cardinal Sin: An Argument for Application of R.I.C.O. to the Catholic Sex Abuse Cases' (2014) 15 *Rutgers Journal of Law and Religion,* p. 298 ff.

[71] An example is the case *Féret v Belgium,* App no 156015/07 (ECHR, 16 Jul 2009), concerning the distribution by the National Front in Belgium, during the election campaign, of several types of leaflets containing slogans such as 'Stand up against the Islamification of Belgium', 'Stop the sham integration policy' and 'Send non-European job-seekers home'. The European Court of Human Rights upheld the conviction of the leader of the National Front for inciting racism considering that there had been no violation of Article 10 (freedom of expression) of the convention. However, it seems to be too much of a restriction on political speech if the political and cultural assumptions, ramifications and implications of immigration policy cannot be openly debated during an election campaign. Such a restriction can backfire and trigger radicalisation and further the development of alternative right-wing populist authoritarian movements.

[72] This was the question in the case *Vejdeland v Sweden*, App no 1813/07 (ECHR, 9 Feb 2012), [8-9] and [59-60], in which the European Court of Human Rights adopted an excessively restrictive view, considering the fact that it was confronted with a critical assessment of sexual conduct.

[73] R. Kiska, 'A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence' (2012/2013) 25 *Regent University Law Review*, pp. 107 ff.

> judgment, as our personal convictions can influence our ideas about what is actually dangerous'[74].

Richard Thaler and Cass Sunstein rightly point out that human beings are very far from being natural-born rationalists and utilitarians[75]. On the contrary, they may have irrational and self-destructive tendencies, leading to some irrational and destructive behaviour[76]. That is why open debate and discussion, based on critical thought and cross-examination of all relevant information and varied opinions, is so important. This debate will help in the determination of the appropriate level of state regulatory paternalism. Sexuality is not exactly the most rational domain of human conduct. That is why Cass Sunstein observes that 'paternalists might believe that certain sexual activity is inconsistent with people's well-being, suitably defined, and hence they should not be allowed to engage in that activity'[77]. Moral debate requires that all human behaviour with systemic ramifications remain open to critical scrutiny and assessment. These principles apply when dealing with religious expression or expression about religion. Sometimes what is considered by some offensive or insulting is no more than an honest disagreement about the meaning of fundamental rights and principles. For example, some religious denominations are considered sexist and misogynistic because they are against abortion. From the perspective of these religious confessions, however, it is only about promoting responsible parenting and preventing the destruction of human life, be it male or female.

Likewise, some religious confessions' opposition to same-sex marriage, polygamy or polyamory is described by some as homophobic, polyphobic and hateful. However, for these religious denominations, there is a divinely established order of creation that lends special dignity to the recognition and protection of the relationship between one man and one woman, understood as complementary human beings with equal dignity. According to this view, the social importance of this union is largely due to the fact that all living beings —present, past and future— are the natural result of the union between a man and a woman. The purpose is to guarantee that more and more children will have the committed and responsible love of their real mothers and fathers.

[74] *Féret v Belgium*, App no 156015/07 (ECHR, 16 Jul 2009), dissenting opinion of Judge András Sajó, joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria.

[75] R.H. Thaler, and C.R. Sunstein, *Nudge, Improving Decisions About Health, Wealth, and Happiness* (London, Penguin, 2009), pp. 17 ff., 74 ff. 249.

[76] R. H. Thaler, and C. R. Sunstein, 'Libertarian Paternalism Is Not an Oxymoron' (2003) 70 *University of Chicago Law Review,* p. 1159.

[77] C. R. Sunstein, 'The Storrs Lectures: Behavioral Economics and Paternalism' (2013) 122 *The Yale Law Journal,* pp. 1828, 1855.

Not everything that is characterised, in a partial, deliberate and opportunistic way, as hateful, insulting or offensive must be accepted as such by the judiciary. That characterisation is often put forward in a partial and biased way by ideologues that have a stake in the issue and want to frame public discussion in a certain way. Their purpose is to immunise their preferred topics against antagonism and confrontation with opposing perspectives. In many situations, that characterisation is, above all, a rhetorical strategy adopted in the heat of political and ideological debate, and must be carefully identified, deactivated and neutralised by the courts at a national and international level.

Many of the arguments that are made in the public square concerning controversial political, legal, economic, cultural or scientific questions are worldview-dependent, in the sense that they depend on a more or less conscientious and coherent comprehensive belief system. And all worldviews, religious or secular, rely on a specific mix of empirical and fideistic, objective and subjective elements. Honest critical inquiry into religion or secular (naturalistic) worldviews and their existential and ethical corollaries is the only efficient way to cross-examine those worldviews and combat prejudice and intolerance, irrespective of their nature and provenance. For this reason, the law must recognise a wide margin of free thought, opinion and expression regardless of the religious or secular nature of the topic and of the arguments in a debate[78]. In many cases, the confrontation of ideas can put the individual face to face with the political, religious, scientific and cultural establishment of their time, exposing what, in their eyes, seems true but that others see as being erroneous, absurd and even unacceptable.

This confrontation of ideas, although in some cases intense and difficult, is considered of great relevance to the dialectic of political, religious, social and cultural progress of the political community. In this context, the promotion of democracy at the national and global levels can be severely hampered by the proliferation of discursive crimes. If such a proliferation is already sufficiently serious and susceptible to abuse when it occurs within stable and traditional democracies, it will most likely be in authoritarian regimes that will not hesitate to resort to such crimes to neutralise and crush dissenting opinions.

We have recently seen what has happened in terms of restricting freedom of expression in countries such as China, Egypt, Indonesia, Pakistan, Russia, Saudi Arabia and Turkey, with long traditions of state censorship, invoking as justification the usual discursive crimes. Having in mind the situation in some of these countries, Asma Uddin notes that ‘blasphemy or defamation are increasingly used by extremists

[78] Magarian, ‘Religious Argument’, pp. 119, 121.

to censor all legitimate critical debate within religions'[79]. The same applies, *mutatis mutandis*, to hate speech.

3. Conversational Civility

A liberal society, politically and legally structured and understood as a constitutional state, is based on principles of equal dignity of recognition, reciprocity and mutual respect. However, this discussion of controversial and sensitive issues cannot do without the right to engage in vehement, difficult, forceful and potentially offensive speech. The criticism of attitudes and conduct may at times be frontal, caustic and very unpleasant to the ears of the recipient. The point is that ideas should be expressed, as much as possible, in an acceptable way, from the point of view of the minimum rules of civility that should regulate human interaction and even grant a reasonable margin for some excess and exaggeration. John Locke, who himself had this personal experience, makes this point very clearly when he writes:

> 'If a man, as a sincere friend to the person, and to the truth, labours to bring another out of error, there can be nothing more beautiful, nor more beneficial. If party, passion, or vanity direct his pen, and have a hand in the controversy; there can be nothing more unbecoming, more prejudicial, nor more odious'[80].

Faced with this reality, it is important to cultivate a discursive ethic based on the principles of equal dignity, mutual respect, reciprocity and civility. Even if the ideal of *gentle persuasion*, promulgated by the Quakers, seems unrealistic and unattainable, it is important to promote a discursive culture based on respect. Truculent bearing, intentional discourtesy, very harsh language, the intention to bully and intimidate, personal abuse or speech threatening bodily harm cannot count on the protection of the law. This aspect is especially important in plural societies.

A greater emphasis on discursive civility is largely justified by pragmatic and prudential reasons. Communication technologies today enable the creation of a worldwide sphere of public discourse in which a video that has gone viral in social networks can ignite a cultural shock with an intensity that can pose a threat to public safety and national security. For instance, today, Google, YouTube and Facebook have to decide whether to make potentially offensive videos about Islam available in some Islamic countries. This is true even if these videos engage in legitimate and serious criticism of Islamic tenets, doctrines and practices.

However, respect for the basic norms of civility does not rule out all forms of caustic or vehement discourse. Moreover, excesses and abuses are unavoidable in a

[79] Uddin, 'Speech and Public Order', pp. 727, 776.
[80] J. Locke, (1695) *The Works of John Locke, The Reasonableness of Christianity* (Vol. VI).

free and democratic society. This point was famously stressed by the US Supreme Court in *Cantwell*:

> 'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is that, under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country, for a people composed of many races and of many creeds'[81].

In *Cantwell*, the US Supreme Court followed a contextual approach. This is very important since the impact of speech cannot be assessed in abstract terms, as will be made clearer below. Moreover, criminal law should play a limited role here. It is not for criminal law to contribute to a sphere of public discourse inhibited by censorship and self-censorship. Of course, in a globalised, interconnected and digitalised world, dealing with contextual issues in the light of international human rights law may become more difficult and more complex[82].

4. **Balancing Freedom of Speech with the Rights of Others**

The spiritual freedoms of conscience, religion, opinion and expression bind the public and private powers. The protection of freedom of expression against the state would be of no avail if the individual speaking could be freely disturbed, intimidated, silenced, evicted or dismissed by private entities. Freedom of religion and speech should be protected from formal or informal acts of private censorship and discrimination.

Of course, individuals and private entities also have their rights of autonomy, which in turn deserve the protection of the law. They should not be obliged to endorse, disseminate or finance opinions or ideas that they do not agree with. On the other hand, the constitutional order cannot entirely ignore the rights, needs and feelings of the targets and the listener, both victims and bystanders[83]. For this reason, the defence of conflicting rights involving different individuals and groups requires a prudential

[81] *Cantwell v Connecticut*, 310 U.S. 296, 310 (1940).

[82] Rosenfeld, 'Hate Speech', pp. 1523 ff.; T. Mendel, 'Does International Law Provide for Consistent Rules on Hate Speech?' in M. Herz and P. Molinar (eds), *The Content And Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge, Cambrige University Press, 2012), p. 417.

[83] Catlin, 'A Proposal for Regulating', pp. 771 ff.

procedure of weighing, balancing, harmonisation, optimisation, practical agreement and social integration.

It has long been understood in constitutional and international human rights law that the problems of the collision of rights must be resolved through a methodology of reasonable consideration of varied competing rights and interests, according to criteria of proportionality, harmonisation and agreement of rights. The goal is to look for solutions of compromise, accommodation and *modus vivendi*, rather than entirely logical, consistent or all-or-nothing solutions. Although this balancing methodology has its weaknesses and may lead to incoherent and inconsistent results[84], it is probably the best that we can come up with in the context of conflicting worldviews and complex societies[85].

The balancing of competing rights and interests should be done according to relevant criteria, such as equal dignity and freedom, communicative democracy, vigorous debate on controversial issues, peaceful coexistence, public order and safety and proportionality. In the specific domain of hate speech, Scott Clatin suggests a number of relevant criteria that should be taken into account. These are: (1) the intent of the speaker; (2) how closely the speech was directed at a specific person or group at the time of its utterance; (3) the response actually induced in the listener; (4) the government's interest in protecting the speech; and (5) whether there is any other reasonable use or purpose of the speech for which it should be protected[86]. According to Amal Clooney and Patricia Webb, the relevant contextual elements that must be taken into account are: '(i) *what* was said, (ii) *who* said it and to *whom*, (iii) *how* was it said, (iv) *when* was it said, (v) *where* it was said, (vi) *what intent* the speaker had, and (vii) *what impact* the statement had'[87]. Balancing cannot be done in the abstract.

It must be assumed that in a free, open, democratic and plural society, public debate must be broad and permanent[88]. As John Rawls put it, we live in a society of a 'plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life'[89]. Constitutional and international human rights law must thus accommodate existing deep and irresolvable differences concerning worldviews, beliefs, values, identities, and groups. This means that *prima facie* all forms of speech on all subjects are constitutionally protected. However, there are

[84] I. Trispiotis, 'The Duty To Respect Religious Feelings: Insights From European Human Rights Law' (2013) 19 *Columbia Journal of European Law,* pp. 499, 503.

[85] N. Tebbe, 'Religion and Social Coherentism' (2015) 91 *Notre Dame Law Review,* pp. 363, 368 ff.

[86] Catlin, 'A Proposal for Regulating', p. 811.

[87] Clooney and Webb, 'The Right to Insult', p. 25, italics in the source.

[88] J. D. Inazu, 'A Confident Pluralism' (2015) 88 *Southern California Law Review,* pp. 587 ff.

[89] J. Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Stud,* pp. 1, 4.

some restrictions that may be necessary in a democratic society that are concerned with the protection of rights and interests such as the rights or reputations of others, national security, territorial integrity, prevention of disorder or crime, public order (ordre public), public health or morals, preventing the disclosure of information received in confidence or maintaining the authority and impartiality of the judiciary[90].

The limitation of freedom must be adequate, necessary and proportional to the protection of a constitutional right or interest, always looking for the least restrictive alternative. In intense debate on controversial issues, an elementary ethic of civility and courtesy must be respected, sensitive to religious or non-religious feelings. Extreme fighting words and incendiary formulations should be avoided, and respect for the human dignity of the interlocutor must be ensured[91]. If it is possible to convey a controversial message on a controversial subject without directly provoking, challenging or humiliating its recipients, this should be the preferred route.

This was what happened in the case involving the vehement message of moral censure of the US Army policy on homosexuality by the Westboro Baptist Church during the funeral of an American marine. In this case, care was taken to ensure a reasonable distance between the members of the church and the relatives of the deceased soldier[92]. However, this did not happen when the feminist and pro-LGBT punk group Pussy Riot sang an anti-Christian, anti-Church and anti-Putin rap in the *Cathedral of Christ the Saviour*, in *Moscow*, shouting phrases like 'Holy Shit', 'Shit of God' and 'Mother of God, become a feminist'[93]**.** Having been charged with the criminal offence of hooliganism motivated by religious hatred and enmity towards Orthodox believers, the singers were sentenced to two years' imprisonment[94]. In fact, it could hardly be understood that freedom of expression protects the right to desecrate and disrupt a place of worship and to insult the beliefs that are manifested there, significantly disturbing the free exercise of religion.

[90] Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953; Article 19(3) of the International Covenant on Civil and Political Rights, 1966.

[91] See *Chaplinsky v New Hampshire*, 315 US 568 (1942): 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'.

[92] *Snyder v Phelps* 131 S.Ct. 1207 (2011).

[93] A thorough discussion of the case can be seen in V. Kananovich, '"Execute not Pardon": The Pussy Riot Case, Political Speech, and Blasphemy in Russian Law' (2015) 20 *Communication Law & Policy,* pp. 310 ff.

[94] Trispiotis, 'The Duty To Respect', pp. 499, 501.

The members of Pussy Riot are not forced to agree with, much less submit to, the tenets of the Russian Orthodox faith and practice. But the band had many other outlets, besides a temple, where it could spread its political and ideological message and its criticism of religion, offensive as it might be. Temples, as core elements of religious faith and worship, regardless or religious denomination, have always been considered worthy of special respect. Regardless of the procedural flaws that may or may not have taken place during the trial[95], the substantive truth is that Pussy Riot showed an extreme lack of respect for a house of worship and its worshipers. This balancing process must comply with abstract and objective criteria. Subjective sensitivity cannot be the only criterion of offence or insult, nor can it provide authorisation to censor speech. If individual or collective sensibility were the decisive criterion in matters of freedom of conscience, opinion and expression, this fundamental right would immediately cease to exist, as it would depend on the veto right of every individual or group.

It is for this reason that constitutional and international human rights case law has long held that freedom of expression protects speech that is shocking, disturbing and offensive. And this is true regardless of whether we are dealing with majority discourse directed at a minority or minority discourse directed at the majority. Even if it is true that constitutional and international human rights are supposed to assure all citizens —especially vulnerable minorities— that they are welcome in society[96], this does not mean that all ideas and conduct, including those of vulnerable minorities, are equally welcome in society, much less immune to criticism and debate.

It is also irrelevant whether it is religious discourse directed at secularised worldviews or lifestyles or discourse that the latter can address to religious worldviews or spiritual communities. No one can claim for themself a statute of discursive immunity and put themself above criticism or discussion of opinions. No one can present themself in the public sphere as a person, group or entity that possesses indisputable ideas and opinions. Trying to get discursive immunity for one's existential or ethical commitments through name-calling is not an acceptable legal option. At the same time, a gratuitous offence that proves obviously unnecessary, disproportionate and devoid of dialectical utility cannot necessarily claim full legal and judicial protection. This balancing methodology recognises the structurally plural, antagonistic and conflicting nature of modern societies, where collisions of rights and principles are associated with hermeneutical conflicts about the normative scope of these same rights and principles. According to John Inazu, a confident pluralism is 'rooted in the

[95] D. Koenig, 'Pussy Riot and the First Amendment: Consequences for the Rule of Law in Russia' (2014) 89 *New York University Law Review,* pp. 666, 671 ff.

[96] J. Waldron, *The Harm in Hate Speech.* (Cambridge MA, Harvard University Press, 2012), pp. 100 ff.

conviction that protecting the integrity of one's own beliefs and normative commitments does not depend on coercively silencing opposing views'[97].

5. **Incitement to Discrimination**

It is often said that incitement to discrimination should be considered a form of hate speech, albeit a more sophisticated and substantive one. This is because, as Michel Rosenfeld notes, hate speech can disguise itself in subtle forms of public discourse, avoiding straightforward, raw and crude invectives. He notes that prejudice and anti-Semitism can disguise themselves as factual or theoretical scientific and historical debates about topics such as the fact and scale of the Holocaust[98] or the presentation and interpretation of certain statistics, such as those indicating that, proportionately, blacks commit more crimes than whites[99]. This may indeed be so. But the problem is to know how and where we should draw the line between the protection of human dignity and the protection of legitimate religious, historical or scientific debate even if its conclusions do not coincide with political, religious or ideological sensibilities or with politically correct positions. In fact, hate speech, and concepts with an equivalent silencing effect, can also be attempts to silence legitimate debate disguised as ways to protect the right to equal dignity. We will discuss one example below.

Some years ago, James Watson, a Nobel Prize-winning geneticist, provoked a public outcry by claiming, in a newspaper interview, that black Africans were less intelligent than whites. He said that 'all our social policies are based on the fact that their intelligence is the same as ours —whereas all the testing says not really'[100]. True to his evolutionary assumptions, Watson also wrote that: 'there is no firm reason to anticipate that the intellectual capacities of peoples geographically separated in their evolution should prove to have evolved identically. Our wanting to reserve equal powers of reason as some universal heritage of humanity will not be enough to make it so'[101]. Although trying to assert a fact that he was convinced (rightly or wrongly) was empirically correct, he was immediately shunned as a racist and removed from public academic discourse. This means that even factual and scientific debate can be

[97] J.D. Inasu, 'A Confident Pluralism', pp. 587, 592.

[98] The case *M'Bala M'Bala v France*, App no 25239/13 (ECHR, 20 Oct, 2015) can possibly be best understood within this framework, although some might question if forbidding Holocaust denial is really necessary to protect democracy and Jews themselves.

[99] Rosenfeld, 'Hate Speech', pp. 1523, 1525 ff.

[100] C. Milmo, 'Fury at DNA pioneer's theory: Africans are less intelligent than Westerners' *The Independent* (17 Oct 2007), <https://www.independent.co.uk/news/science/fury-at-dna-pioneers-theory-africans-are-less-intelligent-than-westerners-394898.html > (accessed 17 Dec 2017).

[101] J. Watson, *Avoid Boring People: Lessons from a Life in Science* (Toronto, Borzoy Books, 2007), p. 326.

stifled by ideological assumptions and presuppositions. People will try to disregard not only the opinions but also even the facts that they find unpleasent or inconvenient in light of their worldview.

However, if it is legally correct to silence the alleged hateful and racist assertions of James Watson, we have to keep in mind that he was just reworking the logical corollaries of Darwinian evolutionary assumptions. As suggested above, Darwinism developed largely as an intellectually sophisticated form of Victorian white supremacist and imperialist theory, with scientific pretensions, with an immediate impact on how Aboriginal, African or Native American peoples could be dealt with in the white-dominated, largely British colonies. This much was admitted by Harvard Professor Stephen Jay Gould, a leading evolutionist himself, who wrote:

> 'Biological arguments for racism may have been common before 1850, but they increased by orders of magnitude following the acceptance of evolutionary theory. The litany is familiar: cold, dispassionate, objective, modern science shows us that races can be ranked on a scale of superiority. If this offends Christian morality or a sentimental belief in human unity, so be it; science must be free to proclaim unpleasant truths'[102].

And there is no doubt about the existence of a clear and direct connection between Darwinism, Aryan imperialism and genocide in Nazi Germany:

> 'struggle, selection, and survival of the fittest, all notions and observations arrived at … by Darwin … but already in luxuriant bud in the German social philosophy of the nineteenth century. … Thus developed the doctrine of Germany's inherent right to rule the world on the basis of [the] superior strength … [of the] "hammer and anvil" relationship between the Reich and the weaker nations'[103].

A broad interpretation of hate speech would certainly disqualify Darwinism as being inherently imperialist, racist and white supremacist in its assumptions and premises. It would lead to the logical conclusion that Darwinism is the ultimate and most successful subtle form of incitement to racist hatred. In football stadiums around the world, African football players have been insulted as 'monkeys' in a way consistent with the worldwide acceptance of evolutionary assumptions, which assume that whites are more evolved than other so-called races[104]. And yet, Darwinism is

[102] S. J. Gould, *Ontogeny and Phylogeny* (Cambridge MA, Harvard University Press, 1977), p. 127.

[103] J. Tenenbaum, *Race and Reich* (New York, Twayne Pub, 1956), 212.

[104] 'Brazilian Soccer Player Left in Tears After Racist 'Monkey Chants' from Rival Fans', *People* 21 February 2017, <Fanshttp://people.com/sports/brazilian-soccer-player-left-in-tears-after-racist-monkey-chants-from-rival-fans/> (accessed 17 Dec 2017). To understand the underlying assumptions, consider, for instance, what Charles Darwin wrote about a hierarchy of races: 'It is very true what you say about the higher races of men, when high enough, replacing & clearing off the lower races. In 500 years how the Anglo-saxon race will have spread & exterminated whole nations; & in consequence how much the Human race, viewed as a unit, will have risen in rank'. Letter 3439, Darwin to Kingsley,

taught all around the world. If we were to accept the broader view of hate speech and concepts with an equivalent silencing effect, we would have to conclude that many university professors, at times without even noticing it, have been teaching their students the tenets of white supremacism, racism and racial discrimination. This conclusion supports the view of those who highlight the arbitrary nature of the standard[105].

What has been said about Darwinism can be extrapolated to other domains of debate that may have consequences for our understanding of equality, equal treatment and treatment as equals. In a very crude formulation, the principle of equality means that equal things should be treated equally, and different things should be treated differently[106]. This principle is violated whenever what is equal is treated differently and what is different is treated equally. But what are the baselines? What are the relevant classifications of equality and difference? Are they biological? Theological? Scientific? Political? Legal? Cultural? Social? And which ones among all the possible classifications should we choose? These are delicate debates that may have an impact on the application of the equality principle in areas such as religious freedom, social dress codes, family, sexuality, gender, reproduction, animals or nature. They try to identify the relevant baselines and classifications of equality and difference. However, it is not always easy to know when the equality principle is being applied or misapplied. The answer is in many cases worldview-dependent[107].

In fact, some answers to fundamental legal questions concerning the meaning of human dignity, freedom, fundamental rights, equality, difference and discrimination are far from self-evident, even when one takes into account the traditional methods of legal interpretation based on text, structure, history and the objectives pursued[108]. They refer inexorably to the conflict between religious and secular views of humankind and the world. These worldviews are disputed in the theological, scientific,

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Charles, 6 Feb 1862. In what would sound today like white supremacism, Charles Darwin also wrote: 'Remember what risks the nations of Europe ran, not so many centuries ago of being overwhelmed by the Turks, and how ridiculous such an idea now is. The more civilised so-called Caucasian races have beaten the Turkish hollow in the struggle for existence. Looking to the world at no very distant date, what an endless number of the lower races will have been eliminated by the higher civilised races throughout the world'. Letter 13230, Darwin to Graham, William, 3 Jul 1881, University of Cambridge, Darwin Correspondence Project, <https://www.darwinproject.ac.uk/> (accessed 19 May 2018).

105 Clooney and Webb, 'The Right to Insult', pp. 1 ff.

106 D. J. Kochan, 'On Equality: The Anti-Interference Principle' (2011) 45 *University of Richmond Law Review,* p. 434.

107 J. L. Levi, 'Misapplying Equality Theories: Dress Codes at Work' (2008) 19 *Yale Journal of Law and Feminism,* pp. 353 ff.

108 Kochan, 'On Equality', p. 431

philosophical, political, juridical and cultural playing fields.[109] Peter Weston goes as far as stating that:

> 'Equality, I argue, has two qualities that together disqualify it as an explanatory norm in law and morals. It is both empty and confusing: "empty" in that it derives its entire meaning from normative standards that logically precede it; "confusing" in that it obscures the content of the normative standards that logically precede it'[110].

In light of these comments, it is understandable that what some may seem to be an honest discussion of the meaning of equality, others may try to characterise it as a hateful appeal to discrimination. On the other hand, what for some may see as a hateful attack on the doctrines or ethical convictions of a vulnerable religious or secular minority group, others may see as a legitimate and proper expression of public criticism within the limits of freedom of thought, opinion and expression[111]. Hence, the expected response should not be unrelated to the goals of accommodation, compromise, conciliation, social integration and peaceful coexistence between different religious and secular worldviews. The state should remain as neutral as possible, letting the discussion follow its due course and abstaining as much as possible from interfering[112].

A binary approach will lead to radicalisation, fragmentation and destabilisation of political and social structures. In a free and democratic society, ideological, religious, political, legal, economic and scientific debates should develop honestly and freely in the multiple domains of the sphere of public discourse. Any regulation of debate can easily curtail freedom of expression, undermining individual autonomy and democracy. Equally reasonable, well-meaning people acting in good faith may agree on the need to promote freedom, equality and the prohibition of discrimination. But they may strongly disagree about the scope of freedom, the meaning of equality and the presence of real discrimination. That is why only totalitarian, irrational, groundless or mean-spirited appeals to political and legal discrimination may be considered hate speech.

6. **Hate Speech and Human Dignity**

In a free and democratic constitutional order, freedom of expression must be the rule, and the restriction of freedom must be the exception: it has to be duly grounded, proportional and subject to restrictive interpretation. The abusive use of highly manipulative expressions such as hate speech, insult, offence, blasphemy, group defamation, defamation of religion or phobias to criminalise the expression of personal or

[109] P. Weston, 'Articles and Commentary on Equality: The Meaning of Equality in Law, Science, Math, and Morals: A Reply' (1983) 81 *Michigan Law Review,* pp. 604 ff.

[110] Weston, 'Articles and Commentary', pp. 604 ff.

[111] Magarian, 'Religious Argument', p. 179.

[112] Kochan, 'On Equality', pp. 431 ff.

institutional opinions or perspectives about controversial issues should be considered contrary to the freedom of expression generally and to the freedom of expression and religion in particular. Even if one does not go so far as to defend a right to insult, as some understandably do[113], it should be stressed that freedom of conscience, opinion and expression must protect independent critical thinking, including the right to examine, analyse, appreciate, evaluate, criticise, judge, comment on, disapprove, censure, condemn, curse, demean, admonish and correct.

For instance, Islamic people may legitimately say that Jews and Christians are infidels, since that label logically derives from their belief system. The same is true with Christians saying that homosexuality is a sin or saying that all human beings are sinners. On the other hand, self-defined LGBT people should be allowed to say that those who disagree with their lifestyle suffer from some phobia, because that logically derives from their belief system. In sum, in a free and democratic society, we should accept everyone's right to hold anyone else in contempt for some reason. Divergences about worldviews and ethical conceptions always overflow the personal level to some extent. From the right to critical thinking arises a right to criticise all people, ideas and behaviours that may have an impact on the rights and interests of individuals or on the political community as a whole. If, in the absence of a real, actual, specific factual harm, the exercise of criticism is subjectively perceived as hateful, defamatory, insulting or offensive by rulers, monarchs, religionists, secularists, majorities, minorities or individuals, that should be legally irrelevant. Criminal law, which is expected to operate only as *ultima ratio*, should have nothing to do with it[114].

This means that the normative scope of the concept of hate speech, and other similar concepts, should be limited to instances of extreme and gratuitously offensive discourse, intentionally directed at individuals or groups, not to make a critical assessment of their worldviews, opinions or ethical conduct and their social ramifications, but with the sole purpose of provoking, disturbing, humiliating or oppressing, not to mention causing the utmost annihilating damage. And even in these extreme cases, punishment must be proportionate.

Hate speech must be linked to a systematic process of dehumanisation and the production of severe physiological symptoms and emotional distress even if there is not a real threat to public order[115]. The same must presuppose the degradation and denigration of a human being, their humiliation or vilification and the ostensible appeal to violence against their dignity. In a free constitutional order, the social

[113] Clooney and Webb, 'The Right to Insult', pp. 1 ff.

[114] D. J. Baker and L. X. Zhao, 'Normativity Of Using Prison To Control Hate Speech: The Hollowness of Waldron's Harm Theory' (2013) 16 *New Criminal Law Review,* pp. 621 ff.

[115] C. J. Ogletree Jr., 'The Limits of Hate Speech: Does Race Matter?' (1996 / 1997) 32 *Gonzaga Law Review,* pp. 491, 502.

democratic compromise must concern itself with the impact of speech on the most vulnerable social groups and with their real speech opportunities[116].

The point is not to prohibit the dissemination of critical opinions or contentious perspectives concerning majority or minority positions, but to repudiate all verbal or symbolic elements that, being particularly offensive, aggressive and menacing, are not necessary for the formulation, expression and full understanding, in all its forcefulness, of ideas transmitted and thus have a *de minimis* social and constitutional value[117]. It is only with a very limited scope that the concept of hate speech is acceptable in a pluralist society based on freedom of conscience, opinion and expression. It can be used to cover the most extreme instances of speech that deliberately and grossly incites hatred, hostility, denigration, dehumanisation and humiliation but that falls short of incitement to violence. When that is the case, this and other similar concepts may apply regardless of the existence of a clear and present danger, provided the punishment is reasonable and proportionate.

7. **Clear and Present Danger**

Freedom of expression has long been advocated, is not absolute and does not protect anyone who decides to shout 'Fire!' in a crowded theatre[118]. This is because doing so could lead to panic, disorientation, confusion, collisions, injuries and deaths. Things differ, of course, if there really is a fire in the theatre or if the person is actually convinced that there is such a fire. In this case, one not only can but must warn others of the danger they are in, even if some negative effects result. The point is that we cannot simply use the metaphor of a shout in a crowded theatre against any unpopular speech. In a democratic society, unpleasant, inconvenient and even dangerous news and ideas must be disseminated because they are deemed to be relevant to the whole community.

People may sincerely believe that religion in general, Christianity, Judaism, Islam, jihadism, capitalism, consumerism, communism, socialism, sexism, feminism, gender theory, homosexuality, atheism, naturalism, scientism, secularism, nationalism or globalism for some reason represents a real danger to society and that they are entitled to articulate and express their thoughts on these and other controversial topics. In this discursive and argumentative process, undesirable ideas will inevitably be disseminated. But they should be opposed primarily by counter-arguments. The possibility of charges of hate speech, incitement to hatred or group defamation must be limited to a significant degree.

116 Ogletree Jr., 'The Limits of Hate Speech', pp. 491 ff. 501.

117 Ibid, p. 502.

118 This expression is part of Justice Oliver Wendell Holmes' opinion in the case of *Schenck v United States* 249 U.S. 47 (1919). In his words, 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic'.

A democratic society cannot aim to totally eliminate the discourse of hatred, as it cannot aim to completely end tobacco, alcohol, prostitution, corruption or tax evasion. Otherwise, it risks becoming totalitarian, authoritarian, intrusive and invasive in a disproportionate and intolerable way. Its aim must be only to significantly reduce the negative impact of these types of conduct, without intending to neutralise essential dimensions of individual and collective freedom. There is a price to pay for freedom, and, in agreement with Ronald Dworkin[119], we can say that the price to pay for freedom of conscience, religion, opinion and expression requires significant compromises and sacrifices.

Freedom of expression is a fundamental right and an objective principle of a constitutional legal order. Freedom is the rule, and the restriction of freedom is the exception: it has to pursue a constitutionally relevant objective and be duly grounded, proportionate and subject to restrictive interpretation. Hence, restrictions on freedom of expression are only admissible if there is a 'clear and present danger' to essential dimensions of the life, physical integrity or dignity of human beings[120].

Freedom of expression should protect all speech that addresses the factual, theoretical or interpretative realms of religious, philosophical, ideological, scientific, political, legal, economic, social or cultural issues[121]. People should be able to make an honest and sincere point concerning all these subjects regardless of how unconventional, unpleasant, counter-intuitive or counter-majoritarian it may be. Emotionally charged, vitriolic, passionate, intense, caustic and satirical speech is *prima facie* protected. Freedom of speech protects not only rational, cerebral, sober and cold discourse produced by philosophers or orators in an ideal speech situation.

This does not exclude the possibility of content-neutral 'time, place and manner' restrictions in order to prevent confrontation, especially when dealing with hostile audiences. As Baker and Zhao put it in reference to Salmon Rushdie's *Satanic Verses*, it would be disproportionate to punish an author for publishing a legitimate work simply because one believes it is likely to encourage riots and public disorder[122]. The state should not be allowed to punish a speaker because of the unlawfully or

[119] R. Dworkin, 'The Unbearable Cost of Liberty' (1994) 3 *Index on Censorship,* pp. 43 ff.

[120] *Whitney v California*, 274 U.S. 357 (1927), Louis Brandais concurring opinion: 'Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence'.

[121] Bambauer and Bambauer, 'Information Libertarianism', pp. 336 ff.

[122] Baker and Zhao, 'Normativity of Using', p. 626.

riotously belligerent actions of an unsympathetic and hostile audience[123]. As a matter of principle, the speaker must not be punished for the side effects of their allegedly offensive speech[124]. However, it can make room for the local and occasional adoption of some circumstantial restrictions in order to allow for the legitimate expression of ideas while at the same time preventing the minimisation of the clear and present risk of riots and violence. Even in these cases, emphasis should be placed on actual harms, and not just on potential harms[125].

Hate speech, and other similar discursive offences, should be limited to those extreme cases in which there is real, specific, direct, intentional or grossly negligent inflammatory incitement to hatred, violence or lawlessness in a way that seriously threatens the public order and breaches the peace or clearly and directly endangers the civic status and safety of those individuals or groups of individuals specifically targeted by the speech or the public in general.

As Asma Uddin points out, 'incitement to imminent violence' requires 'incitement of third parties, a malicious intent to incite and a likelihood of imminent violence'[126]. This is especially important because a broad understanding of incitement to violence will incite violence, i.e. it will encourage those who dislike the content of the speech to react violently, so as to prove that the speech creates a danger to the public order[127]. This generates a continuous cycle of violence and censorship[128].

Speech that is designed to bully, intimidate and threaten individuals or groups may be forbidden and criminalised, along with the instigation of physical violence, murder, terrorism or genocide against the individuals or groups specifically targeted by that speech[129]. The political, ideological, institutional, technological, social and cultural context should be taken into account when making the relevant assessment, along with the existence of a steady stream of inflammatory and toxic invective against a particular individual or group[130]. There must be a sufficient and clear link to violence or breach of the peace if the speech is to be criminalised, besides the simple fact that some or all the recipients of the speech will probably react violently[131]. As

123 Coenen, 'Freedom of Speech', pp. 1533, 1555 ff.

124 *Cohen v California*, 403 U.S. 15 (1971).

125 Coenen, 'Freedom of Speech', pp. 1533 ff.

126 Uddin, 'Speech and Public Order', p. 778.

127 T. P. Crocker, 'Free Speech and Terrorist Speech: An Essay on Dangerous Ideas' (2017) 70 *Vanderbilt Law Review En Banc,* pp. 49, 60 ff.

128 Uddin, 'Speech and Public Order', p. 773.

129 *R.A.V. v City of St. Paul*, 505 U.S. 377 (1992); *Virginia v Black* 538 U.S. 343 (2003). In this second case, the court held that 'a state, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate'.

130 G. S. Gordon, 'The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law' (2014) 74 *Ohio State Law Journal,* pp. 571, 595 ff.

131 Clooney and Webb, 'The Right to Insult', pp. 1 ff.

Gregory Gordon pertinently points out, that link exists whenever speech is 'uttered as part of a widespread or systematic attack against a civilian population (with the defendant having knowledge of his speech being part of the attack)' and is merely meant to spur, justify or glorify violence. Particularly relevant are the words of the US Supreme Court, when it said:

> 'No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot, or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious. Equally obvious is that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions'[132].

In specific emergency situations, the state has the power to prevent riots, disorder or other immediate threat to public safety, peace, order or national security. But that does not necessarily include the right to abstractly prohibit legitimate speech, even if this speech is a source of violence, not because that is what was intended by the speaker, but because of the illegitimate reaction by a third party or by the speaker's audience. Specific restrictions may be imposed when the 'clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion'[133].

VI. Conclusion

In what seems to be *inquisitorial nostalgia*, there remain strong impulses to coercively enforce religious and secular worldviews and ideologies today. Freedom of conscience, thought, religion, opinion and expression do not exist to protect this or that religious or secular orthodoxy. The purpose of these spiritual freedoms is to promote individual and collective autonomous critical thought, including critical thought about the possibilities and limits of critical thought. They are intended to protect the public use of reason and the search for truth and knowledge in all spheres of human life. Individual religious freedom is a substantive corollary of autonomous individual thought. The free and democratic constitutional order is built upon a normative commitment to critical inquiry and collective intellectual engagement.

Hate-speech laws should be looked at with constitutional suspicion whenever they are used and abused to try to carve 'out zones free of critical debate'. They tend to be vague and to create legal uncertainty and an increased possibility of harassment

132 *Cantwell v Connecticut*, 310 U.S. 296 (1940).
133 *Thornhill v Alabama*, 310 U.S. 88 (1940).

and censorship. The same is true about other concepts with equivalent effect crafted and promoted by overzealous religionists or secular ideologues in order to stifle discussion and the expression of individual thought. Those who promote such concepts often want to isolate certain *worldview-sensitive* topics from rational public scrutiny, most probably for fear that this debate might lead participants to conclusions that differ from their default positions on those subjects. This is absolutely unacceptable in a free and democratic constitutional order.

Hate speech and concepts of equivalent effect are admissible only as long as they are interpreted very strictly in order to avoid an undesirable chilling effect on the sphere of public discourse. They may only be used in extreme situations in order to curb speech that is irrationally and arbitrarily discriminatory, that deliberately intimidates, dehumanises and humiliates, that incites to violence or is aimed at creating a clear and present danger thereof. Beyond such exceptional cases, these concepts risk forming a *censorship discursive complex* that can be easily deployed by religious or secular dominant powers to oppose the advancement of truth claims, stifle debate on controversial topics and enforce a particular orthodoxy on all of society. They can easily be co-opted in the service of the coercive imposition of religious or secular worldviews.

Legislators and judges must ensure that members of the public continue to express themselves on a range of controversial issues. People should not be prevented from engaging in critical thinking and expression about the tenets of religious or secular worldviews and ideologies, and their ethical and social implications. Legislators and judges should bear in mind that hate speech and other concepts of equivalent silencing effect may have been adopted or co-opted by the holders of various religious or secular worldviews in order to insulate them from internal and external criticism. This understanding is important for the promotion of individual freedom of conscience, religion and expression, as it fosters critical thinking among all worldviews and lifestyles, be they religious or secular.

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HATE SPEECH AND AUTONOMY OF RELIGIOUS COMMUNITIES

Lina Papadopoulou[1]

I. Defining the topic

This chapter explores the tensional relationship between the legal regulation and prohibition of hate speech, on the one hand, and the autonomy guaranteed for religious communities in various EU member states, on the other. Before getting into the substance of the topic, however, one needs first to briefly explore the notion of hate speech and its relationship to free speech, which is the object of the freedom of expression. The legal regulation of hate speech and the political philosophy behind its prohibition are presented first (in Section I). Then the topic is divided into two different parts: first, hate speech against religious communities, i.e. the members of such communities collectively (in Section II), and second, hate speech articulated by religious communities, i.e. the legal representatives of such communities or their *de facto* representatives, such as religious ministers (in Section III). Brief conclusions will be drawn at the end of the chapter (in Section IV).

1. The Prohibition of Hate Speech

A. *As a Restriction on the Freedom of Expression*

It is a central tenet of constitutionalism and human rights theory that freedom of expression is not only a fundamental right but also a cornerstone of democracy. Moreover, free speech is indispensable because it serves the search for knowledge and truth[2]. This view is unambiguously adopted in all the EU member states and

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[2] J. S. Mill, *On Liberty* (1st edn 1859, Kitchener, Batoche Books 2001), p. 19, <https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf> (accessed 10 Apr 2018).

in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). As a matter of fact, freedom of expression also protects shocking, disturbing and offensive speech.

The European Court of Human Rights (ECtHR), based on Article 10 of the ECHR[3], has consistently enshrined in its case law[4] the overriding and essential nature of the freedom of expression in a democratic society. At the same time, it has also laid down the limits to that freedom in paragraph 2 of Article 10[5]. Under the ECHR, restrictions on the freedom of speech must be prescribed by law and must be proportionate, which means suitable to promote legitimate aims pursued and necessary in a democratic society[6]. States enjoy a margin of appreciation and are free to take into consideration the specific characteristics of each society; nevertheless, the use of this margin is subject to examination by the European Court of Human Rights. More specifically, concerning limitations on free speech:

> 'tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance …, provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued'[7].

The prohibition of hate speech adopted in many European jurisdictions —mainly based on EU legislation (see below)— is commonly considered to be such a restriction on free speech. Hate speech as a term is a neologism that was introduced relatively recently into legal language and texts[8]. It signifies public, and not private, speech, and it is directed against one or more individuals who belong, or the speaker perceives them to belong, to a group (based on nationality, ethnicity, religion, lan-

[3] Article 10 (Freedom of expression): '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'.

[4] See, among other authorities, *Handyside v the United Kingdom* (ECHR, 7 Dec 1976, Series A No 24), [49] and *Lingens v Austria* (ECHR, 8 Jul 1986, Series A No 103), [41].

[5] Article 10: '2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

[6] *Handyside v the United Kingdom*, App no 5493/72 (ECHR, 7 Dec 1976), [49].

[7] *Erbakan v Turkey*, App no 59405/00 (ECHR, 6 Jul 2006), [56].

[8] See European Court of Human Rights, *ECHR, Fact Sheet Hate Speech*, <https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf> (accessed 10 Apr 2018).

guage, gender or gender identity and sexual orientation) not because of their personal characteristics but on the basis of preconceived beliefs and hatred against the group as a whole. The hatred in this case has not been caused by any action on the part of a specific person, who might not even belong to the hated group, but by the beliefs, either justified or prejudiced, that the attacker holds in their own mind in respect of the whole group and every single member of it, whom the speaker does not even know personally. So, for example, a speaker or writer who accuses a specific person, either in the private or public sphere, of having caused harm to them personally or to others, even if they feel hatred, is not guilty of hate speech. They might be committing a more classic offence of defamation or abuse. The indisputable existence of the latter offences in the classic penal armoury of our legal systems proves that words are sometimes considered to be punishable, without causing any objections in principle. This does not apply to the prohibition of hate speech, which has not only proponents but also forceful opponents. The main difference between defamation and abuse and hate speech is that, in the latter case, the speech is not directed at a specific person but expresses and derives from hatred based not on personal but on the (perceived) group characteristics of the victim(s). For example, a common libertarian argument on the issue is that even though speech can be hateful and offensive, the state should not restrict any person's right to express their hate against others and offend them, independently of the perpetrator's and the victim's standing in society. The argument here —which usually comes from the other side of the Atlantic, as in the United States free speech is considered the ultimate freedom— is that the latter is an instance of personal autonomy and promotes self-realisation[9]. Accordingly, free speech and expressive activities should be unrestricted. Thus, the challenges posed by the prohibition of hate speech deserve convincing replies. If the prohibition of hate speech is a restriction of liberty, then on the basis of John Stuart Mill's axiom[10] that power can only rightfully be exercised over any member of society in order to prevent harm, the search focuses here on the harm caused by hate speech.

Nevertheless, one of the most convincing accounts of hate speech, in my opinion, is that offered by Caroline West[11], who suggests that hate speech is not a glorification of free speech —and therefore prohibition of the former is not a restriction of the latter— but that hate speech can in many ways undermine the freedom of expression. She therefore offers an account in which free speech is served by prohibiting racist hate speech. This conclusion is based on a convincing axiom that freedom of speech

[9] E. Baker, *Human Liberty and Freedom of Speech* (Oxford, Oxford University Press, 1989).

[10] Mill, *On Liberty*, p. 13.

[11] C. West, 'Words that Silence? Freedom of Expression and Racist Hate Speech' in I. Maitra and M. K. McGowan (eds), *Speech and Harm: Controversies Over Free Speech* (Oxford, Oxford University Press, 2012), pp. 222-248.

must satisfy three relatively minimal conditions: minimal distribution, minimal comprehension and minimal consideration. Racist hate speech, however, can silence minorities who are being attacked through hate speech and prevent the distribution, comprehension and consideration produced by them and their members. As a result, racist hate speech may serve to undermine, rather than exemplify or enhance, freedom of speech. This intellectual construct is powerful because it is also based on empathy or, at least, sympathy with the victims and on a deeper understanding of how fundamental rights function, rather than merely on a black-letter account of what fundamental rights are. The decisive question in such an account is obviously the speaker's position within their social environment and how forceful and convincing to others their rhetoric is expected to be. This argument —that allowing hate speech undermines rather than celebrates freedom of speech— is admittedly not widely shared. The most typical arguments used to justify prohibition of hate speech are those based on dignity.

B. *As the Price for Securing Dignity and Equal Freedom for All*

In fact, the most widely accepted justification for prohibiting hate speech is that doing so is a prerequisite in order to maintain equal human dignity and democracy as a system and to prevent the marginalisation of specific individuals through a discourse aimed at silencing them and excluding them from the public and the private sphere, if not even eliminating them altogether. In other words, the restriction of free speech as a cornerstone of democracy may only be accepted insofar as it is necessary to protect the empirical and philosophical prerequisites of democracy itself, which are equality and personal autonomy, that is to say, equal freedom.

To this end, democracy and freedom should not be used as weapons against themselves or understood as mere procedural guarantees. Article 17 of the ECHR provides the legal substantiation of this axiom. In fact, there are two different ways in which the court deals with restrictions on speech[12]. First, when the speech in question endangers or negates the fundamental values underpinning the ECHR, it is considered to fall outside the protective field of Article 10. The legal basis for such exclusion is Article 17 (prohibition of abuse of rights)[13]. Second, when speech may be called

[12] The examples of such speech examined by the court have included statements denying the Holocaust, justifying a pro-Nazi policy, alleging the persecution of Poles by the Jewish minority and the existence of inequality between them, or the linking of all Muslims with a grave act of terrorism (see *Lehideux and Isorni*, [47] and [53]; *Garaudy v France*, App No 65831/01, ECHR 2003-IX; *W.P. and Others v Poland*, App No 42264/98 (ECHR, 2 Sep 2004); *Norwood v the United Kingdom*, App no 23131/03 (ECHR, 16 Nov 2004); and *Witzsch v Germany*, App No 7485/03 (ECHR, 13 Dec 2005).

[13] Article 17: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the

hate speech but is not capable of bringing about the result just described above, and is therefore not capable of destroying the values of the ECHR, it may be limited on the basis of Article 10(2) of the convention.

From the point of view of political theory, this means that freedom and democracy, i.e. liberal democracy, need to be conceived as a substantive framework, which deserves to be self-protective and is not liable to being self-destructive. It means the prevalence of a substantive, at the expense of a purely procedural, understanding of these fundamental notions. So, while Professor Machado writes in his contribution to this volume that 'hate speech is part of the price a society has to pay in order to secure democracy', I would rather say exactly the opposite: the prohibition of hate speech is part of the price a society has to pay in order to secure democracy. In the same vein, it can be argued[14] that hate speech results in a violation of personal security and increases inequality within society.

Jeremy Waldron's[15] argument that the illegitimate harm (in the sense of Mill's axiom referred to above) in hate speech, i.e. the harm caused to the victim's dignity, is one of the leading defences of the prohibition of hate speech. Waldron adopts not an individualistic but rather a social understanding of dignity, as he defines it[16] as: 'a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction'. Accordingly, he departs from the belief that all members of a society deserve to enjoy a sense of inclusiveness, that is to say, an equal social status, making no allowance for social exclusions. Within this framework of ideas, the harm that expressions of racial hatred cause represents harm not to those who detest these expressions but 'in the first instance to the groups who are denounced or bestialized'[17], especially minority groups in society. In other words, hate speech damages the social standing of the people it is directed against. Waldron does not overlook the negative effects of the prohibition of free speech, that is to say, the fact that sentiments of hate are driven out of the marketplace of ideas.

Convention'. See *Lehideux and Isorni v France* (ECHR, 23 Sep 1998), Recueil 1998-VII, p. 2885, [47] and p. 2886, [53]; *Seurot v France*, App No 57383/00 (ECHR, decision on the admissibility, 18 May 2004): '[T]here is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 [freedom of expression] by Article 17 [prohibition of abuse of rights]'.

14 S. Heyman, *Free Speech and Human Dignity (New Haven, CT, Yale University Press, 2008).*

15 J. Waldron, *The Harm in Hate Speech* (Cambridge, MA, Harvard University Press, 2012), p. 9 ff.

16 Ibid, p. 105.

17 J. Waldron, 'Free Speech and the Menace of Hysteria', *New York Review of Books* (29 May 2008), available at <https://www.nybooks.com/articles/2008/05/29/free-speech-the-menace-of-hysteria/> (accessed 2 Dec 2018).

2. The Legal Treatment of Hate Speech

A. *At the International Level*

At the level of positive law, the International Covenant on Civil and Political Rights (1966) forbids hate speech in Article 20(2), although it does not use the term explicitly:

> 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

Echoing the same political philosophy, but more analytically and imperatively for the signatory states, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination[18] (1969) provides that:

> 'State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination'.

States that are signatories of this treaty are monitored by the relevant UN committee concerned with the fulfilment of their obligations.

According to one of the first texts in which the notion of hate speech can be found, Recommendation of the Committee of Ministers of the Council of Europe No R (97) 20 to member states on hate speech, adopted on 30 October 1997[19]:

[18] UN Treaties Collection, I-9464, Treaties series, v. 660, 1969, 212, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 Dec 1965, entry into force 4 Jan 1969, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280008954&clang=_en> (accessed 2 Sep 2017).

[19] Recommendation No R (97) 20.

> 'the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin'.

Accordingly, the Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted a recommendation (13 December 2002) suggesting key elements of national legislation aimed at effectively combating racism and racial discrimination. According to this recommendation:

> '18. The law should penalise the following acts when committed intentionally: (a) public incitement to violence, hatred or discrimination, (b) public insults and defamation or (c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; …
>
> '23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions'.

The European Court of Human Rights has also been using the term, at least since its *Sürek* judgment (1999)[20], in which it found that hate speech was connected with the 'glorification of violence'. The court had already, in its *Jersild* judgment[21], accepted that when an expressive activity is 'more than insulting to members of the targeted groups' it does not enjoy the protection of Article 10. More explicitly in its *Gündüz* judgment[22], the court made it clear that sometimes the protection of human dignity demands that a democratic state restrict freedom of expression and freedom of religious manifestation and belief:

> '40. The present case is characterised, in particular, by the fact that the applicant was punished for statements classified by the domestic courts as 'hate speech'. Having regard to the relevant international instruments … and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued (with regard to hate speech and the glorification of violence, see, mutatis mutandis, Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 62, ECHR 1999-IV).

[20] *Sürek v Turkey* (No 1), App no 26682/95 (ECHR, GC, 8 Jul 1999), [62].

[21] *Jersild v Denmark*, App no 15890/89 (ECHR, GC, 23 Sep 1994), [35], referring also to the Commission's admissibility decisions in *Glimmerveen and Hagenbeek v the Netherlands, App nos* 8348/78 and 8406/78, DR 18, p. 187; and *Künen v Germany, App no* 12194/86, DR 56, p. 205.

[22] *Gündüz v Turkey*, App no 35071/97 (ECHR, 4 Dec 2003), [40-41].

> 41. Furthermore, as the Court noted in Jersild v. Denmark (judgment of 23 September 1994, Series A no. 298, p. 25, § 35), there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention'.

Further, the court examines, in light of the case as a whole, taking into consideration both the content and the context, whether the state's 'interference', especially in the form of a penal sanction, was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it were 'relevant and sufficient'. Furthermore, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference[23].

B. *At the Level of the European Union*

Harmonisation in the field of the legal regulation of hate speech stems from the transposition and implementation of European Union Council Framework Decision 2008/913/JHA 'on combating certain forms and expressions of racism and xenophobia by means of criminal law'[24]. Behind this effort lies the goal of preventing racist groups from moving to countries with less restrictive legislation[25]. This decision broadened the constituent elements of the offence also with regard to religion. What Michał Rynkowski reports (in this volume) is thus not surprising, namely that the notion of hate speech crops up in a huge number of questions, both oral and written, that are addressed to the European Commission. This is due to the fact that the EU has regulated this field of human activity, obliging member states to adopt a more or less uniform approach to the subject matter.

Moreover, Article 6 of the Audiovisual Media Services Directive (AVMSD)[26] obliges member states to ensure by appropriate means that the audiovisual media services provided by relevant providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality. Rynkowski further reports that the European Commission has proposed[27] revising the AVMSD in order to strengthen the fight against hate speech.

The European Commission also uses soft-law instruments and undertakes operative actions in order to combat hate speech online, which is proliferating nowa-

[23] See ECtHR *Skałka v Poland*, App no 43425/98, (3rd Section, 27 May 2003), [42].

[24] OJ L 328/2008, pp. 55-58.

[25] U. Belavusau, 'Fighting hate speech through EU law' (2012) 4 *Amsterdam Law Forum*, pp. 20-34, 28.

[26] Directive 2010/13 (EU) of the European Parliament and of the Council of 10 Mar 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[27] COM (2016) 287 final of 25 May 2016.

days.[28] In the same vein, a 'Code of Conduct on illegal online hate speech' has been adopted. This action[29] involves Facebook, Twitter, YouTube and Microsoft, which have undertaken the obligation to review and remove or disable access to illegal hate speech in less than 24 hours. On 1 March 2018, the European Commission adopted a 'Recommendation on measures to effectively tackle illegal content online'[30], which contains a set of operational measures that member states and companies need to take in order to prevent and disallow all forms of illegal content, including racist and xenophobic incitement to hatred and violence.

C. *Insights from National Reports*

Since this report refers to the EU member states, and the latter have incorporated the above-mentioned Council Framework Decision 2008/913/JHA, national law on the subject of the prohibition of hate speech derives from EU law (which was not transposed in Ireland until March 2018).

In Austria, the relevant provision on public hate speech —Section 283 of the Criminal Code— was modified by Decision 2008/913, and the protection was extended to any religious organisation, not only to domestic churches and religious communities as it had been before[31]. In Belgium, it is reported[32] that Muslim radicals have been prosecuted and some of them convicted on the basis of criminal legislation on the prohibition of hate speech. In the Czech Republic, both defamation of nation, race, ethnicity or another group of people (Section 355) and incitement to hatred against a group of people or restriction of their rights and liberties (Section 356) are criminalised.

In France, as has been reported[33], public authorities monitor places of worship and thereby prevent groups of radicalised Muslims around imams from distributing hate speech or rhetoric of violence. Since 2016, several mosques have been closed

[28] See the Communication 'Tackling illegal content online: towards an enhanced responsibility of online platforms' COM (2017) 555 final of 28 Sep 2017, which provides that what is illegal offline, based on EU and national law, is also illegal online.

[29] European Commission, press release, 'European Commission and IT Companies announce Code of Conduct on illegal online hate speech', 31 May 2016, <http://europa.eu/rapid/press-release_IP-16-1937_en.htm> (accessed 2 Dec 2018).

[30] Commission Recommendation of 1 Mar 2018 on measures to effectively tackle illegal content online (C(2018) 1177 final), <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online> (accessed 30 Mar 2018).

[31] W. Wieshaider, chapter on Austria in this volume.

[32] J. Vrielink and A. Overbeeke, 'Moving from Implicit Trust to Explicit Suspicion: Securitisation of Religion in Belgium', in this volume.

[33] F. Messner and P. H. Prélot, 'Securitisation of Religious Freedom: Religion and the Scope of State Control and Education', in this volume.

down on the basis of the law on the state of emergency, as a result of such religious radicalisation. Similarly, in Germany, the state administration can close mosques and ban associations. In 2017, for example, a radical Salafist association in Kassel was banned and the Medina-Mosque was closed as part of the Almadinah Islamic Culture Club because, according to the state administration, it had operated as a platform for disseminating hatred and advocating violence[34].

In Hungary, there is a distinction between offensive or degrading statements, which are not punishable, and incitement to hatred against the Hungarian nation or any other national, ethnic, racial or other group, which is a criminal offence protecting the dignity of individuals belonging to a particular community or minority (religious, ethnic or other). Also, the defamation of national symbols and the denial of the Holocaust and of communist crimes are not considered unconstitutional limitations of free speech[35].

The Prohibition Against Incitement to Hatred Act (1989) is in force in Ireland, which has not yet (as of March 2018) introduced legislation to ensure compliance with the 2008 EU Council Framework Decision. The 1989 act prohibits the distribution or broadcast of any material, words, behaviour, visual images or sounds that are threatening, abusive or insulting and are intended or, under the circumstances, are likely to stir up hatred against a group of people due to their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation. The act has been criticised as being inadequate for present-day needs since it fails to deal with, among other things, racial or other abuse that is not intended to stir up hatred.

In Slovakia[36], amendment No 316/2016 to the Criminal Code (1 January 2017), aimed at intensifying the fight against extremism, defines the criminal offences of extremism, including, among other things, the offence of establishing, supporting and propagating any movement leading to the suppression of fundamental rights and freedoms and the manifestation of support for any such movement, or the production, possession and dissemination of extremist material. The denial or approval of the Holocaust and of crimes of political regimes and crimes against humanity are also regarded as offences, as are the defamation of a nation or race, the incitement to national, racial or ethnic hatred, apartheid or discrimination against a particular group of people and actions carried out with a special motive (with the intention of committing a terrorist offence and various forms of participation in terrorism). The production, dissemination, publication or possession of extremist material with the

[34] M. Pulte, 'Securitisation of Religious Freedom: Religion and the Limits of State Control - the German Situation', in this volume.

[35] B. Schanda, report on Hungary in this volume.

[36] See M. Moravčíková, report on Slovakia in this volume.

intention of inciting others to hatred or discriminating against certain groups for national and racial reasons or national, racial, ethnic or religious hatred or hatred on the grounds of sexual orientation are all subject to stricter punishments and, at the same time, regarded as terrorist offences. A new offence has been added: that of apartheid or racial segregation.

The only state where there is an explicit constitutional provision prohibiting hate speech is Slovenia[37]. Article 63 of the Slovenian Constitution provides that: 'Any incitement to national, racial, religious or other discrimination, and the inflaming of national, racial, religious or other hatred and intolerance are unconstitutional. Any incitement to violence and war is unconstitutional'. Accordingly, the Religious Freedom Act of 2007 explicitly prohibits any incitement to religious discrimination, inflaming of religious hatred and intolerance and any direct or indirect discrimination on the basis of religious belief or the expression or exercise of such belief. Moreover, as stipulated by EU law, the new Criminal Code (Article 297), enacted in 2008, includes the offence of public incitement to hatred, violence or intolerance. In the same vein, the Media Act and the Audio-Visual Media Services Act prohibit the dissemination of programme content that encourages ethnic, racial, religious, sexual or other discrimination, violence or war, or that incites racial, sexual, religious or other hatred and intolerance.

Spain[38] transposed Framework Decision 2008/913 through Organic Law 1/2015, amending the regulation of hate speech contained in its Criminal Code, which was more limited in scope, as it only criminalised (Article 18) 'provocation', understood by the courts to mean a direct incitement to commit crimes, and also because the only possible victims of this offence were 'groups or associations', not individuals. The new regulation, on the contrary, criminalises any action aimed, directly or indirectly, at inciting hatred, hostility, discrimination or violence against not only groups or associations but also individuals, and it provides for stiffer penalties when such actions are committed online. The Spanish Constitutional Court, for its part, affirmed (judgment 112/2016) that the criminal prosecution of 'hate speech' is a legitimate form of interference with the freedom of expression, as it directly or indirectly endangers individuals or even the liberal political system. The case concerned the punishment imposed for glorifying terrorism by participating in a tribute to a deceased member of the ETA terrorist group. Although Spain does not prohibit anti-democratic ideologies, the court, following the ECtHR, decided that the expressions used in this case,

37 B. Ivanc, report on Slovenia in this volume.

38 See S. Cañamares, report on Spain in this volume.

which were incitements to violence, met the criteria of hate speech and were thus not protected by the freedom of expression in a democratic state[39].

The situation in the United Kingdom[40] is similar to that of the rest of the EU. Under the Racial and Religious Hatred Act 2006[41], 'religious hatred' is directed 'against a group of persons defined by reference to religious belief or lack of religious belief'. Words, actions, written material, recordings or programmes may be considered to be an expression of hatred if they are threatening and if there is either the intention to stir up religious hatred or recklessness as to whether or not religious hatred is stirred up. This offence can be committed either in private or in public, but not if a person is inside a dwelling. Moreover, according to Section 29 B(c) of the act, 'it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling'.

II. The notion of the autonomy of religious communities

According to the jurisprudence of the European Court of Human Rights, as presented by Judge Gaetano (in this volume):

> 'while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Participation in the life of the community is a manifestation of one's religion, protected by Article 9 of the Convention. The right to freedom of religion under Article 9, interpreted in the light of Article 11, the provision which safeguards associations against unjustified State interference, encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention'[42].

In other words, the autonomy of religious communities is an expression of the freedom of religion when applied to the religious community as such and needs to be viewed not only under Article 9 but also in the light of the freedom of associa-

[39] E. Roca, C. Vidal, A. Queralt, E. Guillén and L. Álvarez, 'Developments in Spanish Constitutional Law' in R. Albert, D. Landau, P. Faraguna and Š. Drugda (eds), *The I·CONnect-Clough Center 2016 Global Review of Constitutional Law* (3 Aug 2017), The Clough Center for the Study of Constitutional Democracy 2017, <https://ssrn.com/abstract=3014378> (accessed 30 Mar 2018), pp. 196-200, 199.

[40] See N. Doe and R. Riedel's report on the United Kingdom in this volume.

[41] See the Crown Prosecution Service website: <https://www.cps.gov.uk/publications/prosecution/cases_of_inciting_racial_and_religious_hatred_and_hatred_based_upon_sexual_orientation.html> (accessed 2 Dec 2018).

[42] Para. 73 of the judgment in case No 39023/97, *Supreme Holy Council of the Muslim Community v Bulgaria* (ECHR, 16 Dec 2004).

tion (Article 11 ECHR). And it is worth noting that what is prohibited is not every kind of state interference but only those kinds that might be regarded as arbitrary or unjustified. What is protected by the combination of Articles 9 and 11 ECHR is free establishment and pluralism[43] since 'the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection that Article 9 affords'[44].

As a matter of fact, I can hardly determine which of the four headings proposed by Justice Gaetano the issue of hate speech against or by (representatives of) religious communities might fall under (the four headings being: (i) the general principle of the autonomy of religious associations; (ii) the prohibition of state interference in both intra-denominational and inter-denominational conflicts; (iii) disputes between religious associations and their members; and (iv) disputes between religious organisations and their employees). The autonomy of religious associations cannot mean that the latter are freed of the obligation to obey the law, including any general prohibitions on hate speech. Self-regulation relates to the inner life of the community, even when human rights impose restrictions on the freedom allowed by self-regulation, but this is another issue. The organisational life of the community is protected by Article 9 of the ECHR, as a concomitant and prerequisite of all other aspects of the individual's freedom of religion. However, this institutional guarantee does not give a wider margin of appreciation to religious ministers or believers who invoke their freedom of religion when the manifestation of the latter contravenes and needs to be balanced with other fundamental rights.

In other words, my thesis here is that the autonomy of religious communities could and should not have legal consequences for the widening or narrowing of the margin of freedom of speech. In simpler words, autonomy does not mean the freedom to say anything one wants to say just because they are a minister or official of a church or other religious community. Nor does Article 17 of the Treaty on the Functioning of the European Union change this legal situation. Consequently, autonomy of the community as such does not mean immunity against the law. This is also in harmony with the state's positive duty to remain neutral and impartial[45].

III. Posing practical and research questions

Free speech is the necessary concomitant of free thought. It encompasses not only an individual's right to express their thoughts but also the 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in

[43] See also *Metropolitan Church of Bessarabia and Others v Moldova*, App no 45701/99 (ECHR, 13 Dec 2001).

[44] *Supreme Holy Council of the Muslim Community*, [118].

[45] See the case of *S.A.S. v France*, App no 43835/11 (ECHR, GC, 1 Jul 2014).

writing or in print, in the form of art, or through any other media of [one's] choice', as Article 19 of the International Covenant on Civil and Political Rights stipulates. By the same token, the autonomy of religious communities is the concomitant right to freedom of religious conscience. Whereas both free thought and free (religious) conscience are absolute rights, in the sense that they are freedoms that do not allow for any kind of limitation, their externalities, expression and reception of thought and the organisation of the faithful, respectively, may be limited to allow harmonisation with other rights and freedoms and mutual respect between them.

Hate speech relates to religious communities in a twofold manner: either as hate speech against religious communities or as hate speech expressed by (representatives of) religious communities. In the former case (hate speech against religious communities), hate speech may also be compared with both blasphemy and defamation. The difference between these different forms of verbal attack against religious communities should be defined. There is a need to respond to the question as to what extent a rational critique of, or even a radical attack against, a certain religious view may also constitute hate speech. The question that arises here is whether speech against religious communities is regulated and/or should be regulated in a manner more or less permissive than that against other groups of people or other secular ideologies.

In other words, the question is whether the free speech of a religious group's opponents, those expressing religious hatred, should be narrower in scope so that the protection of religious communities is enhanced compared with, let's say, national or ethnic communities or gender or sexual minorities. Obviously, the opposite question could also be posed: whether criticism of religious communities should enjoy broader protection even if it incites hate against them. The discussion about blasphemy, when it resembles hate speech, is closely connected with this problem. Such a question, however, has never actually been posed and is counter-intuitive.

Concerning the latter case (hate speech by religious communities), needless to say an association as such, i.e. a religious community, despite its possible legal personality, can only express itself through its representatives. Religious ministers, workers of any kind and official institutions of the religious community, while functioning as such, are thus covered by this topic. On the contrary, individual followers and believers as such are not covered by the autonomy of religious communities but by freedom of speech as a fundamental human right. This aspect of the topic is covered by Professor Jónatas Machado in this volume[46].

The question posed here is whether religious ministers, ecclesiastical organs and church employees do or should enjoy a wider margin of free speech than ordinary people due to the fact that their religious freedom is added in some way to

[46] See the chapter by J. Machado in this volume.

their freedom of speech, precisely because their beliefs have (or purport to have) a spiritual basis.

IV. Hate speech against religious communities

1. Blasphemy and Defamation of Religion are Not Hate Speech

Machado[47] agrees with Asma Uddin, who notes that 'blasphemy or defamation are increasingly used by extremists to censure all legitimate critical debate within religions'[48]. However, he adds that '[t]he same applies, mutatis mutandis, to hate speech'. It is the thesis of this chapter that both blasphemy and defamation of religion could and should be differentiated from hate speech. While the former attacks ideas, beliefs and practices, the latter attacks people belonging (or thought to belong) to specific groups. The Portuguese example, in which the mocking of religious ceremonies is considered a crime under Article 252 of the Penal Code, is an aspect of the former. As Rodríguez Blanco rightly points out, the tendency in modern law, at both the international and the national level, is to place the legal protection of religion in the ambit of hate speech[49]. In the same vein, a United Nations resolution adopted by the Human Rights Council in 2011[50] considers blasphemy laws to fall outside the legitimate restrictions on the freedom of expression. Similarly, in a resolution passed in 2007[51], the Parliamentary Assembly of the Council of Europe (*PACE*) stressed that: 'any democratic society must permit open debate on matters relating to religion and religious beliefs' and that 'blasphemy, as an insult to a religion, should not be formalized as a criminal offence'.

Serious doubts have, of course, been expressed[52] about the conceptual possibility of such differentiation between insulting religion as such and insulting and undermining the human dignity of the followers of a religion. So, these concerns need to be addressed more analytically. Machado's cautious statement[53] that the 'legitimate criticism of religious and non-religious tenets and conduct, of both majority and mi-

[47] See the chapter 'Hate Speech and Individual Religious Freedom' in this volume.

[48] A. Uddin, 'Speech and Public Order Exceptions: A Case for the U.S. Standard' (2015) 3 *Brigham Young University Law Review*, pp. 727-779, 776.

[49] M. R. Blanco, 'La prohibición de la difamación de las religiones en el derecho internacional: ¿una noción inoperante?' (2017) *Derecho y Religión*, pp. 11-26.

[50] UN Human Rights Council Resolution 16/18, Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence against, Persons based on Religion or Belief (12 Apr 2011) UN Doc. A/hrc/res/16/18.

[51] Council of Europe, PACE Resolution 1577 on Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of their Religion, 2007, paras. 2-4.

[52] See, for example, E. Barendt, 'Religious Hatred Laws: Protecting Groups of Belief?' (2011) 17 *Res Publica*, pp. 41-53.

[53] J. Machado, report on Portugal in this volume.

nority communities' should not be 'overinterpreted as hate speech' is correct, though it should be made clear that a distinction should be drawn between criticising beliefs and severely insulting people just because they share a specific characteristic.

In his celebrated book mentioned above, Waldron[54] thinks there is a clear distinction between an attack on a body of beliefs and an attack on an individual's dignity. Admittedly, it is hard to draw such a distinction, although it is worth making the effort to do so. Judgments should, after all, be made on an ad hoc basis, case by case, and judges are obliged to look more closely at the speech and the circumstances, the power of the speaker, the audience, the former's influence on the latter and its specific characteristics. The prohibition of hate speech is aimed at protecting a person's dignity, not the views they hold. Protection by the law must then be offered to protect everybody from having their dignity, in the sense of their social standing, violated, not to prevent any kind of distress that might be caused. So, if an adherent of a particular religion feels distress when somebody attacks their religious beliefs, the law is not supposed to protect them from feeling that way.

In the same vein, in a recommendation on blasphemy, the Parliamentary Assembly of the Council of Europe[55] has concluded that:

> '[4] blasphemy, as an insult to a religion, should not be deemed a criminal offence…'
>
> and
>
> '[5] that in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion. Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels'.

In other words, whereas the offences of blasphemy and defamation are possible enemies of free speech as a prerequisite of a liberal and democratic political community, the offence of hate speech, or rather the prohibition of the latter, is a legal means of protecting the equal access of all individuals to public discourse and a necessary, albeit inadequate, requirement for equal citizenship. In this context, Professor Machado correctly refers to the case in which a number of Muslims accused *Charlie Hebdo* of Islamophobia, racism and blasphemy due to the republication of a series of cartoons depicting the Prophet Muhammad, first published in the Danish

[54] Waldron, *The Harm in Hate Speech*, pp. 118 ff.

[55] Council of Europe, Parliamentary Assembly, Recommendation 1805 (2007), Blasphemy, religious insults and hate speech against persons on grounds of their religion, Text adopted by the Assembly on 29 Jun 2007 (27th Sitting), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en> (accessed 11 Nov 2017).

newspaper *Jyllands-Posten*. Correctly then, the Paris Appeals Court[56] held that freedom of expression protects newspapers of the kind that are 'satirical, caustic and of a disrespectful spirit' and concluded that this was not an attack on a religious group. The court ruled that the caricatures in question were not a manifestation of hate speech, as they only targeted Islamic terrorists and not the Muslim population as a whole. If one wanted to summarise the difference, one could say that in hate speech there is incitement to hatred and violence, whereas in the defamation of religion and blasphemy there is no such incitement, and while the former is directed at the followers of a religion as a whole, in the latter case the target is the religion or some of its specific beliefs or practices.

In Hungary, for example, incitement to hatred towards a religious community (or a non-religious or even anti-religious community) falls under the provision stipulating that such an act is a misdemeanour punishable by imprisonment of up to three years (Criminal Code § 269). In contrast, the religious sentiments of the population, or of certain groups of the population, do not enjoy any protection through criminal law. In a 1992 ruling, the Constitutional Court concluded that mere defamation does not qualify as a criminal offence any more than a prohibition would be a disproportionate limitation of the freedom of expression[57].

2. Are Religious Communities the Same as Other Groups (Based on Race, Ethnicity, Gender)?

The question raised here is whether religious communities, or more precisely their members, should enjoy the same or less immunity against hate speech. Those purporting that freedom of expression should be broader when it comes to attacks and criticism against religious groups differentiate the latter from, let's say, racial or ethnic groups because membership of the latter is not something that has been chosen or can change even if the individual wishes to do so. Being black or Roma, for example, is not something that necessarily characterises your behaviour but is still something that you cannot change, even if you do not share any of the characteristics that this group is associated with in the public mind. On the other hand, one may stop being, for example, Muslim or Christian. The situation is more complicated with Jews since their ethnic origin is closely connected with a sense of religious belonging, as will be discussed below.

Although it has a point, this differentiation disregards a body of empirical evidence that includes the following: first, there are many people who conceive of their (imposed) religious identity as something unalterable. Muslims usually fall under this

[56] Paris Court of Appeals, 11th chamber, Section A, 12 Mar 2008, Case No 07/02873.

[57] Decision 30/1992 (V. 26.) AB, as mentioned by Schanda, report on Hungary in this volume.

category. The fact that many Muslim countries do not consider change of religion as a facet of religious freedom is revealing. Second, there are also other groups of which one could hardly say that membership is a conscious choice, e.g. homosexuals. The line between groups that have their identity imposed on them and groups that choose it themselves is very thin and contestable. Transsexuals consider themselves to be internally obliged to live in their true gender, but cis people often doubt that. Members of linguistic minorities can easily be thought of as having chosen their language, but does it really matter if they can or cannot speak the majority language for the sake of being more or less protected against hate speech? In other words, the differentiation argument is not only very thin, but it is also empirically unstable and counter-intuitive. It should rather be accepted that members of all kinds of groups, based on race, nationality, ethnicity, religion, language, gender, sexual orientation or gender identity, regardless of whether belonging to them is or may be thought to be a conscious choice, should enjoy equal protection from verbal abuses based on hatred against the group they belong to.

3. Negationism and Hate Speech against Jews as Both an Ethnic and Religious Community

Jews may be understood as both an ethnic and a religious community. When someone utters hate speech against Jews, it is impossible to tell whether they are referring to them in the former or latter sense; rather, it is likely that they are referring to the community in both senses. There are two interesting cases in the case law of the ECtHR that have been dubbed examples of 'ethnic hate', although they may also be understood as examples of religious hate: *Pavel Ivanov*[58] and *W.P. and Others v. Poland*[59]. In the former case, the applicant, Mr Ivanov, had been convicted in Russia for anti-Semitic hate speech, since he portrayed the Jews as the source of evil in Russia and denied them the right to national dignity. In the latter case, Poland had denied the applicants the right to create an anti-Semitic association, and the applicants complained that this decision had infringed their right to freedom of association. In both cases, the court declared the claims to be inadmissible and held that the applicants could not benefit from the protection offered by Articles 10 and 11, respectively, of the ECHR, on the basis of Article 17 of the ECHR. In the *W.P. and Others* case, the court concluded:

> 'The applicants essentially seek to employ Article 11 as a basis under the Convention for a right to engage in activities which are contrary to the text and spirit of

[58] *Pavel Ivanov v Russia*, App no 35222/04 (ECHR, 20 Feb 2007) regarding the admissibility of the case.

[59] *W.P. and Others v Poland*, App no 42264/98 (ECHR, 2 Sep 2004) regarding the admissibility of the case, <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-66711%22>.

> the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms set forth in the Convention'.
>
> 'Consequently, the Court finds that, by reason of the provisions of Article 17 of the Convention, the applicants cannot rely on Article 11 of the Convention to challenge the prohibition of the formation of the National and Patriotic Association of Polish Victims of Bolshevism and Zionism'.

In the *Garaudy v France* case[60], the applicant was the author of a book titled *The Founding Myths of Modern Israel*[61], and he was convicted for disputing the fact that crimes against humanity occurred, for defamation in public of a group of people —the Jewish community— and for incitement to racial hatred. The court based its decision on inadmissibility (it found that part of the complaint was incompatible *ratione materiae* with the provisions of the ECHR), on the basis of Article 17 ECHR, since it accepted that the applicant's speech constituted Holocaust denial. Furthermore, it stressed that denying crimes against humanity was one of the most serious forms of racial defamation of Jews and of incitement to hatred against them, aimed at rehabilitating the Nationalist Socialist regime.

The *M'Bala M'Bala v France* case[62] was of the same tenor: the court declared the application of a comedian who was convicted for public insults against Jews[63] as inadmissible on the basis of Article 17. It considered that the offending scene turned the performance in question into a political statement of hatred and anti-Semitism, promoting negationism (Holocaust denial). The application was thus rather the applicant's attempt to deflect Article 10 from its real purpose by using his right to freedom of expression for ends that were incompatible with both the letter and the spirit of the convention. It is worth recalling that, in France, denying the existence of a crime against humanity has been a punishable offence since 1990. This provision, however, concerns only the denial of the Holocaust; on the other hand, the French Constitution-

[60] Decision of 24 Jun 2003 (on admissibility). Similarly, see *Honsik v Austria*, decision of the European Commission of Human Rights of 18 Oct 1995 (concerning a publication denying the commission of genocide in the gas chambers of the concentration camps under National Socialism), and *Marais v France*, decision of the Commission of 24 Jun 1996 (concerning an article in a periodical aimed at demonstrating the scientific implausibility of the 'alleged gassings').

[61] R. GARAUDY, *Les Mythes fondateurs de la politique israélienne* 1996 (in English, *The Founding Myths of Modern Israel*, Institute for Historical Review, 2000).

[62] Application No 25239/13, decision on the admissibility of the case of 20 Oct 2015.

[63] At the end of a show in December 2008 at the Zénith in Paris, the applicant invited Robert Faurisson, an academic who has been convicted on numerous occasions in France for his negationist and revisionist opinions, mainly his denial of the existence of gas chambers in concentration camps, to join him onstage to receive a 'Prize for Infrequentability and Insolence'. The prize, which took the form of a three-branched candelabra with an apple on each branch, was awarded to him by an actor wearing what was described as a 'garment of light'-a pair of striped pyjamas with a stitched-on yellow star bearing the word 'Jew'-who thus played the part of a Jewish deportee in a concentration camp.

al Council has censored a law aimed at prohibiting denial of the Armenian genocide[64]. As Professors Messner and Prélot (in this volume) make clear, denialism does not always derive from religious radicalism, but often stems from far-right, non-religious, sometimes pagan, circles. Quite often, however, it can also derive from hatred based on religious grounds, especially when expressed by Muslim extremists, due to the conflicts in the Middle East.

Greece has a very bad record in respect of anti-Semitism[65], as evinced by the fact that it has the highest index score (69%) of anti-Semitic attitudes outside the Middle East and North Africa[66]. Anti-Semitic stereotypes also derive from some sections of the Greek Orthodox Church. In a telling incident, Metropolitan Seraphim of Piraeus even blamed Jews for orchestrating the Holocaust and accused global Zionism of a conspiracy to enslave Greece and the Orthodox Church.

V. Hate speech by (representatives of) religious communities

1. Religion is Not a Valid Excuse for Articulating Hate Speech

The regulation, restriction or even prohibition of hate speech expressed by those representing religious communities is the outcome of a multidimensional balancing act. The principles or rights to be balanced are, on the one hand, free speech as a prerequisite of democracy and the autonomy of religious communities —as an expression of religious freedom in general, one of the historically most important civil rights safeguarding personal autonomy— and, on the other hand, the protection of dignity and equal access to free speech for all human beings. These restrictions may either be imposed a priori by the legislator or left to the judge in an ad hoc judgment.

Religious freedom, in its expression as a *forum internum*, is an absolute right. Neither the state nor any private entities or individuals are entitled to brainwash others in order to proselytise to them by abusing a dominant position. So, neither the state nor the law can ever preclude a faithful person or a religious minister from feeling hate not only for the sin but also for the sinner. In a civilised society, however, the expression of feelings like religious hatred is not completely protected by the law. Restrictions are also allowed when the words used incite hatred and promote violence against others. This is valid when the victim is personally specified (this is already punishable with classic instruments of penal law and makes the perpetrator liable

[64] See Conseil Constitutionnel, No 647 DC of 28 Feb 2012; No 2015-512 QPC of 8 Jan 2016; No 2016-745 DC of 26 Jan 2017, as reported by Messner and Prélot, 'Securitisation of Religious Freedom: Religion and the Scope of State Control and Education', in this volume.

[65] Anti-Defamation League, 'ADL Global 100: A Survey of Attitudes Toward Jews in Over 100 Countries Around the World', <global100.adl.org/public/ADL-Global-100-Executive-Summary.pdf> (last accessed 14 Jul 2018).

[66] Ibid.

in civil-law terms). What is different in the regulation of 'hate speech' is that the victims are not personally identified. However, whether speech stems from religious convictions or political or ideological ones should make no difference to the legal consequences. A person's hatred of homosexuals and incitement to hatred against them on the basis of their religious convictions do not deserve greater legal protection than the same behaviour on the basis of political or ideological convictions. When the words used by a religious minister or other member or organ of a religious community can be termed hate speech and this same hate speech is prohibited or considered to be punishable by the legal system, the legal treatment may not be altered in favour of a milder or harsher penal- or civil-law sanction.

2. Examples in National Contexts

The most interesting case reported is the conviction[67] of the spokesman of a group called Sharia4Belgium, who had promoted, in a series of videos on YouTube, Sharia and jihad against the unfaithful, and had described the terminal illness of a radical right-wing politician as being 'a punishment from God'. What is even more interesting is that the ECtHR found his appeal to Article 10 inadmissible on the basis of Article 17 ECHR (abuse of rights)[68]. The court confirmed that defending Sharia law and calling for violence to establish it could be regarded as hate speech and held that as such it was not protected by Article 10 of the ECHR. It also noted that each contracting state was entitled to oppose political movements based on religious fundamentalism. So, since the application was incompatible *ratione materiae* with the provisions of the ECHR (Article 35 §§ 3(a) and 4), it found it inadmissible.

In her chapter on the Netherlands (in this volume), Sophie van Bijsterveld reports on the administrative battle to prevent the religious hate speech produced mainly, but not only, by so-called hate imams. Excluding such an imam from a particular geographical area, on the basis of the Temporary Act on Administrative Measures on Counterterrorism, and another one from speaking at an Islamic conference are two noteworthy administrative decisions that were upheld by a court as being justified restrictions of religious freedom.

In Slovenia[69], in accordance with the constitutional prohibition of hate speech, the Religious Freedom Act (2007) empowers the state prosecutor to launch an administrative procedure that may lead to a judicial prohibition of the activities of a church or a religious community (Article 12) in cases where the latter seriously violate the Constitution or incite individuals to national, racial, religious or other

67 Court of Appeal of Antwerp, 6 Jun 2013; Court of Cassation, 29 Oct 2013.
68 *Fouad Belkacem v Belgium*, App no 34367/14 (ECHR, 20 Jul 2017).
69 See B. Ivanc, chapter on Slovenia in this volume.

forms of inequality, to violence or war, or inflame national, racial, religious or other forms of hatred (para. 1). Such a prohibition is also possible if the church or religious community's purpose, objectives or manner of carrying out religious instructions, religious mission, religious rites or any other activity is based on violence or uses violent forms, threatens human life or health or threatens other rights and freedoms of church members or members of other religious communities or other individuals in a manner that seriously violates human dignity (para. 2).

In Spain, Organic Law 1/2015, which transposed EU Council Decision 2008/913/JHA, also amended the power given by the Criminal Code (Article 515) to restrict illegal associations. Not only those associations founded to commit illegal acts are considered 'illegal' but also those pursuing legal ends through violent means or by brainwashing their members. Furthermore, associations that promote or directly or indirectly provide incitement to hatred, hostility, discrimination or violence against individuals, groups or associations by reason of their particular characteristics, such as ideology, religion or beliefs, etc. may also be restricted[70].

One of the groups that are frequent victims of religion-based hate speech are homosexuals. In a telling incident in Greece, when civil unions were extended to same-sex couples, Metropolitan Seraphim of Piraeus threatened to excommunicate any member of parliament who voted in favour of extending civil partnerships to same-sex couples. In the same country, the metropolitan of Kalavryta, Amvrosios, was tried —and found not guilty— for the offence of public incitement to violence and abuse of his office because of his statements in December 2015 on the same occasion of the introduction of same-sex civil unions. Amvrosios had characterised homosexuals as 'vermin' and attacked them by saying: 'Spit on them! Jeer at them! Blacken their names!' To make matters worse, he added: 'They are mentally disturbed! Unfortunately, they are three times worse and more dangerous than those in the madhouses'. According to Article 196 of the Greek Penal Code, any religious minister who, while exercising his duties or publicly using his position, incites others to hatred against other people may be punished with a prison sentence of up to three years. Such cases should and can be differentiated from the mere expression of religious belief and the firm opposition against, for example, homosexuality as such. Here the differentiation is clear: one can radically oppose the acts of homosexuality without characterising homosexuals.

There is another interesting judicial case from Spain that was decided under a previous provision of the Criminal Code that presupposed the 'provocation' of hatred. A civil association accused the bishop of a Catholic diocese in the Madrid region of inciting hatred against homosexuals in his homily in the Good Friday Mass (broadcast

[70] See S. Cañamares, report on Spain in this volume.

on Spanish state television). The bishop referred to the suffering that many homosexuals experience when, in order to, in his words, decide on their sexual orientation, they go to men's clubs and have occasional sex, by saying: 'I can assure you that they found themselves in hell'. Neither the first- (2012) nor the second-instance (2014) court considered this hate speech because the statement did not condemn all those who engage in homosexual sex but only those who 'sometimes' engage in behaviour that is considered reprehensible from a religious point of view[71]. It has been argued[72] that, had the current legislation been applied, the courts would have been obliged to decide otherwise, because the above-mentioned statements might be considered indirect incitement to hatred. However, this would not necessarily have been the case. Not because, as Cañamares (in this volume) suggests, 'these crimes cannot be used to impede the dissemination of ideas that are contrary to those shared by the vast majority of society'. Nor because 'religious discourse can only be considered a crime when it is objectively aimed —directly or indirectly— at inciting [others] to any form of violence against certain individuals or groups in light of their characteristics', since the wording of the law has been broadened to cover incitement to 'hatred'. The bishop would have been found not guilty on the basis of the same reasoning that the courts applied in this case. His statements (if only those reported by Professor Cañamares) were chosen carefully and formed a play on the ambiguous word 'hell' (meaning both a punishment for sins and an extremely difficult situation to be in, not necessarily by your own fault), but they seem to be intended to prevent the faithful from accepting homosexuality and to cause them to feel pity rather than hatred for homosexuals who find themselves obliged to have occasional sexual intercourse.

VI. Concluding remarks

The foregoing analysis has reached two main conclusions: first, hate speech against religious communities should not be regarded as being equal to blasphemy or defamation. The former should always be directed against individuals, whereas the latter is directed against ideas, beliefs and practices. It is argued in this chapter that this distinction may and should be made even if, in many cases, it may appear to be very difficult to do so. In this sense, there is no hate speech against communities, but there can be hate speech against all members of a religious community. While prohibitions of hate speech are compatible with equal dignity as a prerequisite of free speech, blasphemy and defamation of religions are not.

[71] More analytically, S. Cañamares, report on Spain in this volume.

[72] A. C. Jover, 'La libertad de enseñanza de las confesiones religiosas entre libertad de expresión y discurso del odio' (2017) 24 *Rivista telematica* <http://www.statoechiese.it/images/uploads/articoli_pdf/Castro.M_Libertad.pdf> (accessed 30 Mar 2018).

Second, the autonomy of religious communities is not a valid basis for exempting them from their obligation to observe the law prohibiting hate speech. In the same vein, hate speech by religious ministers is prohibited just as much as hate speech by any other public official or politician that is capable of influencing a large number of people who are believers or followers.

The concern here is that 'some religious denominations may feel obliged to silence certain parts of their doctrine in order to avoid accusations of discrimination or incitement to hatred against certain individuals or groups'[73]. This may be a valid point. In fact, some religions or religious doctrines are indeed, in their raw versions, a manifestation of hatred for specific categories of people and incite violence against them. In some of its manifestations, for example, Islam may advocate jihad, war against all infidels, as an expression of its hatred for them. Or, as expounded by Cañamares in this volume, there might be interpretations of the sacred scriptures that result in forbidden practices, such as the physical punishment of women advocated by the imam of Fuengirola (Málaga) in his book on women in Islam[74]. This is an obvious case in which the state did interfere[75] in a purely religious matter, taking sides in the matter of possible interpretations by excluding that which advocates physical punishment and favouring that which disallows it.

So, the question is not whether such manifestations of hatred deriving from religious faith are suppressed by law —they are indeed suppressed— but whether this is a good or bad effect of the relevant legislation. In order to answer this question, one needs to adopt a particular position: there is no neutral point of departure. In the case of a so-called hate imam, it is obvious that for him legislation disallowing hate speech will have a negative effect on what he believes is the right thing to do. In the case of a bishop, like the one in the Greek example (who was not convicted after all, but let us suppose he could have been convicted for inciting hate and violence against homosexuals), he would hold the same opinion as the imam. If one belongs to a targeted group, then logically one is likely to support hate-speech legislation.

[73] Cañamares, chapter on Spain in this volume.

[74] M. K. Mustafa, *La mujer en el islam* (Fuengirola/Málaga, Centro Cultural Islámico Sohail, 2000).

[75] Cañamares, chapter on Spain, argues to the contrary, namely that the court 'simply showed that not every religious discourse can be considered acceptable from a legal point of view despite the fact that it can be endorsed by a part of the religious community'. But this is precisely an example of the state's interference in religious matters. The author goes on to point out, quite rightly, that: 'neither religious freedom nor freedom of expression is an unlimited right. Consequently, they can be prohibited by law —and even by criminal law— as long as they affect the fundamental rights of others, public safety or other relevant public interests'.

There are two critical points here. First, if one is[76] a Christian and accepts the prohibition of hate speech stemming from an imam calling on Muslims to disregard, spit on and deny service etc. to all Christians, then this same Christian should, for the same legal reason, accept the restriction of hate speech stemming from a Christian bishop if, for example, it is aimed at homosexuals. Second, how should someone judge who does not belong either to a targeted group or to a (religious) community that expresses hate speech? Ideally speaking, this is the job of the legislator. In other words, the 'law must continuously choose what kind of community it will sustain' and, at the same time, a '[l]aw that seeks to enforce the "common morality" of society must thus intervene into controversies about norms'[77].

In this difficult case, the European legal order, through hate-speech legislation, has adopted a specific position: to defend the equal dignity of all, countering the libertarian approach towards human rights currently prevailing in the United States of America that views them merely in procedural and not substantive terms. The rationale behind this decision is the one analysed above (in Section I.1). Behind this rationale, there is the following point to consider: for those putting God above people, there might be an urgent need to defend their own God against infidels and sinners; for humanists, however, compassion and empathy for human beings might lead them to accept restrictions on liberty —in their procedural sense— in order to achieve equal dignity in a more substantive sense.

[76] See the more nuanced differentiation offered by R. Blanco, *La prohibición de la difamación de las religiones*, who follows M. Atienza, 'Las caricaturas de Mahoma y la libertad de expresión' (2007) 30 *Revista Internacional de Filosofía Política*, pp. 66-67, and proposes four different perspectives: first, that of a religious fundamentalist or an extreme communitarian who prioritises the value of the sacred; second, that of a moderate communitarian or a non-fundamentalist believer; third, that of a moderate liberal; and, fourth, that of a radical liberal.

[77] R. Post, 'Hate Speech' in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford, Oxford University Press, 2009), pp. 123-138, 130.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE SCOPE OF STATE CONTROL AND EDUCATION

Francis Messner [1]

I. Introduction

Objective religious and theological teaching integrated within school and university methodology is considered by almost the entirety of socio-political actors as the best remedy to all forms of extremism, fundamentalism and violent radicalisation. This stance is being defended by religious authorities, by supporters of the secular cause and by public authorities, though using differing content in each case. Religious authorities most commonly value inclusive, open theological or religious education that respects other forms of belief. Supporters of secularity advocate teaching freed from the weight of religious ideologies, and public authorities wish to promote religious education linked to common values and facilitating the integration of members of religious groups into society. The recent upsurge in forms of violent radicalisation that would call into question the routine aspects of ecclesiastical law or law of religions (of which religious education and theological teaching is one component) is already raising a certain number of issues. What should be the goal of religious education in state schools? How should private teaching establishments be monitored? What is the status of theology in public and private universities? How can we help to construct a counter-rhetoric without violating the guarantee of freedom of religion and its constituent part, i.e. collective religious freedom?

The situation is not the same in all European states. Some are barely affected by radicalisation, while others are confronted with recurrent terrorist acts and the development of breeding grounds for various forms of radicalisation. States in which large Muslim communities have settled are most affected, and it is they who, after much procrastination, are implementing measures to detect and counteract these phenomena. Indeed, over a long period, signs of radicalisation —or at least of extremism

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creating circumstances favourable to radicalisation— have been especially noticeable in educational institutions, and it has then been difficult for the administration to take appropriate action[2]. It seems that this passivity is relatively common in various European states (see, in particular, the chapter on Belgium in this volume). It is often rooted in the fear of offending religious believers and in the desire to avoid comparing Islam with its extremist branches. In France, public debate has equally highlighted the lure of 'Islamo-leftism' —corresponding to collusion between Islamism and the far left— which defends the idea that Islam can contribute to the emergence of winds of change. In this notion, there has re-emerged a recycled form of the Leninist theory of the useful idiot.

II. Private education

The issue of private education is particularly sensitive and complex in light of difficulties related to the radicalisation of religious groups. It is complex due to the multitude and diverse nature of institutions directly or indirectly attached to private education: establishments attached to a religious society as a public-law entity, establishments with a partnership agreement or simple contract, establishments without a contract and, lastly, those mainly providing religious instruction (madrasas or Quranic schools, for example). State monitoring or guardianship of these institutions is exercised differently depending on their status. It is sensitive insofar as these primary and secondary schools are institutions where a religious persuasion can legally shape education as a whole and not just religious education.

Primary and secondary Islamic educational establishments —Islam being a religion whose believers have been more subject to radicalisation— do not, however, exist in great numbers in the member states of the European Union. Moreover, the administration has sometimes developed relatively effective monitoring mechanisms, especially for institutions contracted to, or in cooperation with, the state. In Flanders, Belgium, for example, where the number of private Islamic primary schools can be counted on one hand, private denominational schools are generally under the authority of a recognised faith that exercises control over the content of their religious aims and especially over the religious teaching delivered there. In most other states, there is monitoring of state-funded private institutions. It is different for schools that have no state contract. To remedy this lack of supervision of institutions without contracts, the French Government decided in 2016 to impose a system of prior authorisation for the creation of private schools. The idea behind this was to monitor early on the creation of new (in particular, Islamic) schools, but the planned measure was rejected

[2] For France, see the account by B. Ravet, *Principal de collège ou Imam de la République* (Kero, 2017).

by the Constitutional Council for technical reasons. In any event, it is worth noting that one of the reasons cited by the government was the desire to more effectively monitor the plans being put forward by radicalised religious movements. In the United Kingdom, public authorities have gone a step further and introduced inspections of religious education systems existing outside of schools, encompassing madrasas and informal classes created by ultra-Orthodox Judaism. The state's desire to monitor the situation should not in this case be interpreted as limiting freedom of education, the freedom of organisation of faiths or the autonomy of faiths. It is primarily aimed at guaranteeing the interests of the child and to avoid phenomena of radicalisation, provided that a number of criteria are implemented.

One particular interpretation of the principle of academic freedom should not prevent reflection on increasing the limit attached to this freedom, especially in order to avoid a standardisation of 'communitarianism'. As such, the right of private institutions to select students according to their religious affiliation has been investigated in several national reports. European states' public policies should at least attempt to eliminate what might, depending on the circumstances, result in a withdrawal into oneself. Much good practice has been proposed, such as greater pluralism, better blending of students during the recruitment process, introducing knowledge of other religions and convictions into religious education courses and developing an educational environment favourable to denominational pluralism and respect for common values.

III. Religious education

Religious education in public (state) schools in Europe was until recently based almost exclusively on the denominational model of teaching religion. Teachers commissioned by one or more historical religions and appointed by the authorities would provide education for students affiliated with each of the faiths involved. Students grouped together for secular education were —and still are in some cases— divided up in order to receive religious education. Recent developments have, however, tended to reshape this structure, so as to adapt it to current needs that have arisen due not only to the rise of radicalism, but also to the secularisation of society. This situation has given rise to new demands. While religious education was hitherto provided in the form of transmission of religious convictions at school for the benefit of the confessions concerned, public policies implemented by many European states are now particularly attentive to maintaining religious peace, strengthening living and acting together, religious pluralism and the implementation of an objective transmission of religious knowledge to all students regardless of their religious affiliation or lack thereof.

In Greece, therefore, a 2017 ministerial decision recommends that general and vocational high schools allow, *inter alia*, for the development of personal identity, a

critical understanding of religion and contact and communication with others (see the report on Greece in this volume). Similarly, in Spain, the religions that have signed an agreement with the Spanish state (Catholics, Protestants, Jews and Muslims) deliver confessional teaching in public primary and secondary schools, while Muslim pupils are accounted for thanks to the creation in 2016 of an optional course on Islam in high schools. Such courses —created on the initiative of the public authorities— should form an obstacle to violent radicalisation by facilitating respect for freedom of religion and the development of a culture of peace, avoiding discrimination based on religion. A law allowing funding for confessional religious education that is not part of the primary education curricula was recently passed in the Netherlands. It once again targets Islam, aiming to provide high-quality teaching on Islam to counter so-called tainted versions of the religion. Equally, the creation of a mandatory course is envisaged to provide more general knowledge of religions within secondary education. Other religions are also sometimes the target of action taken against fundamentalism. In Lithuania, for example, a Catholic religious education teacher who was delivering a course on the dangers of homosexuality (backed up by their teaching materials) was convinced that a link existed between homosexuality and cannibalism. This stance was deemed inappropriate by the Ministry of Education, which put in place —in cooperation with the Lithuanian Catechetical Centre— a procedure likely to prevent such extremes. Appropriate educational material will now be made available to teachers.

With a few exceptions, efforts to ensure equality of treatment between different religions gave rise in the late 20th century to multiple religious education courses open to minority religions and modelled on those for majority religions. In the current context of rising fundamentalism, specialists in the field and representatives from society have highlighted the limits of this model. Religions have more or less moved away from the catechetical approach to instead teach tolerance and knowledge of other religions. Nevertheless, the fact remains that pupils are being separated according to their religious affiliation and, during religious education classes, are not debating or living together. Based on this observation, many European states are considering creating religious education courses or a course in religious culture or values education for everyone, bringing together all pupils. In Belgium, on a certainly modest level, the French community, which had until 2016 two hours of religious education available within primary schools, has transformed the second hour into Philosophy and Citizenship Education (*éducation à la philosophie et à la citoyenneté*, or EPC). It was extended to secondary schools in 2017. This development was accelerated by the Paris attacks in 2015. EPC classes are indeed considered to be a remedy to counter the radicalisation phenomenon. This also suggests that conventional religious education classes offer no guarantees in the fight against religious radicalisation. The debate has, however, stalled in the Flemish community, where the *status quo* is being maintained. Community activists are campaigning for the removal of lessons in re-

ligion and morals and are favouring a common course on philosophy, ethical issues and major streams of thought.

This trend is being confirmed with the transformation from confessional courses to interfaith and interreligious —or even religious culture— courses. In England and Wales, compulsory religious education, which pupils can be exempted from, is interfaith. Here, it is not about catechising students, but rather providing them in a pragmatic way with elements of knowledge about their religion and that of other students in the same establishment by mobilising all those involved. Since 1988, curricula implemented at the local level have taken into account Christianity and major non-Christian religions represented in the United Kingdom thanks to collaboration between school management, the Anglican Church established in England and disestablished in Wales and other relevant local religions. However, such courses must reflect an *agreed syllabus* at the national level.

Since the mid-20th century, the Nordic countries, and Sweden in particular, have abandoned confessional Protestant teaching in order to develop compulsory courses on knowledge of Christianity, the major religions and non-religious philosophies without the involvement of the popular or national Lutheran churches during the drafting of the curricula and the appointment of teachers. The Swedish Government, sensitive to radicalisation, has been distributing for some time specific teaching materials to strengthen young people's democratic values in educational institutions. The City State of Hamburg in Germany has entrusted the Protestant Church, which has withdrawn from its denominational teaching of Protestantism, with creating a course on religion that is open to all pupils, while (in keeping with constitutional principles) maintaining denominational religious education classes for religions wishing to keep them, such as Catholicism and Islam. The city state strongly encourages Muslim students to follow religious education classes open to all (following an agreement between Muslim communities and the City State of Hamburg), while guaranteeing the Muslim community the ability to create denominational religious education courses.

In France, for Alsace-Moselle and its local law system, courses in religious education currently delivered in public schools are denominational, as they are placed under the responsibility of the religious authorities of statutory faiths. However, they are not of a catechetical nature. A request to establish education for interreligious and intercultural dialogue (EDII) that is sensitive to current developments was introduced and formalised by the authorities of statutory (Catholic, Protestant, Jewish) and non-statutory (Muslim, Buddhist) faiths. EDII, which includes curbing radicalisation phenomena and creating an inclusive educational context allowing students to experience living and acting together, should gradually replace denominational religious education courses. The administrative organisation of EDII originates from the statutory faiths that have decided, as part of an interfaith approach linked to their doctrinal self-understanding, to join with non-statutory faiths. One of the religious authorities represents the statutory faiths organising EDII at the education authority

(*rectorat*) and presents candidates for appointment to EDII teaching posts. Teaching programmes are submitted for approval to the administration by the applicable religious authorities. EDII teachers are paid from the budget assigned to statutory faiths for religious education.

The State of the Grand Duchy of Luxembourg has gone one step further by moving away from all things confessional and interfaith and instead secularising religious education. In September 2017, religious education in public schools aimed solely at Catholic pupils and organised by the administration in conjunction with the archdiocese was replaced by a compulsory course for all pupils called Life and Society, which emphasises values education. This course includes learning about tolerance founded on the knowledge of different convictions, be they religious or non-religious, developing independent critical thinking and exploring the major issues of life and society. This teaching is indeed non-denominational, but the administration is obliged to gather an advisory opinion on curricula from the Council of Recognised Faiths (*Conseil des cultes conventionnés*), bringing together in a statutory manner all the religions that have signed an agreement with the government of the State of the Grand Duchy, including Islam.

IV. Higher Education

The national reports are mainly focused on public and private, primary- and secondary-school establishments. They have not dealt in detail with civil and civic training as part of the theological training of religious officials. However, it appears that in some certainly rare cases of violent radicalisation, imams have been able to play an important role (the imam of Ripoll in Spain, the imam of Torcy in France etc.). Moreover, it is difficult to deny that non-violent radical discourse is somehow conducive to the development of violent radicalism. Particular attention could be paid to the procedure for training ministers and related personnel, including the resources made available to religious communities to promote integration and prevent violent radicalisation of their personnel. Moreover, the institutionalisation of Islam in Europe has accelerated the reshaping of how religious education is organised. Public authorities in European countries that have a significant number of Muslims wish to integrate students of this confession within the measures in force despite the existing difficulties. In the absence, in most cases, of institutions of higher education for Islamic theology, staff trained in the teaching of Islam are lacking or are being trained abroad. The academic and objective approach to religion and its introduction within the context of the methodology implemented in schools is not always accepted by religious communities and the methods of institutional representation of Muslim communities do not always match the criteria laid down by public authorities. Despite all these difficulties, European states have created courses in Islamic religion, e.g. Austria, Belgium and Germany. As a result, these states have also established

teacher-training centres. Germany has introduced five institutes of Islamic theology in public universities; in 2017/2018, Austria plans to establish an Islamic theology faculty at the University of Vienna; and Belgium recently developed a Master's in Islamic Theology at the universities of Leuven and Louvain-la-Neuve. Some reports in this volume stress the need to train religious officials 'to develop a sensitivity that avoids extremism'[3] without, however, indicating the procedure to be followed. We may also note that a law has been passed in the Netherlands allowing the withdrawal of accreditation to offer a diploma of higher education should a representative from the degree course make discriminatory remarks, regardless of the quality of teaching provided.

In a number of European countries, theology faculties have been created within public and private universities on an equal footing. However, faculties of theology, including public and private faculties authorised by public authorities, have been created to pacify interfaith relations and integrate religious institutions and their members into society by disseminating religious thought that is aligned with academic methodology and respectful of the foundation of common values. The existence of a faculty of Islamic theology at a university is in any case an academic response to fundamentalism and its radical excesses. It is contributing to the development of an academic Islamic theology backed up by approaches and methodology in place at public universities.

The creation of a faculty of Islamic theology can be considered a good practice. It enables the linking of the various components of the training of religious personnel in order to avoid a training system that consists of two epistemologically disjointed blocks, each implementing different methodologies for theology and social sciences, respectively. History demonstrates, through the modernist crisis in the Catholic Church in France, that this somewhat schizophrenic coexistence of two methodologies as part of the same training is not sustainable in the medium term and that it is a source of frustration, tension and confusion for all involved. It is not about imposing training on religious confessions, which would be contrary to the principle of the freedom of organisation of faiths, but rather about proposing a model for academic theology.

Furthermore, mandatory training to facilitate the integration within public services of chaplains paid by the state, as has been established in France, also seems to be a solution that should be retained. Chaplains paid for their duties in the army or in public service are indeed serving members of a faith, but they also participate in the functioning of these institutions into which they must be perfectly integrated. For example, hospital chaplains are not part of the care team, but work with it with

[3] See the chapter on Finland in this volume.

a view to providing all-round care for the person being accompanied. Training chaplains about the institutions of the state and religious pluralism is therefore justified. It is not about religious or theological education, which falls under the jurisdiction of religious authorities, but training that facilitates integration into an administration or into the armed services. Moreover, recruitment of personnel remunerated by the state is generally conditional on holding a diploma.

V. Conclusion

Phenomena related to radicalisation are likely to influence the future evolution of the law on state-religion relations or ecclesiastical law. Generally, the question will arise as to the justification of the special status, support and advantages granted to faiths by public authorities. The weight of history, the political power of religions *vis-à-vis* the state and the ancient paradigm of the perfect society are all arguments that are equally losing momentum. In a liberal and globalised society additionally weakened by acts of violent religious radicalism, emphasis will be placed on forms of support promoting the maintenance of a society at peace over the long term.

RELIGION, RADICALISATION AND THE EU

MICHAŁ RYNKOWSKI[1]

I. INTRODUCTION

The aim of this chapter is to underline Europe's added value, i.e. to demonstrate the contribution of EU institutions and of European legislation to the debate about, and the fight against, radicalisation. It focuses on five aspects:

- the multiple EU-level actions undertaken in response to radicalisation, in particular as regards the 2016 (Internet) Code of Conduct and the tackling of illegal content online;
- the discussions about religion and radicalisation at the EU level, mainly in the European Parliament, reflected in questions from members of the European Parliament (MEPs) and in the European Commission's answers;
- the protection of external borders (Schengen-related acts) and on the creation and reinforcement of data exchanges concerning criminal acts and records, i.e. eu-LISA and the European Criminal Record Information System (ECRIS);
- some institutional (and operational) developments, e.g. changes within the structure of the European Commission and within Europol; and
- the important issue of the free movement of clergy within the EU and possible (or rather impossible) legal limits thereof.

This report covers events and documents up to the publication of the 'Twelfth progress report towards an effective and genuine Security Union' (12 December

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2017), the EU's 'Action Plan to support the protection of public spaces' (18 October 2017) and the regulation on the EU Entry/Exit System (30 November 2017)[2].

II. Social context

The number of migrants and of individuals with a migrant background (second and third generations) is steadily growing in the EU. Since the second and third generation of migrants predominantly keep the religion of their ancestors, they remain a focus group of this chapter: as defined by Council Framework Decision 2008/913/JHA[3], they are described as people characterised by their 'descent'.

In terms of statistics on migration, the European Commission gathers and publishes the respective data, e.g. in the DG HOME's document 'Statistical compilation', prepared by the DG Statistics Task Force[4]. To keep migration, and in particular illegal migration, under control, it is important to note the figures concerning the percentage of effective returns compared to decision returns, which varies between 14% and 15% in some member states and up to almost 100% in others (Germany, Luxembourg). In general, the return rate in the EU in 2014 was around 40% and below 30% for African countries[5]. Applicants who receive a negative answer and who, instead of returning to their country, 'disappear' in their host country may contribute to security threats. The directive on returns (Directive 2008/115/EC)[6] should provide a respective answer to this situation.[7]

EU institutions are well aware of the risks of radicalisation and undertake various actions to counter it. This awareness is clearly presented in the monthly 'progress report towards an effective and genuine Security Union', which takes the form of a communication from the European Commission to the European Parliament, the European Council and the Council of the EU. It should be noted that the Security Union and the activities related focus not only on terrorist threats but also on various other challenges, including organised crime and cybersecurity. The latest version of the report available at the time of writing was the twelfth progress report, document

[2] Regulation 2017/2226, OJ L 327/20 of 9 Dec 2017.

[3] OJ L 328, 6 Dec 2008, p. 55.

[4] Updated in Oct 2016.

[5] As stated in the EU Action Plan on return, COM(2015) 453 fin of 9 Sep 2015.

[6] Directive 2008/115/EC of the European Parliament and of the Council of 16 Dec 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348, 24 Dec 2008, p. 98.

[7] K. Zwaan (ed), *The Returns Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Nijmegen, Wolf Legal Publishers, 2011), in particular in this volume: D. Acosta Arcarazo, 'The Returns Directive: Possible Limits and Interpretation', p. 7 and ff.

COM(2017) 779 final from 12 December 2017[8]. This consists of a text describing the most significant actions taken, while the ninth report also included an annex listing all the actions taken and indicating their stage of completion (ongoing, completed, etc.). The progress reports refer to the conclusions of the European Council of 22-23 June 2017, which 'reiterated and reinforced the Union's resolve to cooperate to fight the spread of … radicalisation online, to coordinate … work on preventing and countering violent extremism and addressing … ideology'[9]. The 2017 Taormina G7 Summit statement on the fight against terrorism and violent extremism also sent a strong signal in this direction[10]. In his State of the Union speech on 13 September 2017, European Commission President Jean-Claude Juncker called for the establishment of a European intelligence unit and for tasking the European public prosecutor with prosecuting cross-border terrorist crimes.

There are a number of EU documents relating directly or indirectly to the fight against radicalisation that will be presented in detail in a later part of this chapter. At this stage, only one will be mentioned: according to the **communication 'Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU's Response'** (CPRT)[11], some 4,000 EU nationals are estimated to have joined terrorist organisations in Syria and Iraq[12]. Known as 'European foreign fighters', they represent a particular danger when they return to Europe to pursue their activities.

A European response to the challenges of radicalisation is indeed needed: the Commission has stressed on many occasions that since chat rooms, social media and other online tools often have an international dimension and do not stop at national borders, action at the EU level may be effective[13].

To complete this introduction, it is important to note that hardly any of the Commission's communications mention any religion or any group within a religion. The only time this happened was in the 2016 communication COM(2016) 379, which explicitly mentions 'Islamist extremists'. On the other hand, there are documents that explicitly refer to certain TV channels, programmes (e.g. Al-Qaeda's Inspire

[8] Issued in chronological order in 2017: fourth report COM(2017) 41 of 25 Jan 2017, fifth report COM(2017) 203 of 2 Mar 2017, sixth report COM(2017)213 of 12 Apr 2017, seventh report COM(2017)261 of 16 May 2017, eighth report COM(2017) 354 of 29 Jun 2017, ninth report COM(2017) 407 of 26 July 2017, tenth report COM(2017) 466 of 7 Sep 2017, eleventh report COM(2017)608 of 18 Oct 2017.

[9] http://www.consilium.europa.eu/en/meetings/european-council/2017/06/22-23-euco-conclusions_pdf/.

[10] http://www.consilium.europa.eu/en/press/press-releases/2017/05/26-statement-fight-against-terrorism/.

[11] COM(2013) 941 final, 15 Jan 2014.

[12] The figures date from 2013 and might have grown significantly since then.

[13] See CPRT, p. 3.

programme) and terrorist groups (e.g. Al-Shabab)[14]. In addition, the report of the High-Level Commission Expert Group on Radicalisation of 8 December 2017 mentions violent Islamist ideology as its priority and main concern[15].

III. Political and public debate

The public debate at the European level has numerous dimensions. One is a kind of summation of national debates brought by Member States to discussions in the Council. Another is the discussion in the European Parliament, including questions addressed by MEPs to the European Commission. Every year, there are thousands of questions asked both orally and in writing. To give readers a general idea, the notion of 'hate speech' has been the subject of 255 questions, the majority of which have been asked in recent years. Instead of discussing these questions and answers here, they will be referred to in various parts of this chapter in a given context in order to explain the Commission's view. An overview of the questions shows that, on issues of religion, the attention of MEPs is focused on countries outside the EU.

At the highest European level, 2015 and 2016 saw a high number of EU summits. One of the most important reasons for these frequent meetings of heads of state and government was migration and related issues. Three special meetings were also held between EU heads of state or government and Turkey (29 November 2015, 7 March and 18 March 2016)[16].

It is worth noting that political debate and reactions happen immediately: the declaration of EU interior ministers of 24 March 2016, just two days after the attacks at Zaventem Airport and Maelbeek metro station in Brussels, suggested the creation of an Internet Code of Conduct by June 2016, and the document was indeed ready a few months later, on 31 May 2016 (see below).

IV. Legal and political framework

1. Definition (or Non-definition) of Extremism, Fundamentalism and Radicalisation

A definition of religion is included in Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[17]: this should be understood as broadly referring to persons defined by reference to their religious convictions or beliefs. Another term that is defined for

[14] Ibid, p. 8.

[15] <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=36235&no=1> (accessed 6 Feb 2018).

[16] The European Council, December 2014 to April 2016, Vol. 1, p. 31.

[17] OJ EU L 328/55, 6 Dec 2008.

the purpose of this decision is 'hatred', as referring to hatred based on race, colour, religion, descent or national or ethnic origin. The EU has no definition of 'extremism', 'fundamentalism' or 'radicalisation', although these notions appear many times in EU documents.

2. Legislation *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

The first European legal act in the area was a Joint Action of 15 July 1996 concerning action to combat racism and xenophobia (96/443/JHA).[18] Since this kind of legal act no longer exists in the EU, it is worth noting that it was similar to a directive, giving the Member States time to fulfil their obligations: in this case, by the end of June 1998[19].

In a second act that repealed the above-mentioned Joint Action, Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, Article 1 states that each member state must take the measures necessary to ensure that the following intentional conduct is punishable:

> 'a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin. …
>
> c) publicly condoning, a denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or

[18] This document mentioned the Consultative Commission on Racism and Xenophobia established by the Corfu European Council, http://europa.eu/rapid/press-release_IP-95-1387_en.htm.

[19] For historic reasons, it is worth quoting the Joint Action: 'In the interests of combating racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II, to ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour:

(a) public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;

(b) public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;

(c) public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;

(d) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

(e) participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred'.

> a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group'.

Interestingly, letter e) of the Article 1 of the Joint Action (participation in the activities of groups, organisations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred) disappeared.

The important provisions are found in Articles 3, 5 and 8. According to Article 3, member states must take necessary measures to make sure the crimes are punishable by effective, proportionate and dissuasive criminal penalties (from one to three years in prison). Article 5 refers to the liability of legal persons, including a list of possible penalties for legal persons (from exclusion from entitlement to public benefits or aid to a judicial winding-up order). Last but not least, Article 8 says that each member state must take the necessary measures to ensure that investigations or prosecutions are not dependent on a report or an accusation made by a victim of the conduct at least in the most serious cases where the conduct has been committed in its territory.

As framework decisions are also no longer adopted, it is worth mentioning that, similar to joint actions, they corresponded to EU directives, but with limited jurisdiction on the part of the European Court of Justice and limited competencies on the part of the European Commission in pursuing non-implementation of this directive by the Member States.

Getting this Framework Decision adopted was not easy: the Commission stressed that 'deeply regrets that several Member States in Council discussions downgraded the level of ambition of the proposal and that this draft instrument was blocked for almost two years'[20].

The directive on combating terrorism (and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA)[21] **was adopted on 15 March 2017,** giving the Member States time to transpose the rules by 8 September 2018. In its recital 35, the directive stresses that it 'respects the principles recognised by Article 2 TEU, respects fundamental rights and freedoms and observes the principles recognised, in particular, by the Charter [of Fundamental Rights]': freedom of conscience and religion are listed explicitly. Article 21 of this directive obliges the Member States to take measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence, as referred to in Article 5, that is hosted in their territory. Member States must also endeavour to obtain the removal of such content hosted outside their territory.

[20] This answer was provided on 21 Mar 2005 to MEP K. Dillen (E-218/05).

[21] Directive (EU) 2017/541 of 15 Mar 2017, OJ L 68/6 of 31 Mar 2012.

Article 6 of the Audiovisual Media Services Directive[22] provides that Member States must ensure by appropriate means that the audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality. In addition, 'the audiovisual commercial communication shall not … include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation'.

De lege ferenda, **the Commission proposal (COM(2016) 287 final of 25 May 2016) for the revision of the Audiovisual Media Services Directive reinforces the fight against hate speech**. It aims: 'to align the Directive with the Framework Decision on combating certain forms and expressions of racism and xenophobia, and the Charter of Fundamental Rights. It also foresees an obligation on Member States to ensure that video-sharing platforms put in place appropriate measures to protect all citizens from incitement to violence or hatred. These measures consist, for instance, of flagging and reporting mechanisms'[23].

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

Indirectly relevant is the Schengen Information System and more precisely the Schengen Borders Code (regulation 562/2006 of 15 March 2006). In its Article 6, the Code reads: 'Conduct of border checks

> '1. Border guards shall, in the performance of their duties, fully respect human dignity.
>
> Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.
>
> 2. While carrying out border checks, **border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief** [emphasis added], disability, age or sexual orientation'.

While entering the Schengen Area is, of course, an important moment, equally important is when individuals exit: according to Article 7 of the Schengen Borders Code:

> '(b) thorough checks on exit shall comprise:
>
> (i) verification that the third-country national is in possession of a document valid for crossing the border;
>
> (ii) verification of the travel document for signs of falsification or counterfeiting;

[22] Directive 2010/13 (EU) of the European Parliament and of the Council of 10 Mar 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[23] 11th PR, p. 12.

> (iii) **whenever possible, verification that the third-country national is not considered to be a threat to public policy, internal security or the international relations of any of the Member States** [emphasis added]'.

These checks should include verification of alerts in the Schengen Information System, which contains alerts labelled as 'terrorism' or 'terrorism-related activity'. However, it does not provide any detailed information about whether such alerts are linked to hate speech or to other activities[24].

The new regulation on the EU Entry/Exit System (EES) (Regulation 2017/2226 of 30 November 2017)[25] is yet another important step. The EES was created for recording and storing the date, time and place of entry and exit of third-country nationals crossing the borders of EU Member States where the EES is operated: similar information about refusal of entry and the reasons therefor (radicalisation-related crimes are not explicitly listed in the regulation, but could be one of the reasons) is also recorded and stored. The EES creates alerts for Member States when an authorised stay has expired.

The EU PNR (Passenger Name Record) directive[26] obliges airlines to hand over information to EU countries about their passengers in order to help the authorities fight terrorism and serious crime. While the word 'radicalisation' is not mentioned, the directive includes multiple references to religion, mainly from the point of view of data protection, as stipulated by the Charter of Fundamental Rights. The directive refers to religion (which together with race or ethnic origin, sexual orientation, etc. should not constitute a reason for any discriminatory treatment) in Articles 6, 7 and 13.

It is also worth mentioning a few other initiatives: the returns directive (2008/115/EC)[27], readmission agreements and the creation of IT systems and agencies in charge of implementation. An important role in this context is played by eu-LISA, the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. Eu-LISA was set up in 2011 by regulation 1077/2011: it currently manages the Visa Information System, Schengen Information System and Eurodac (database of fingerprints). On 29 June 2017, the European Commission presented a report on the functioning of eu-LISA to the Council and to the European Parliament[28].

[24] Answer given by the Commission to MEP K. Piri, question P-9967/15.

[25] OJ L 327/20, 9 Dec 2017.

[26] Directive EU 2016/681 of the European Parliament and of the Council of 27 Apr 2016 on the use of the passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119/132 of 4 May 2016.

[27] Directive 2008/115/EC. For a detailed commentary and a discussion of implementation challenges, see Zwaan (ed), *The Return Directive*, including a list of judgments in the area.

[28] COM(2017) 346 final of 29 Jun 2017.

The EU's newest tool indirectly linked to the issue of radicalisation is the **exchange of criminal records of non-EU nationals in the European Criminal Records Information System (ECRIS).** A proposal to reinforce ECRIS was presented on 28 June 2017, COM(2017) 352 final. Currently, all 28 Member States are part of ECRIS, but none of them are able to exchange information with all 27 other Member States (so far, Austria, Ireland, Spain and the United Kingdom have made 26 connections). ECRIS is recognised as a legislative priority, identified in a joint declaration of the presidents of the European Parliament, the Council and the Commission[29].

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

The prevention of radicalisation was highlighted as a key part of the fight against terrorism in the European Agenda on Security[30].

As stated above, the EU has a number of policy documents on this issue. **The revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism of 19 May 2014 (9956/14)**[31], adopted by the Council of the EU, states that, 'Although the responsibility for combating radicalisation and recruitment to terrorism primarily lies with the Member States, this Strategy should help Member States develop, where relevant, their own programmes and policies, which take into account the specific needs, objectives and capabilities of each Member State'. This is the philosophy behind all the communications issued by the EU institutions. Once needs are identified, a response is prepared relatively quickly. The European Agenda on Security of 28 April 2015[32] may serve as an example. This document proposed reinforcement of the Schengen Information System and ECRIS (see Section 3.3 above), the creation of the Internet Referral Unit at Europol and the creation of an EU-level forum with IT companies. All of these proposals materialised within two years (see below).

Other important documents, listed chronologically, include:

— the **Paris Declaration, which was adopted on 17 March 2015** by the education ministers of EU Member States and the European Commission, is a declaration on promoting citizenship and the common values of freedom, tolerance and non-discrimination through education[33].

[29] 8th PR, p. 7.

[30] The European Agenda on Security, COM (2015) 185 of 28 Apr 2015.

[31] <http://data.consilium.europa.eu/doc/document/ST-9956-2014-INIT/en/pdf> (accessed 26 Oct 2017).

[32] COM(2015) 185 final of 28 Apr 2015.

[33] Paris Declaration, <http://ec.europa.eu/dgs/education_culture/repository/education/news/2015/documents/citizenship-education-declaration_en.pdf> (accessed 25 Oct 2017).

— The **Justice and Home Affairs Council Conclusions on enhancing criminal justice response to radicalisation of 20 November 2015 (14382/15)**[34], which stressed the importance of 'well-trained religious representatives in prisons'. A stakeholder conference organised on 27 February 2018 will help share the results of ongoing projects[35].
— The Action Plan for strengthening the fight against terrorist funding[36] of 2 February 2016.
— **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions supporting the prevention of radicalisation leading to violent extremism**, COM(2016) 379 of 14 June 2016.
— The Nice declaration of 29 September 2017[37], adopted by the conference of the mayors of the Euro-Mediterranean region, organised by the mayor of Nice with the support of the European Commission, aimed at the exchange of best practices on the prevention of radicalisation and the protection of public spaces[38]. However, this declaration does not include any link to religion (being prepared and announced in France).
— **The Communication 'Tackling illegal content online: towards an enhanced responsibility of online platforms'**[39] of 28 September 2017 states that **what is illegal offline is also illegal online:** 'What is illegal is determined by specific legislation at the EU level, as well by the national law'.

This list would not be complete without a major IT initiative known as the **Code of Conduct on illegal online hate speech**, which is probably the most efficient instrument so far. In May 2016, the Commission (under the lead of Commissioner Věra Jourová) together with Facebook, Twitter, YouTube and Microsoft established a code of conduct to combat the spread of illegal hate speech online in Europe[40]. These global IT companies committed to reviewing the majority of valid notifications for the removal of illegal hate speech in less than 24 hours and to removing or disabling access to such content if necessary. This is in line with Article 14 of the e-commerce

[34] Conclusions of the Council of the European Union and of the Member States meeting within the Council on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism of 20 Nov 2015.

[35] 11th PR, p. 11.

[36] COM(2016) 50 final of 2 Feb 2016.

[37] The Nice declaration: cities action for preventing violent extremism and securing urban spaces in Europe and in the Mediterranean, <https://efus.eu/files/2017/10/déclaration-Nice-VF-et-VA.pdf> (accessed 25 Oct 2017).

[38] 11th PR, p.3.

[39] COM(2017) 555 final of 28 Sept 2017.

[40] <http://europa.eu/rapid/press-release_IP-16-1937_en.htm> (accessed 25 Oct 2017).

directive 2000/31/EC[41], which says that Member States shall ensure that a 'service provider is not liable for the information stored at the request of a recipient of the service, on condition that … b) the provider, upon obtaining such knowledge or awareness [about the illegal nature of the content] acts expeditiously to remove or to disable access to the information'. Such reviews will be carried out in accordance with each company's rules and community guidelines and where necessary national laws transposing Framework Decision 2008/913/JHA, with a dedicated team reviewing requests. The European Commission does not pay the IT companies that are involved in the code of conduct[42]. The number of hate-related items removed within the last year has increased significantly. On 11 July 2017, several German newspapers, including *Frankfurter Allgemeine Zeitung*, were given an opportunity to interview 650 Facebook employees who regularly monitor and remove unsuitable content (such as decapitation videos shown by terrorist groups)[43]. The resulting article, which was also published by many other German and Austrian media, shows the immense scale of hatred on the Internet and the actions undertaken to prevent it.

One of the EU's most recent documents is the **Action Plan to support the protection of public spaces (COM(2017) 612 of 18 October 2017**), which points out that recent targets for terrorist attacks have been **so-called soft-targets: places of worship are explicitly mentioned in addition to shopping malls, concert halls and city squares**. The same communication confirms that while the Member States are primarily responsible for the protection of public spaces, 'the EU can and should do more to support these efforts'. As an example, the European Commission launched (on 18 October 2017) a call for project proposals through the Internal Security Fund Police worth a total of EUR 18.5 million.

V. Effects of the measures on religious freedom

The documents presented and discussed above are mainly communications from the European Commission, which are policy documents and report on certain achievements, but do not have a direct legal effect. These communications do not have any impact on the EU Charter of Fundamental Rights. This is confirmed by the Commission Staff Working Document (SWD) on the Application of the EU Charter of Fundamental Rights in 2016[44]. However, one should keep in mind that, in princi-

[41] Directive 2000/31/EC of the European Parliament and of the Council of 8 Jun 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1 of 17 Jul 2000.

[42] E-5418/16, asked by MEP Marie Le Pen.

[43] <http://www.faz.net/aktuell/wirtschaft/netzwirtschaft/alltag-im-facebook-loeschteam-nach-der-ersten-enthauptung-habe-ich-geheult-15101055.html> (accessed 12 Jul 2017).

[44] 18 May 2017, SWD (2017) 162, COM (2017) 239 fin.

ple, the Charter of Fundamental Rights applies to everyone whether or not they are EU citizens[45]. On the other hand, the Regulation on the European Border and Coast Guard (2016/1624) was quoted in this SWD as an example of an act that respects fundamental rights. According to the same SWD, the importance of education (Article 14) as a tool for the prevention of radicalisation and the right to cultural and religious diversity (Article 22) must be respected, while radicalisation should be prevented.

The specific issue of the (Internet) Code of Conduct in relation to fundamental rights was tackled by Marijana Petir MEP in her question to the Commission. In its answer (E-5976/16), the European Commission emphasised that:

> 'the Code of conduct is limited to tackling clearly illegal online hate speech as defined in the EU Framework Decision on combating racism and xenophobia, in full respect of the right to freedom of expression as enshrined in Article 11 of the EU Charter of Fundamental Rights. In line with the relevant case-law of the European Court of Human Rights, content that "offends, shocks or disturbs the State or any sector of the population", which is protected under the right to freedom of expression, is not illegal under the Framework Decision and the Code cannot be invoked in relation to such content'.

Issues concerning schools and other entities, like publishing houses, are discussed in national reports. There is no clear link between European Schools (in the sense of the Schola Europeae)[46] and the topic covered in this chapter.

VI. Educational measures to tackle radicalisation and extremism

1. Laws, Policy and Programmes

There are numerous specific EU programmes and actions in this area.

One prominent example is the Radicalisation Awareness Network (RAN) Centre of Excellence, established in 2011, which brings together 700 experts and practitioners from across Europe. RAN's work has resulted in, among other things, Communication CPRT 2014, which identified 10 areas where Member States and the EU can take more action to prevent radicalisation at home and abroad. RAN has also produced several valuable manuals. The programmes (so-called exit strategies) proposed by RAN are very ambitious; however, they may also be difficult to implement, as they suggest a tailor-made approach to every person willing to disengage and deradicalise, including the appointment of a leading mentor and some additional support staff.

[45] S. Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' in E. Guild and P. Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Leiden, Martinus Nijhoff, 2012), p. 446.

[46] This term refers to schools created by a separate international agreement between the member states of the EU aimed mainly at educating the children of officials of EU institutions. For more information, see <https://www.eursc.eu/en> (accessed 12 Jul 2017).

Other programmes and actions include the following:

— Eurojust support for the Terrorism Conviction Monitor (EUR 8 million in 2015 and 2016);
— under the Justice Programme: cooperation with the European Confederation for Probation and the European Organisation of Prison and Correctional Services;
— the Erasmus+ Regulation establishing the EU Programme for Education, Training, Youth and Sport of 11 December 2013 (regulation 1288/2013), where social inclusion is one of the objectives of the programme;
— the Rights, Equality and Citizenship Programme 2014-2020, where combating racism, xenophobia, homophobia and other forms of intolerance is one of the programme's nine objectives[47];
— through Horizon 2020, the Commission supports tools that help professional journalists find reliable information on social media and receive feedback on the trustworthiness of their sources[48];
— there are also projects on religious diversity in Europe, covered by a EUR 2.5 million call for proposals relating to the religious diversity: past, present and future[49];
— on 6 October 2017, the Commission launched a call for proposals to provide funding of EUR 6 million to consortia of civil society actors that develop and implement counter-narrative messages online[50].

This chapter would not be complete without mentioning Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund (generally known as AMIF), amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

In April 2014, the European Parliament commissioned a report titled 'Preventing and countering youth radicalisation in the EU', following a request from the LIBE Committee[51] (PE 509.977) to gather experience from the field.

[47] Based on the Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 Dec 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020, OJ L 354, 28 Dec 2013, p. 62, <http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm> (accessed 12 Jul 2017).

[48] Answer E-4717/17.

[49] COM(2016) 379, p. 12.

[50] 11th PR, p. 11.

[51] Civil Liberties, Justice and Home Affairs Committee of the European Parliament.

The EU Internet Forum was launched on 3 December 2015 by the European Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, in cooperation with the Commissioner for Justice, Consumer and Gender Equality, Věra Jourová. The forum brings together EU interior ministers, high-level representatives of major Internet companies, Europol, the EU Counter Terrorism Co-ordinator and the European Parliament. The Action Plan to combat terrorist content online is its most important document so far[52].

VII. The free movement of priests/clergy and the possible legal limits thereof

The point of departure for this section is the question raised by MEP Édouard Ferrand. Following a Danish debate[53], he asked if the EU would create a list of radical imams who would be banned from entering the EU and from moving within the EU. The Commission confirmed that it was aware of the Danish debate but that that it did not intend to create such a register[54].

This question may be discussed from various angles; however, it would appear to be most interesting from the legal point of view. The issue of a ban on radical clergy (probably mainly targeting imams) entering the EU could potentially be clarified through the extensive legislative activities of the EU in respect of protection of the EU's external (or, more precisely, Schengen) borders. The second issue (movement inside the EU) is, legally speaking, much more challenging. Clergy (priests, imams) basically circulate within the EU, benefitting tacitly from freedom of movement. This important right, one of the cornerstones of the EU's internal market, is linked to, and depends on, an individual's legal status. One may move freely in the EU with the status of a student, an employee or as an independent. An interesting point from the legal point of view is that the position (the legal status) of the clergy is not defined at the EU level or, more precisely speaking, is not comprehensively defined, as the various judgments of the Court of Justice of the EU are not coherent. Generally speaking, the most obvious assumption would be that (Christian) clergy are workers who are subordinated to a bishop, and to apply this position to clergy of other religions, including rabbis and imams, even if this does not correspond with the actual internal structure of those denominations. So far, only a few EU judgments have been issued in this area, and the establishment of any line of jurisdiction

[52] 11th PR, p. 11.

[53] When the Danish authorities published a list of six preachers forbidden from entering Denmark for at least two years (2016).

[54] Question E-2722/2016.

seems impossible. According to the case of A.J.M. van Roosmalen[55], a priest is a self-employed individual (an opinion that deserves criticism, but in this case it was the only way to ensure Father Roosmalen's social security, but it remains very hard to justify legally). Another judgment concerning Mr Steymann (the *Bhagwan* case)[56] links the religious activities of a community to the economic services rendered by its members. This reasoning also seems to be wrong: a recent judgment of the European Court of Human Rights in Strasbourg (*Károly Nagy v Hungary)*[57] recalls the judgments of the Hungarian courts, which question the market value of the services rendered by priests (thus, also potentially by imams) and thus indirectly challenges religious services as a service within the meaning of the EU Treaty. There is another reasonable option that has so far not been applied by the European Court of Justice: in countries where there is a state church (established church), one could argue that the clergy fulfil certain obligations of state officials (which some years ago was still true for the clergy of the Danish National (Lutheran) Church, when the Folkekirke was *de facto* acting as a civil registration office). State officials are excluded from the freedom of movement, as stipulated by the EU Treaty (Article 45(4) of the Treaty on the Functioning of the European Union: the provisions on the freedom of movement of workers do not apply to employment in the public service), and this could also be claimed for the clergy (with the concordats in the EU Member States up to now stating that bishops must be nationals of the country where they operate). Last but not least, the jurisprudence, like in the case of *Ms Yvonne van Duyn v Home Office*[58], where the plaintiff was refused entry to the UK to take up work only because she was a member of a particular denomination (in her case, the Church of Scientology), seems, after 44 years, not be applicable anymore.

The above paragraph may at first glance look like an academic discussion written for the pleasure of intellectual debate. One should keep in mind, however, that if priests and imams can move freely in Europe, there is no legal need to justify the legal basis for doing so. If EU institutions, or rather the interior ministers of the EU Member States, were to limit this freedom of movement, they would certainly be asked to explain the legal reasoning behind such a limitation. Such an explanation would probably include a legal definition of the freedoms that members of the clergy have available to them.

[55] Judgment of 23 Oct 1986, *AJM van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid*, Geestelijke en Maatschappelijke Belangen, case 300/84, EU:1986:3097.

[56] Judgment of 5 Oct 1988, *Udo Steymann v Staatssecretaris van Justitie,* Case 196/87, EU:1988:6159.

[57] *Károly Nagy v Hungary,* App no 56665/09 (ECHR, 14 Sep 2017).

[58] Judgment of 4 Dec 1974, *Yvonne van Duyn v Home Office*, Case 41/74, EU:1974:1337.

VIII. Conclusions (and institutional developments at the EU level)

Deradicalisation is and will remain an important element of EU policies and strategies, mainly as a part of security policy.

In terms of institutional developments, it is important to note that the new British commissioner, Sir Julian King (following the resignation of the previous commissioner, Jonathan Hill, in the wake of the Brexit vote), was entrusted with the European Commission's security portfolio[59]. His team's tasks include radicalisation, the RAN network and the EU Internet forum. Of course, King's portfolio also includes other important issues, like cybersecurity, trade in explosive materials, money laundering and many other dangerous and illicit activities.

In addition, the European Commission established a High-Level Commission Expert Group on Radicalisation[60]. A progress report on its work was presented to the Justice and Home Affairs Council in December 2017. The 19-page report is available online[61], and it includes recommendations for the Commission and for the Member States that clearly suggest that violent Islamist ideology is one of the main concerns and priorities for the group[62].

Within Europol, thanks to a new regulation[63] that entered into force on 1 May 2017, the Internet Referral Unit was reinforced. This unit, created in July 2015 and recently mentioned explicitly by President Juncker in his 2017 State of the Union speech, provides support for the removal of terrorist content online[64]. Some Member States have created their own Internet referral units[65].

Internal security is possible only when a certain degree of security is guaranteed at the EU's external borders. An important player in this respect is the European Border and Coast Guard, which is known under its former short name of Frontex and is based in Warsaw, Poland[66].

[59] <https://ec.europa.eu/commission/commissioners/2014-2019/king_en> (accessed 17 Jul 2017).

[60] Commission Decision of 27 Jul 2017 setting up the High-Level Commission Expert Group on radicalisation, OJ C 252/3, 3 Aug 2017.

[61] <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=36235&no=1> (accessed 6 Feb 2018).

[62] 'It is understood that the scale and pace of radicalisation based on violent Islamist ideology presents a particular challenge in Europe, as demonstrated by recent terrorist attacks, and is a priority for the High-Level Commission Expert Group on Radicalisation'. See their interim report, p. 3.

[63] Regulation (EU) 2016/794 of 11 May 2016.

[64] 10th PR, p. 5.

[65] Tackling Illegal Content Online Communication, COM(2017)555 of 28 Sep 2017 p. 8.

[66] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 Sep 2016 on the European Border and Coast Guard, OJ L 251, 16 Sep 2016, pp. 1-76, <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20170613_ebcg_en.pdf> (accessed 17 Jul 2017).

It is important to keep in mind that while many events and actions are focused on Islam, in terms of links both to European foreign fighters and to Islamophobia, it is still important to closely follow the situation involving the Jewish minority, who continue to be subjected to various threats and mistrust[67]. Therefore, days like Holocaust Remembrance Day are still an important element of the EU agenda, which is clear from the active presence of the commissioners, including First Vice-President Frans Timmermans. German national Katharina von Schnurbein was appointed coordinator for anti-Semitism within the European Commission's Directorate-General for Justice on 1 December 2015. Davide Friggieri, a national of Malta, was appointed (also on 1 December 2015) as the coordinator for combating anti-Muslim hatred[68].

Interestingly, one of the questions raised by MEPs referred to the possibility of creating an EU fund to cover the costs of protection for individuals threatened because of their (political or religious) views. In this particular case, MEP Koenraad Dillen referred to the situation of Hirsi Ali, as the Dutch government stopped paying for her protection once she decided to move to the United States. In response to the question, the Commission stressed the importance of free speech and pointed out that threats are unacceptable; however, it also stated that 'providing for protection of public figures is not a task for either the Commission or the EU'[69].

In conclusion, it might be worth noting two thoughts that have been repeated in many EU documents in recent years:

a) that what is illegal offline is also illegal online; and
b) that while the primary responsibility in the field of security (and needless to say, in the field of church-state relations) remains with the Member States, the EU can and should do more to help them in this respect.

[67] *Antisemitism: Overview of data available in the European Union 2006-2016* (Vienna, European Union Agency for Fundamental Rights, 2017). Also see 'Reactions to the Paris attacks in the EU: fundamental rights considerations', European Union Agency for Fundamental Rights, paper 1/2015, p. 3.

[68] <http://ec.europa.eu/justice/newsroom/fundamental-rights/news/151201_en.htm> (accessed 16 Feb 2018).

[69] Question E-1006/08, 23 Apr 2008.

NATIONAL REPORTS

PUBLIC SECURITY AND RELIGION: AN AUSTRIAN APPROACH

Wolfgang Wieshaider[1]

I. Introduction

Following a brief statistical overview, this report will outline Austrian criminal law with regard to terrorism and hate speech and legislative action taken in the field of integration affairs that could affect the exercise of religion in response to concerns about public safety and public order, as well as the legal framework for religious schools. In addition, the report will also touch upon aspects of education, consultation and pastoral care in prisons.

II. Current debates

There has been political and public debate on the subject of refugees, migration and public security in general, as well as on religious accommodation and religious headgear in particular. Specific legal measures have been taken in the form of the Federal Integration Act[2] and the Federal Act Prohibiting Face Veils in Public[3], both outlined below.

III. Social context

Since 2011, the census has been compiled from registers of births, marriages and deaths in accordance with the Federal Act on the Register-Based Census[4]. These

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[2] *Integrationsgesetz*, Bundesgesetzblatt I No 68/2017, as last amended by Bundesgesetzblatt I No 37/2018.

[3] *Anti-Gesichtsverhüllungsgesetz,* Bundesgesetzblatt I No 68/2017.

[4] *Registerzählungsgesetz,* Bundesgesetzblatt I No 33/2006, as last amended by Bundesgesetzblatt I No 125/2009.

registers do not contain any information about religious affiliation. If necessary, the competent minister can order a non-personal statistical survey on religious affiliation pursuant to section 1(3) leg cit. To date, this has not been done. According to a survey published in 2013 by a non-governmental service portal for journalists, Catholics account for about 63%, Muslims 6-7%, Orthodox and Eastern Christians 6%, Protestants 3.8%, Alevis 0.7%, Buddhists 0.25%, Jehovah's Witnesses 0.25% and Jews 0.15% of the population of Austria[5].

The following table depicts the largest groups of asylum seekers according to states of origin —those granted asylum are shown in parentheses— in the years 2013 to 2015[6]:

	2013	2014	2015
Afghanistan	2,589 (1,259)	5,076 (2,450)	25,563 (2,083)
Iraq	468 (121)	1,105 (211)	13,633 (637)
Iran	595 (520)	743 (422)	3,426 (436)
Kosovo	935 (14)	1,903 (13)	2,487 (10)
Nigeria	691 (0)	673 (20)	1,385 (12)
Pakistan	1,037 (28)	596 (41)	3,021 (25)
Russia	2,841 (673)	1,996 (775)	1,698 (667)
Somalia	433 (254)	1,162 (269)	2,073 (548)
Syria	1,991 (838)	7,730 (3,604)	24,547 (8,114)

IV. Legal framework

The following section will focus on two acts of law, i.e. the regulations of the Criminal Code[7] with respect to public security issues and the most recent package of laws concerning aspects of integration.

Particular provisions with regard to terrorism were introduced into the Criminal Code in 2002[8], based on the Council of the European Union Framework Decision

[5] Medien-Servicestelle Neue ÖsterreicherInnen, 'Weltreligionen in Österreich-Daten und Zahlen', <http://medienservicestelle.at/migration_bewegt/2013/01/18/weltreligionen-in-osterreich-daten-und-zahlen/> (accessed 9 Apr 2018); also see the estimates in A. Goujon, S. Jurasszovich and M. Potančoková, *Demographie und Religion in Österreich. Szenarien 2016 bis 2046. Deutsche Zusammenfassung und englischer Gesamtbericht* (Wien, Österreichischer Integrationsfonds, 2017), <https://www.integrationsfonds.at/publikationen/forschungsberichte/forschungsbericht-demographie-und-religion/> (accessed 9 Apr 2018).

[6] Statistics Austria, 'Asylum applications', <http://www.statistik.at/web_en/statistics/PeopleSociety/population/migration/asylum/> (accessed 9 Apr 2018).

[7] *Strafgesetzbuch,* Bundesgesetzblatt No 60/1974, as last amended by Bundesgesetzblatt I No 117/2017.

[8] *Strafrechtsänderungsgesetz 2002,* Bundesgesetzblatt I No 134; 1166 der Beilagen zu den stenographischen Protokollen des Nationalrats, 21st legislative period, p. 16; cf W. Wessely, 'Zu den neuen Terrorismustatbeständen im StGB' (2004) 59 *Österreichische Juristen-Zeitung,* pp. 827-837.

on combating terrorism[9], Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the member states of the European Union[10], the International Convention for the Suppression of the Financing of Terrorism 1999[11], Resolution 1373 (2001) of the United Nations Security Council and the United Nations Convention against Transnational Organized Crime of 2000[12] The constituent elements include terrorist groups, the financing of terrorism, the aggravating circumstances of terrorist crimes and domestic jurisdiction.

According to section 278c(1) of the Criminal Code, certain criminal offences will be considered terrorist offences if they are likely to disturb public life severely or persistently or to harm the economy severely and are committed with the intention to menace the population severely, to compel public authorities or international organisations to undertake certain acts or omissions or to undermine or destroy the political, constitutional, economic or social structures of a state or an international organisation seriously. The relevant offences include murder, kidnapping, intentional offences constituting a public danger and others[13]. The commission of a terrorist offence increases the penalty incurred by half to a maximum of 20 years' imprisonment, pursuant to section 278c(2) of the Criminal Code[14]. Section 64(1)9 of the Criminal Code extends domestic jurisdiction in the given context in case the perpetrator was an Austrian citizen while committing the crime or had Austrian citizenship when the criminal proceedings were initiated, is domiciled in Austria or cannot be extradited to their home country; if the offence was committed in favour of an Austria-based body corporate or directed against a legislative body, a public authority, a court, the Austrian population or an EU body based in Austria[15].

Section 278b(3) of the Criminal Code defines a terrorist group[16] as a long-term coalition of more than two people aiming to commit the aforementioned terrorist offences or to finance terrorism. The leaders of such groups face five to fifteen years' imprisonment, while the leaders of a group that only threatens to commit terrorist offences or to finance terrorism[17] are punishable by one to ten years' imprisonment,

[9] OJ L 164/2002, pp. 3-7.

[10] OJ L 351/1998, pp. 1-3.

[11] UNTS 2178, I-38349.

[12] UNTS 2225, I-39574.

[13] Cf. F. Plöchl, 'section 278c StGB' in F. Höpfel and E. Ratz (eds), *Wiener Kommentar zum Strafgesetzbuch* (2nd edn, Wien, Manz, 1999 ff) §§ 3-19 (version of 1 Jan 2014).

[14] Ibid, § 25.

[15] Cf. F. Salimi, 'section 64 StGB' in Höpfel and Ratz, *Strafgesetzbuch,* §§ 109-124 (version of 1 Mar 2016).

[16] Cf. F. Plöchl, 'section 278b StGB' in Höpfel and Ratz, *Strafgesetzbuch,* § 1 (version of 1 Jan 2014).

[17] Ibid, § 8.

pursuant to section 278b(1) of the Criminal Code. Mere members of terrorist groups are liable to the latter punishment pursuant to section 278b(2) of the Criminal Code.

The offence of financing terrorism is a subsidiary offence according to section 278d(2) of the Criminal Code[18]. It is covered by section 278d(1)-(1a) of the Criminal Code. The offence comprises the collection and supply of assets with the intention that they be, at least partially, used by individuals or terrorist groups for hijacking an aircraft, kidnapping, bodily assault or attacks on the life, liberty, home, office or transport equipment of a person protected by public international law, causing danger through nuclear energy or ionising radiation, armed attacks on individuals at international airports, damaging such airports or aircraft thereon, including the same with regard to ships, carrying or using explosives or similar lethal material to public places, institutions, means of transport or works in order to cause death, severe injury or large-scale destruction, or killing or severely assaulting civilians during an armed conflict in order to menace a section of the population or to coerce a government or an international organisation into certain acts or omissions[19]. Offenders face one to ten years in prison. This offence enumerates actions that will be considered terrorist activities; it thus defines terrorism, as was exemplified by the explanatory notes[20] with regard to Austria's ratification of the Council of Europe Convention on the Prevention of Terrorism of 2005[21]. Section 64(1)10 of the Criminal Code extends domestic jurisdiction in the given context similarly to section 64(1)9 of the Criminal Code referred to above[22].

With respect to the aforementioned criminal offences, a new State Protection Act[23] regulates the protection of state institutions provided for by the constitution and their capacity to act, the protection of representatives of foreign states, of international organisations and other bodies of public international law, of critical infrastructure and of the population. These need to be shielded from terrorist, ideologically or religiously motivated crime[24], from espionage or proliferation of nuclear or chemical weapons, as indicated by section 1(2) leg cit. The specific police units, as exemplified by section 1(3) leg cit, are obliged by section 6(1) leg cit to keep groups likely to

[18] Cf. F. Plöchl, 'section 278d StGB' in Höpfel and Ratz, *Strafgesetzbuch,* § 27 (version of 1 Jan 2014).

[19] Ibid, §§ 5-16b.

[20] 95 der Beilagen zu den stenographischen Protokollen des Nationalrats, 24th legislative period, p. 3; cf S. Schima, 'Die wichtigsten religionsrechtlichen Regelungen des Bundesrechts und des Landesrechts, Jahrgang 2010' (2013) 60 *österreichisches Archiv für recht & religion,* pp. 395-415 (p. 405).

[21] CETS No 196, Bundesgesetzblatt III No 34/2010.

[22] Cf. Salimi, 'section 64 StGB' § 125-127.

[23] *Polizeiliches Staatsschutzgesetz,* Bundesgesetzblatt I No 5/2016, as last amended by Bundesgesetzblatt I No 32/2018.

[24] Cf. G. Heißl, *Polizeiliches Staatsschutzgesetz* (Wien, Manz, 2016), section 1, § 47.

commit crimes menacing public safety, in particular by including ideologically or religiously motivated violence under surveillance, to protect against attacks impairing the constitution's authority in case of substantiated suspicion or suspicion based on information provided by domestic, foreign, supra- or international authorities. Section 6(2) considers, inter alia, the aforementioned terrorist offences pursuant to sections 278 ff of the Criminal Code as such attacks impairing the constitution's authority and, similarly, other offences against public order if they are ideologically or religiously motivated[25]. For some commentators, religiously motivated offences seem to constitute the most relevant threat to public order at present[26].

Public hate speech is covered by section 283(1) of the Criminal Code. It is worth noting that the amendment of 2011[27], motivated by Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[28], widened the constituent elements of the offence with regard to religion. While, previously, only domestic churches and religious societies were protected, the protection was expanded to any religious organisation. Other protected groups correspond to those protected by Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[29] and by Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[30]. Perpetrators face up to two years in prison. According to section 283(2)-(3) of the Criminal Code, the penalty incurred increases to up to three years' imprisonment when committed through the press, broadcasting or the like, or to between six months and five years' imprisonment in the case of hate speech provoking physical violence against a member of a targeted group. Someone who does not face a more severe punishment pursuant to section 283(1)-(3) of the Criminal Code but who makes publicly available through the press, broadcasting or the like any material about ideas or theories promoting or supporting hatred or violence against groups or individuals or inciting others thereto will face up to one year in prison or up to 720 day fines according to section 283(4) of the Criminal Code.

The most recent piece of legislation outlined here covers integration. Its first part is the Federal Integration Act, which, pursuant to its section 1(1), is aimed at fostering the integration of people legally dwelling in Austria and at requiring them to play an active role in their integration procedure. Section 1(2) leg cit refers to the state's

25 Ibid, section 6, § 43.

26 A. Hauer, 'Das Polizeiliche Staatsschutzgesetz' (2016) *Jahrbuch Öffentliches Recht,* pp. 41-57 (p. 57); cf. Schima, 'Jahrgang 2010' p. 405.

27 Bundesgesetzblatt I No 103/2011.

28 OJ L 328/2008, pp. 55-58.

29 OJ L 180/2000, pp. 22-26.

30 OJ L 303/2000, pp. 16-22.

indispensable principles, which require respect. The explanatory notes view radical and fundamentalist trends in clear opposition to these values[31].

The notion of integration is defined by section 2(1) leg cit. Accordingly, integration is considered a common societal process that depends on both the personal interaction of all people dwelling in the country and appropriate measures offered by state institutions. Such measures are intended to empower people to take part in societal, economic and cultural life. Pursuant to section 2(2) leg cit, crucial factors are gainful employment, education, gender equality and the ability to maintain oneself economically. Conveying language skills and respecting constitutionally anchored values and principles are essential in all areas concerned, as the explanatory notes underline[32]. The last step in the integration process is the granting of Austrian citizenship.

Sections 7 ff on the integration agreement were basically transferred from the Settlement and Residence Act[33], as exemplified by the explanatory notes[34]. Pursuant to section 7(1) of the Integration Act, such an agreement is aimed at integrating third-country nationals and thus enabling them to take part in societal, economic and cultural life in Austria. They are required to acquire knowledge of the German language and of the state's democratic order and its basic principles.

The second part of the aforementioned piece of legislation is the Federal Act Prohibiting Face Veils in Public. According to its section 1, it will both promote integration through participation in society and safeguard peaceful living together[35]. The explanatory notes thereto refer explicitly to the peaceful living together of people of different origins and religions in a pluralistic society[36]. This is the only reference to religion in the explanatory notes to this act; the text of the legal norm itself contains no reference of this kind. This demonstrates the legislator's attempt to find neutral wording. The act was based on Article 10(1)7 of the Federal Constitution[37], assigning the competence to legislate in the domain of the maintenance of public order, peace and safety to the Federation[38].

[31] 1586 der Beilagen zu den stenographischen Protokollen des Nationalrats, 25th legislative period, p. 2.

[32] Ibid, pp. 2 f.

[33] *Niederlassungs- und Aufenthaltsgesetz,* Bundesgesetzblatt I No 100/2005, as last amended by Bundesgesetzblatt I No 84/2017.

[34] 1586 der Beilagen zu den stenographischen Protokollen des Nationalrats, 25th legislative period, p. 1.

[35] Cf. *S.A.S. v France,* App no 43 835/11 (ECHR, 1 July 2014), §§ 121 f, 141 f, 153, 157.

[36] 1586 der Beilagen zu den stenographischen Protokollen des Nationalrats, 25th legislative period, p. 11.

[37] *Bundes-Verfassungsgesetz,* Bundesgesetzblatt No 1/1930, as last amended by Bundesgesetzblatt I No 22/2018.

[38] 1586 der Beilagen zu den stenographischen Protokollen des Nationalrats, 25th legislative period, p. 11.

Accordingly, section 2(1) of the Federal Act Prohibiting Face Veils in Public declares it an administrative offence to veil or cover one's face to an extent that the facial features cannot be recognised. The prohibition extends to public places or buildings, which are characterised by their accessibility by an a priori unlimited group of people. They include public streets and squares, as well as, for instance, buildings for educational or administrative purposes, theatres, museums, shops, offices, swimming pools or sports halls[39]. The prohibition, which entered into force on 1 October 2017, also extends to the mobile infrastructure of public and private bus, railway, aeroplane and ship transport. The penalty attached to this offence amounts to 150 euros. Face coverings that are prescribed by state law, required for artistic, cultural or traditional events, e.g. some pre-Christian alpine traditions[40], for athletic activities or for purposes motivated by reasons of health or profession, do not constitute an offence pursuant to section 2(2) leg cit. The explanatory notes clarify that the exemption covers situations where a motorcyclist continues to wear their helmet required for driving by section 106(7) of the Motor Vehicle Act[41], after getting off the motorcycle in order to fill the tank[42].

The religious implications of the Federal Act Prohibiting Face Veils in Public will have an impact on religiously motivated headgear. Accordingly, face veils, such as niqabs or burqas, will be banned in public places. It is worth noting that the political debate about the draft law defined headgear more widely to include headscarves worn in pursuance of official functions[43]. However, the law did not alter any act regulating the characteristics of official vestments or uniforms. Accordingly, the ordinance of the minister of justice on judges' vestments[44] specifies the requirements for judges' caps and robes (section 1) and requires that judges wear robes during all court hearings and that they put on their caps when pronouncing their judgements or administering oaths (section 3), without having any additional religious implications.

[39] Ibid, p. 12.

[40] Ibid.

[41] *Kraftfahrgesetz* 1967, Bundesgesetzblatt No 267, as last amended by Bundesgesetzblatt I No 37/2018.

[42] 1586 der Beilagen zu den stenographischen Protokollen des Nationalrats, 25th legislative period, p. 12.

[43] See, for example, *Tiroler Tageszeitung* of 6 Jan 2017, p. 18; 2 Feb 2017, p. 9; 4 Mar 2017, p. 49; and 20 Mar 2017, p. 10; *Der Standard* of 7 Jan 2017, p. 11; *Die Presse* of 11 Jan 2017, p. 26, and 24 Jan 2017, p. 22; *Kurier* of 15 Jan 2017, p. 8, and 22 March 2017, p. 2.

[44] *Verordnung des Bundesministeriums für Justiz über die Beschaffenheit, das Tragen und die Tragdauer des Amtskleides der Richter*, Bundesgesetzblatt No 133/1962, as last amended by Bundesgesetzblatt II No 331/2001, based on section 70(5) of the Act on Judges and Public Prosecutors (*Richter- und Staatsanwaltschaftsdienstgesetz*), Bundesgesetzblatt No 305/1961, as last amended by Bundesgesetzblatt I No 32/2018.

V. Specific educational measures

Section 4(1) of the Integration Act obliges the Federation to subsidise German-language courses for people entitled to asylum and to subsidiary protection, in order to enable them to master both the spoken and written language at the A2 level. The Federal Ministers for Europe, Integration and Foreign Affairs and for Labour, Social Affairs, Health and Consumer Protection are required to cooperate in providing these courses pursuant to section 4(2) leg cit. With regard to content, courses are required to cover knowledge of basic legal and societal values, as explained forthwith, pursuant to section 5(4) leg cit. This knowledge shall be consolidated and deepened through additional courses provided by the Federal Minister for Europe, Integration and Foreign Affairs and run by the Austrian Integration Fund pursuant to section 5(1) leg cit. Section 5(3) leg cit provides the basic framework for the curriculum for these courses. Accordingly, these courses have to teach about the democratic order and its fundamental legal and social principles and the rules of peaceful living together, stressing human dignity, equality of all human beings and everyone's right to self-determination and personal responsibility.

VI. Religious schools

The law distinguishes between public and private schools. According to section 4(1)-(2) of the Private School Act[45], private schools can be established by morally reliable individuals with full capacity to act on their own account, territorial authorities, legally recognised religious societies and other bodies corporate of public law, as well as any other legal entity whose executive body fulfils the aforementioned requirements applicable to individuals. Non-domestic institutions need domestic representatives.

In accordance with Article 14(7) of the Federal Constitution, public status can be bestowed upon private schools if they fulfil certain conditions established by section 14(1)-(2) leg cit. In addition to successful education, the operators are obliged to guarantee that schools meet the requirements of proper education as laid down by the law. Section 14(3) leg cit assumes that bodies corporate of public law, including legally recognised religious societies, satisfy this guarantee. The curricula need to be equivalent to those of public schools or in line with a decree of approval from the competent federal minister, pursuant to sections 11(2) and 14(2)b leg cit. Public status authorises schools to issue school reports equivalent to those of public schools, to hold the corresponding exams, to accept teacher candidates and to apply the pro-

[45] *Privatschulgesetz,* Bundesgesetzblatt No 244/1962, as last amended by Bundesgesetzblatt I No 138/2017.

visions legislated for public schools other than with regard to the establishment, maintenance, closing, districts and school fees pursuant to section 13(1)-(2) leg cit.

Section 17(1) leg cit entitles legally recognised religious societies to subsidies for expenditure on employed[46] teaching personnel of religious schools pursuant to sections 18-20 leg cit. Religious schools are specified by section 17(2) leg cit as both private schools maintained by legally recognised religious societies and private schools that are run by other bodies corporate and recognised by the competent body of the corresponding religious society. Section 19(1) leg cit provides that such subsidies are granted by allocating state teachers. Pursuant to section 20 leg cit, religious schools and religious authorities may reject individual teachers either a priori or a posteriori. The teachers themselves are also entitled to apply for a cancellation of the allocation[47]. Other private schools can be subsidised in accordance with the federal budget under section 21 leg cit.

While public schools are generally accessible pursuant to section 4(1) of the School Organisation Act[48], section 4(3) leg cit entitles private schools to select their pupils according to religious affiliation or language and to segregate the sexes. In case of a language-based selection, the language can be established as the teaching language pursuant to section 16(2) of the School Teaching Act[49].

With regard to the general possibilities for private schools, advantageous assumptions in favour of schools run by bodies corporate of public law, including legally recognised religious societies, are considered constitutionally justified[50].

VII. Academic education

It is worth noting that the teaching of theology and teacher training programmes have transcended the traditional focus on Catholic and Protestant institutions. At university level, Islamic pedagogy was introduced in 2007 embedded in the Faculty of Philological and Cultural Studies of the University of Vienna[51] and, with reference to section 24 of the Islam Act 2015[52], was expanded to Islamic theology in preparation for both academic careers and the positions of imams. In 2013, another programme of

[46] Cf. *Verwaltungsgerichtshof,* 22 Mar 1993, 92/10/0077.

[47] Cf. H. Kalb, R. Potz and B. Schinkele, *Religionsrecht* (Wien, WUV, 2003), pp. 385 f.

[48] *Schulorganisationsgesetz*, Bundesgesetzblatt No 242/1962, as last amended by Bundesgesetzblatt I No 35/2018.

[49] *Schulunterrichtsgesetz,* Bundesgesetzblatt No 472/1986 (republished), as last amended by Bundesgesetzblatt I No 35/2018.

[50] *Verfassungsgerichtshof,* 27 Sep 1965, B 178/64, VfSlg 5034; cf. Kalb, Potz and Schinkele, *Religionsrecht,* p. 380.

[51] Mitteilungsblatt der Universität Wien 2006/2007 No 112; the modified curriculum was published in Mitteilungsblatt der Universität Wien 2011/2012 No 242 as amended.

[52] *Islamgesetz 2015,* Bundesgesetzblatt I No 39.

Islamic pedagogy was established at the University of Innsbruck[53]. The appointment of teachers is based on the model of the appointment of professors of the Faculty of Protestant Theology, and the religious societies concerned are consulted[54].

With regard to the academic training of primary and secondary school teachers of religion, interreligious co-operation was brought to a higher level at the Catholic Private University College for Teacher Education[55], offering training for the Catholic, Lutheran, Reformed, Orthodox, Old Catholic, Armenian Apostolic, Coptic and Syrian Orthodox, Free-Church, Islamic, Jewish and Alevi religions in co-operation with the religious communities concerned[56].

VIII. A special consultation mechanism

According to sections 17(1) and 18(2) of the Integration Act, an independent council of experts is established within the Federal Ministry for Europe, Integration and Foreign Affairs. This council helps implement the national action plan and other strategies for integration and produces and publishes an annual report on integration pursuant to section 18(1) leg cit. Additionally, the Federal Minister for Europe, Integration and Foreign Affairs appoints an advisory board comprising representatives of federal ministries, Länder, self-regulatory public bodies corporate, the Austrian Integration Fund, five selected non-governmental organisations dedicated to integration and the UN High Commissioner for Refugees in accordance with section 19(1)-(2) leg cit. The members of the advisory board have to update one another about the implementation of the action plan and other strategies. Furthermore, section 20(1) leg cit provides that recommendations of the council of experts, their implementation and the results of monitoring established according to section 21 leg cit are discussed and commented on by the advisory board.

IX. Prison chaplancy

Section 85(1) of the Act on the Execution of Penalties[57] grants prisoners the right to see a chaplain appointed or authorised for the prison in question; section 85(2)

[53] Mitteilungsblatt der Leopold-Franzens-Universität Innsbruck 2013 No 297.

[54] Cf. W. Wieshaider, 'Die Fühlungnahme' (2015) 62 *österreichisches Archiv für recht & religion,* pp. 49-69.

[55] Kirchliche Pädagogische Hochschule Wien/Krems, 'Welcome to KPH Vienna/Krems' <http://www.kphvie.ac.at/en/home.html> (accessed 9 Apr 2018).

[56] Cf. B. Moser-Zoundjiekpon '"PädagogInnenbildung NEU" interreligiös betrachtet: die Kirchliche Pädagogische Hochschule Wien/Krems' (2015) 62 *österreichisches Archiv für recht & religion,* pp. 276-291; M. Jandrokovic, 'Orthodoxer Religionsunterricht und ReligionslehrerInnenausbildung in Österreich' (2016) 63 *österreichisches Archiv für recht & religion,* pp. 275-294 (pp. 290-294).

[57] *Strafvollzugsgesetz,* Bundesgesetzblatt No 144/1969, as last amended by Bundesgesetzblatt I 32/2018.

leg cit extends this right to see another chaplain not yet appointed. The Constitutional Court holds that formal membership of a religious community is thereby not required[58]. Section 85(3)-(4) leg cit grants chaplains access to the prison within and even beyond visiting hours and guarantees that their conversations with prisoners are not monitored. Chaplains are authorised by their religious communities even if they are employed by the state[59]. There is co-operation with the competent authorities to counter radicalisation and to develop de-escalation programmes[60].

X. Prospects

Concerns about public order and safety are serious. Accordingly, they have traditionally been embedded as legitimate limitations on both the freedom of expression and freedom of religion (Articles 9 and 10 of the ECHR). Any measures to restrict liberty need to be carefully argued[61]; they constitute a last and immediate resort, always to be combined with cooperation of all stakeholders in question, be they governmental or non-governmental, secular or religious, as well as with pedagogical action.

[58] *Verfassungsgerichtshof,* 6 Oct 1999, B 15/99, (2000) 47 *österreichisches Archiv für Recht & Religion,* pp. 260-266, commented on by S. Schima, *ibid,* pp. 266-268; Kalb, Potz and Schinkele, *Religionsrecht,* pp. 266 f; R. Potz, 'Recht auf seelsorgliche Betreuung aus der Sicht der Patienten und der Religionsgemeinschaften' in U. H. J. Körtner, S. Müller, M. Kletečka-Pulker and J. Inthorn (eds), *Spiritualität, Religion und Kultur am Krankenbett. Ethik und Recht in der Medizin 3* (Wien, New York, Springer, 2009), pp. 108-118 (p. 112).

[59] Kalb, Potz, Schinkele, *Religionsrecht,* p. 265; cf Article XVI of Concordat, Bundesgesetzblatt 1934 II No 2; section 19 of the Protestant Church Act *(Bundesgesetz über äußere Rechtsverhältnisse der Evangelischen Kirche),* Bundesgesetzblatt No 182/1961, as last amended by Bundesgesetzblatt I No 92/2009; section 8(1)2 of the Israelite Religious Society Act *(Gesetz betreffend die Regelung der äußeren Rechtsverhältnisse der israelitischen Religionsgesellschaft),* Reichsgesetzblatt No 57/1890, as last amended by Bundesgesetzblatt I No 48/2012, sections 11(1)2 and 18(1)2 of Islam Act 2015. Section 7(1) of the Orthodox Church Act *(Bundesgesetz über äußere Rechtsverhältnisse der griechisch-orientalischen Kirche in Österreich),* Bundesgesetzblatt No 229/1967, as last amended by Bundesgesetzblatt I No 68/2011, and section 3(1) of the Oriental Orthodox Churches Act *(Orientalisch-orthodoxes Kirchengesetz),* Bundesgesetzblatt I No 20/2003, both refer to the above-cited section 19 of the Protestant Church Act.

[60] See the annual reports of 2015 and 2016 at <https://www.justiz.gv.at/web2013/ja_strafvollzugsakademie/strafvollzugsakademie/oeffentlichkeitsarbeit.html> (accessed 9 April 2018).

[61] Cf, for example, H. Keller and M. Sigron, 'Radikal-islamischer religiöser Extremismus im Spannungsfeld von Meinungsfreiheit und staatlicher Sicherheit' (2010) 37 *Europäische Grundrechte-Zeitschrift,* pp. 20-22 (pp. 21 f), referring to the clear and present danger test of the US Supreme Court, 3 Mar 1919 *(Schenck / United States),* 249 US 47 (1919).

MOVING FROM IMPLICIT TRUST TO EXPLICIT SUSPICION: SECURITISATION OF RELIGION IN BELGIUM

Jogchum Vrielink
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I. Introduction[2]

Belgium is a federal state that —aside from the federal level— comprises three communities (the Flemish Community, the French-speaking Community and the German-speaking Community), three regions (the Brussels-Capital Region (Brussels), the Flemish Region (Flanders) and the Walloon Region (Wallonia)), and four language areas (the Dutch language area, the French language area, the German language area and the bilingual Brussels-Capital area). All these different federated entities are competent, in one way or another, for matters pertaining to religion and belief as well as for issues of security, although the federal level remains the most important in that regard.

Furthermore, Belgium has a system of recognised religions. At present, Belgium recognises and subsidises six religions and one non-religious belief: Roman Catholicism, Protestantism, Judaism, Anglicanism, Islam, Orthodoxy and the secular humanist movement (or organised *laïcité*).

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[2] On the Belgian system in general, see R. Torfs and J. Vrielink, 'Law and religion in Belgium' in G. Robbers and W.C. Durham (eds), *Encyclopedia of Law and Religion* (Leiden, Brill, 2016), pp. 30-53; L.-L. Christians and A. Overbeeke, 'Religious Rules and Principles in Belgian Law' in R. Bottoni, R. Cristofori and S. Ferrari (eds), *Religious Rules, State Law, and Normative Pluralism - A Comparative Overview* (Berlin, Springer, 2016), pp. 91-115; P. Loobuyck and R. Torfs, 'Religion in Belgium' in *World and Its Peoples - Europe - Volume 4 Belgium, Luxembourg, Netherlands* (New York, Cavendish, 2009); J. Velaers and M.-C. Foblets, 'Religion and the State in Belgian Law' in J. Martinez-Torron and C. Durham (eds), *Religion and the Secular State. La religion et l'Etat laïque* (Washington and Madrid, Brigham Young University and Complutense University of Madrid, 2014), pp. 99-122.

II. Social Context

Belgium's population of about 11 million people is characterised by a rich diversity of religions and beliefs. This has not always been the case. For a variety of reasons, Belgium used to be a predominantly Roman Catholic country. Since the 1960s, however, the combined forces of secularisation and immigration have drastically altered this former state of affairs[3].

It is currently estimated[4] that between 50% and 60% of the population (5.5 to 6.6 million people) belong to the Roman Catholic Church. Most of these, however, are not active practitioners.

Muslims have been present in Belgium in significant numbers only since the post-WWII period. Between 1945 and the late 1960s, massive labour immigration took place, strengthening the country's industrial workforce with Italians, Turks, Moroccans and Tunisians. This was followed by a process of family and marriage immigration from the 1970s onwards[5].

Islam is currently the second-largest religion in terms of adherents, who are estimated to number between 400,000 and 900,000 (amounting to 3.5% to 8% of the population), most of whom are active practitioners.

The presence of Islam, and (fear of) radical Islam in particular, is an important issue in public and political debates in Belgium (see Section II), giving rise to a significant number of repressive and restrictive policy initiatives and legal measures, often from a 'securitisation' perspective (see Sections III and V).

Socio-economically speaking, second- and third-generation non-European immigrants —and Muslims in particular— lag behind (dramatically) in employment, education and other opportunities[6]. Many Muslims with migration roots live in impoverished parts of the country's major cities, Brussels, Antwerp and Charleroi in particular.

The remaining religious and belief groups are significantly smaller in size. The number of Protestants is estimated at 80,000 to 110,000 (around 1% of the population). Jews and Orthodox are believed to range between 30,000 and 50,0000 each. Other religious minorities, smaller still, include Jehovah's Witnesses, Anglicans,

[3] R. Torfs and J. Vrielink, 'Law and religion in Belgium', in G. Robbers and W. Cole Durham (eds), *Encyclopedia of Law and Religion* (Leiden, Brill, 2016), p. 29.

[4] Reliable statistics are notoriously difficult to find, and estimates of the relative and absolute sizes of religious groups vary widely and are often based on questionable and mutually contradictory sources.

[5] M.-C. Foblets and A. Overbeeke, 'Islam in Belgium: the Search for a Legal Status of a New Religious Minority' in R. Potz and W. Wieshaider (eds), *Islam and the European Union* (Leuven, Peeters, 2004), pp. 1-39.

[6] This is not to say that all Belgian Islamist radicals come from marginalised backgrounds or even from particularly religious ones.

other Christian congregations, Buddhists, Hindus, Mormons, Sikhs, Hare Krishnas, Jains and Scientologists.

III. Political and Public Debate

Political and public debate in Belgium has, for a number of years, increasingly focused on issues of security, migration and religious and ethnic diversity (especially in their 'unwanted' aspects and mostly concerning Islam), with voters electing politicians and parties that position themselves as hardliners in this regard.[7]

However, this debate gained significantly more momentum immediately after the Paris attacks in January and November 2015, particularly since there were links with Belgium in both cases: weapons used in the first attack had been bought in the country, and Belgian-born terrorists were key players in the second incident.[8] More generally, Belgium was found to have contributed more foreign jihadists in Iraq and Syria than any other European country (400 to 600)[9] relative to the country's size.

Since then, the security agenda has clearly prevailed in public and political debate, and both migration and religious policies are strongly impacted by this fact. Shortly after the January 2015 attacks, the federal government presented 'twelve measures against radicalism and terrorism', and immediately following the November attacks it came up with no fewer than 18 additional measures. Regional governments followed suit concerning their own competencies[10]. Later attacks in Belgium itself, on 22 March 2016, reinforced this trend[11].

First, concerning *migration*, human mobility is currently presented and seen as a threat, and it is dealt with accordingly. This security focus on migration has resulted in efforts aimed at securing external borders, limiting the entry of newcomers and

[7] Prior to this, the country's political debate —especially on these issues— was dominated, for a variety of reasons, by progressive and centrist parties. At the time, the approach tended to be less law-enforcement-oriented and sought to avoid stigmatising the Muslim community. However, the 'securitisation' path regarding religious extremism is also not entirely new in Belgium either: especially since the 1990s, there has been a strong focus on violence and other (perceived) threats to public order by sectarian movements. See R. Torfs and J. Vrielink, 'Law and religion in Belgium' in Gerhard Robbers and W. Cole Durham (eds), *Encyclopedia of Law and Religion* (Leiden, Brill, 2016), pp. 29-53.

[8] Particularly Molenbeek (a municipality in the Brussels Region) has come under scrutiny in this regard. The assailants in the Nov 2015 attacks —Abdelhamid Abaaoud, Salah Abdeslam and Ibrahim Abdeslam— were all raised in Molenbeek. Later attacks and attackers also had links with Molenbeek.

[9] Exact figures are hard to find.

[10] Federal measures are the main focus in this analysis. Additionally —where particularly relevant for the topic— reference will be made to measures by the Flemish government in particular (since it, comparatively speaking, also paid significant policy attention to the issue). For more, see Section V.

[11] See the recommendations in the recent Fourth Report of the Parliamentary Inquiry on the 22 Mar 2016 attacks (*Parliamentary Documents* Chamber 2017-18, No 54-1752/9). The 2015-2016 migration crisis also seems to have further exacerbated existing tensions.

asylum seekers, creating additional detention facilities and making efforts to criminalise unwanted human mobility. In the context of (re)migration, there is also the issue of Belgian foreign fighters returning to Belgium and Europe, and the threat they may pose.

Second, and related to the above point concerning *religion* and *religious diversity*, Islamic religious radicalism and Islam in general (and the regional migration of Muslims) have become important issues in public and political debates in Belgium, resulting in a range of repressive and restrictive policy initiatives and legal measures, often from a 'securitisation' perspective.

Meanwhile, national and local human rights organisations have been pointing to rising intolerance of ethnic and religious minorities in Belgium —particularly since the attacks in Brussels and Paris— and the rise of right-wing extremism.

IV. Legal and Political Framework

As mentioned, over 30 new counterterrorism measures and laws have been taken by the federal government alone (Section II above). This section focuses on a number of these[12], while also highlighting some previously existing legislation geared to tackling extremism and radicalism[13],

1. Legal Definition of Extremism, Fundamentalism and Radicalism

Belgian criminal legislation does not in any general sense contain a definition of extremism, fundamentalism or radicalism, as none of these beliefs or attitudes are (currently) banned. Only certain expressions or instances of extremism, fundamentalism or radicalism are forbidden, and we will deal with these in the subsequent sections.

However, legislation on the security services does refer to (or define) 'extremism'. More specifically, it takes 'extremism' to mean: 'racist, xenophobic, anarchist, nationalist, authoritarian or totalitarian views or intentions, regardless of whether they are of a political, ideological, confessional or philosophical nature, which either in theory or in practice conflict with the principles of democracy or human rights, with the proper functioning of democratic institutions or with other constitutional principles'[14].

[12] Especially the ones that had already been adopted at the time of writing.

[13] In 2017, the government introduced a bill to approve the 2005 Council of Europe Convention on the Prevention of Terrorism (*Parliamentary Documents* Chamber 2016-17, No 54-2435/1). Several measures and policies discussed below are already based in whole or in part upon (or inspired by) this Convention.

[14] Art 8(1c) Act of 30 Nov 1998 concerning information and security services.

The same legislation also incorporates a definition of 'radicalisation process', i.e.: 'A process whereby an individual or a group of individuals is influenced in such a manner that said individual or group of individuals is mentally shaped for or is willing to commit terrorist acts'[15].

2. Legislation and Policies *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

Measures to tackle and prevent radicalisation, extremism and terrorism have been and continue to be issued in rapid succession, especially since 2015, often with at least an indirect focus on religious adherence[16]. Even prior to the recent wave of terrorism committed in the name of Islam, legislation was issued to tackle (forms of) radicalism, radicalisation and extremism. In the following, we limit ourselves to discussing some of the relevant legislation in the context of (a) migration, (b) in the criminal law and (c) in the penal and penitentiary system.

A. *Migration and Citizenship Legislation*

a) *Stripping nationality*

One of the most notable measures in the context of migration and citizenship allows for the stripping of Belgian citizenship from individuals with dual nationality. The law, approved in 2015, makes this measure possible for individuals who have been sentenced to at least five years' imprisonment for terrorism-related crimes[17].

The measure can be applied only to individuals who hold an additional nationality, since international law precludes states from rendering people stateless. Furthermore, the measure cannot be applied to *everyone* with dual nationality: people who obtained their Belgian nationality by birth are exempt (most notably, second- and third-generation 'migrants', i.e., people whose parents or grandparents already obtained Belgian citizenship). Finally, only judges may authorise the (facultative) measure (and it can be waived for several reasons, including *de facto* statelessness and harm to family life).

[15] Art 3(15°) Act of 30 Nov 1998.

[16] See J. Vrielink, 'Radicalisme en de rechtsstaat. Strafrechtelijke en penitentiaire bestrijding van terrorisme en (moslim)extremisme in België na de aanslag op Charlie Hebdo' in P. Kruiniger (ed), *Jihad, islam en recht. Jihadisme en reacties vanuit het Nederlandse en Belgische recht* (The Hague, BJU, 2017), pp. 85-95.

[17] For a number of other crimes, citizenship can only be revoked in case the crimes in question were committed within 10 years after obtaining Belgian citizenship; in other words, this limitation period of 10 years was withdrawn in the case of terrorist offences.

b) *Deporting foreign nationals born in Belgium*

Additionally, legislation was enacted in 2017 that made it possible for foreign nationals born in Belgium to be deported if they are suspected of terrorism or other crimes (a conviction for such a crime is not required; merely that a foreign national be deemed a 'threat to public order or national security'). Previously, the relevant legislation protected foreigners in Belgium against this measure if they were born in the country or if they had arrived in Belgium prior to reaching the age of 12.

c) *Newcomer's declaration*

Non-EU migrants wanting to live in Belgium for more than three months will be required to sign a statement or have their claim for residency rejected. The federal Belgian parliament passed a bill to this end in November 2016. The (yet to be elaborated) declaration will entail that the newcomer 'understands the fundamental values and norms of the society, and will act in accordance with them'.

In a draft version[18] of this declaration that the federal government drew up, these 'values and norms' concerned: gender equality, separation of church and state, sexual diversity and autonomy, and free speech. Furthermore, the statement included a pledge to prevent and report any attempt to commit an act of terrorism.

Initially, the bill aimed to subject all non-EU migrants to the obligation. However, critics[19] and the advisory section of the Council of State remarked that this could not be the case for refugees or people granted subsidiary protection. What mostly remains are people entering as part of family reunification and labour migrants.

Furthermore, the advisory section of the Council of State pointed out that the federal government was overstepping its authority by wanting to impose this declaration unilaterally, in light of the competence that the communities (see the 'Introduction' above) hold concerning issues of integration.[20] Therefore, the law now merely provides that the government will, by ministerial decree, determine the precise content of the declaration, in mutual agreement with the communities.

[18] The actual declaration that newcomers will have to subscribe to was not part of the law that was adopted (see the end of this section, concerning the competence issue); the law merely says that they have to 'sign a declaration stating that they understand the fundamental values and norms of [Belgian] society, and will act accordingly'.

[19] See, for example, J. VRIELINK, 'Een boeketje grondrechten. De Nieuwkomersverklaring kan nooit zoveel gewicht krijgen', *De Standaard*, 2 Apr 2016.

[20] Council of State, advice No 59.224/VR/4, 19 May 2016, *Parliamentary Documents* Chamber 2015-16, No 54-1901-001.

B. *Criminal Laws and Provisions*

a) *Private militias*

One of the oldest legal instruments to tackle (violent and organised) radicalism, albeit not necessarily of a religious nature, is the law on private militias, dating back to 1934[21]. This prohibits any private militia or paramilitary organisation whose goal is to use violence 'or to replace the army or the police'. People who are a part of such organisations or who support them can be punished, and the organisation's property can be confiscated.

In the last few years, several attempts have been undertaken to amend this legislation in order to more explicitly[22] target terrorist and radical religious organisations, and to ban those organisations as a whole. Thus far, these attempts have not been successful, but support for them does seem to be increasing.

b) *Hate speech*

Discrimination legislation on all levels includes a criminal prohibition of 'incitement to hatred, discrimination and violence' (either in public or at least in the presence of witnesses)[23]. While this provision may be invoked in order to *protect* religious groups and individuals against extremists (e.g., Islamophobes or anti-Semites), it can be applied against individuals engaging in (radical) religious speech as well.

Especially during the last few years, Muslim radicals have increasingly been prosecuted under these provisions, and this has resulted in several convictions[24]. One such case concerned the spokesperson for a group called Sharia4Belgium[25]. He had, in several YouTube videos, called for a war against the unfaithful, and he had called the terminal illness of a politician of a radical right-wing party 'a punishment from God'[26]. In Strasbourg, the European Court of Human Rights (ECtHR) found the man's appeal to Article 10 to be inadmissible, based on Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (abuse of rights)[27].

Moreover, religious hate speech, even if it does not lead to prosecution, is sometimes used as grounds for deporting people. A notable example concerned an imam

[21] Law of 29 Jul 1934 whereby private militias are banned, *Moniteur belge*, 7 Aug 1934.

[22] Obviously, some extremist or terrorist organisations fulfil the requirements in the present law.

[23] Additionally, said legislation also bans actual discrimination as well as hate crimes.

[24] Sometimes in combination with charges concerning (incitement to) terrorism.

[25] Sharia4Belgium, which officially disbanded in 2012, aspired to institute sharia (Islamic) law in Belgium. The group was headed by Fouad Belkacem.

[26] Court of Appeal of Antwerp, 6 Jun 2013; Court of Cassation, 29 Oct 2013.

[27] *Belkacem c. Belgique,* App No 34367/14 (ECHR, 20 Jul 2017).

from Verviers, who was deported to the Netherlands because he allegedly preached hatred and supported radical proselytism[28].

c) *Anti-terrorism legislation*

Belgium, like other European countries, has at its disposal a range of criminal provisions specifically concerning terrorism. Most of these provisions are rather standard, so we will only focus on the ones that may be particularly salient for religious extremism and terrorism and/or provisions that have been enacted relatively recently.

Direct and indirect incitement to terrorism

Belgian legislation has included a provision banning incitement to terrorism since 2013. In 2016, however, this provision was modified to henceforth not only ban *direct* incitement to terrorism but *indirect* incitement as well[29]. After the amendment, the provision prohibited people from spreading 'a message or otherwise making it publicly available, with the intention of directly or indirectly inciting the commission' of a terrorist act[30]. Moreover, the amendment *removed* the requirement that the (direct or indirect) incitement actually result in 'the risk that one or more' terrorist acts will be committed (the so-called risk requirement), thereby again expanding the provision's reach[31].

Despite the enlargement of the incitement provision, several (thus far unsuccessful) attempts have additionally been undertaken (by government parties) to criminalise minimising, condoning or glorifying terrorism.[32] Moreover, the federal government has recently even entertained the option of rendering it a criminal offence to visit jihadist websites[33].

[28] The individual appealed his deportation, but his appeal was rejected by the Council of Alien Law Litigation.

[29] Act of 3 Aug 2016 concerning several provisions to combat terrorism, *Moniteur belge*, 11 Aug 2016.

[30] Art 140*bis* Criminal Code. 'Terrorist act' is understood to mean any of the other terrorist crimes included in the Criminal Code.

[31] Note, however, that the provision was annulled by the Constitutional Court (see Section IV.1.b.ii).

[32] See, for example, *Parliamentary Documents* Chamber 2015-16, No 54-1467 (proposal by French-speaking liberals); Lej, 'N-VA pleit voor grenzen aan vrije meningsuiting voor "collaborateurs" van terrorism', *De Standaard*, 27 Jun 2016 (proposal by Dutch-speaking nationalists). For a critique, see J. Vrielink, 'Te veel antiterrorisme moeten we ook niet verheerlijken', *De Tijd*, 1 Dec 2015.

[33] See, for example, Jvt, 'Premier Michel overweegt verbod IS-propaganda', *De Standaard*, 23 Jun 2017. For a critique, see J. Vrielink and K. Lemmens, 'Verbod op jihad-propaganda is even nuttig als chocoladen theepot', *De Morgen*, 27 Jun 2017.

Travelling abroad for terrorist purposes

In 2015, an article was introduced in the Criminal Code that provides that anyone who either 'leaves the national territory in order to commit a terrorist crime' or who 'enters the national territory' for such purposes will be punished[34].

In other words, it concerns two separate crimes: the aim was to target not only people travelling to Syria from Belgium in order to commit terrorist offences but also those who enter Belgium to commit such crimes. Concerning the latter, the legislator had incidents in mind such as the attack on the Jewish Museum in Brussels on 24 May 2014, committed by a French national who entered Belgium for the purpose.

Both the text of the provision and the parliamentary discussions surrounding it indicate that the perpetrator must be punished regardless of whether or not terrorist offences occurred: it was the legislator's aim to *prevent* harm[35].

(Temporarily) closing down extremist mosques

While not a criminal measure in the strict sense, a 2017 amendment of the Municipal Code merits discussion here as well. Based on a new article[36] in the Municipal Code, mayors acquired the power to shut down facilities —including mosques or other houses of worship— if there are serious indications or suspicions that terrorist activities are taking place there.

A similar article already made this possible for a maximum duration of six months in case of suspicions of human trafficking. An identical time limitation holds where it concerns a shutdown due to (suspected) terrorist activities. Furthermore, the powers of the mayor are qualified: the measure can only be taken after consultation with judicial instances and while respecting minimal rights of defence of the people responsible for the facility (in this case, the local mosque leadership).

C. ***Penal and Correctional System***

Prisons often pose radicalisation risks. This is no different in Belgium than elsewhere and it has led the government to take several measures aimed at subverting this risk.

[34] Art 140*sexies* Criminal Code, introduced by means of an act of 20 Jul 2015, *Moniteur belge*, 5 Aug 2015. A related measure extended the powers of government to suspend or withhold passports and identity cards for up to six months without prior judicial review, including in cases in which people are suspected of wanting to travel to conflict zones (e.g., Syria) for terrorism-related purposes.

[35] The parliamentary debate further indicates that the new provision was meant, in part, to implement United Nations Security Council Resolution 2178 (24 Sep 2014). In that resolution, the Security Council called on countries to undertake efforts in the field of anti-terrorism, including punishing civilians who go abroad to commit terrorist offences (§ 6 of the Resolution).

[36] Art 134*septies* Municipal Code, introduced by an act of 13 May 2017, *Moniteur belge*, 16 and 21 Jun 2017. A mayor's decision must be confirmed by the city council afterwards.

a) *Separation of radical inmates*

To begin with, in 2015, the Belgian authorities started to separate or 'quarantine' prisoners who were considered to pose a risk of converting others to Islamic extremism. There are two such isolation wings in Belgian prisons: one in the prison of Bruges (Flanders) and one in Ittre prison house (Wallonia). They house around 40 to 60 people in all[37].

b) *Chaplains*

Contemporary chaplaincy policies, particularly in prisons, have also become strongly extremism-driven[38]. As a result, religions that are *not* perceived to be associated with a potential threat will lack policy attention and will thereby paradoxically be in a weaker position when it comes to state-funded spiritual care. Of course, this increased (financing of) spiritual support is also coupled with greater interference with organisational autonomy. Prison chaplains' changing role in this regard includes detecting radicalism and actively countering radical beliefs held or spread by Muslim inmates[39].

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

There are numerous measures that are indirectly relevant to tackling radicalisation and extremism. Given the space limitations, we will only focus on a small number of recent measures in the context of (a) migration, (b) criminal law and (c) funding for religions.

A. *Migration: No Visas for Imams Wanting to Serve at Unrecognised Mosques*

New entry policies have been introduced for foreign (non-EU) religious workers. These measures —though (allegedly) general in nature— were conceived specifically for Muslim communities, as their dependency on imams from abroad is widely regarded as posing barriers to integration.

The new visa policies most notably include the provision that non-EU nationals can only obtain working visas (and as such access to Belgian territory) if they want

[37] For a critique, see J. Vrielink and P. Loobuyck, 'Geradicaliseerde gevangenen samen brengen is minder eenvoudig dan het lijkt', *Knack*, 19 Jan 2015.

[38] See A. Overbeeke and J. Vrielink, 'Religious Assistance in Institutions: Belgium' in R. Balodis and M. Rodríguez Blanco (eds), *Religious Assistance in Public Institutions, XXVIII Annual conference of the European Consortium for Church and State Research* (Madrid, Comares, 2018).

[39] In Jun 2017, the federal Minister of Justice stressed the role of Muslim chaplains as crucial figures in the government's 'deradicalisation' policies. See *Bulletin Parliamentary Questions and Answers* Chamber No 122, 26 Jun 2017, 191 (question No 985).

to serve in mosques (or houses of worship of other religions) recognised and financed by the state. On a side note, less than a quarter (80) of about 400 mosques in Belgium are recognised.

Several imams affected by the new regulations have fought the decision, claiming their religious freedom was being violated. However, the Council of Alien Law Litigation ruled that the imams' claims could not be evaluated under Belgian law or the ECHR because the claimants did not live in Belgium[40].

B. *Criminal Law: Burqa Ban*

After France, Belgium was the second European country to introduce a general prohibition on face-covering clothing in public life, a so-called burqa ban. The relevant act of 1 June 2011 entered into force on 23 July 2011. It was, to a large extent, geared towards what its supporters saw as an expression of Islamic (or Islamist) extremism and radicalism. Prior to the introduction of this general prohibition, many Belgian municipalities had already banned the wearing of face veils (and other forms of face covering) locally[41].

The federal act introduced an article (Article 563*bis*) in the Belgian Criminal Code that renders it an offence to publicly 'cover or conceal one's face in whole or in part, so that one is unrecognisable'. Exceptions are limited to legal provisions and labour regulations that impose or allow one's face to be covered in public and to 'local ordinances regarding festivities'.

Both the Belgian Constitutional Court[42] and the European Court of Human Rights[43] ruled that the ban(s) did not violate fundamental rights.

C. *Funding and Finances*

The Belgian state finances recognised religions[44]. However, funding only ensues if local religious communities (that have a sufficient number of adherents) apply for

[40] For a critique, see A. Overbeeke, 'Pas de visa pour les imams de mosquées non reconnues', *Ojurel.be*, 5 Apr 2017.

[41] E. Brems, J. Vrielink and S. Ould Chaib, 'Uncovering French and Belgian Face Covering Bans' (2013) 2 *Journal of Law, Religion and the State,* pp. 69-99

[42] Constitutional Court 6 Dec 2012, 2012/145. For a critique, see J. Flo and J. Vrielink, 'The Constitutionality of the Belgian Burqa Ban', *openDemocracy.net*, 14 Jan 2013; J. Vrielink, 'De Grondwet aan het gezicht onttrokken. Het Grondwettelijk Hof en het 'boerkaverbod' (2013) 4 *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, pp. 250-260.

[43] On the nationwide ban, see *Belcacemi and Oussar v. Belgium,* App No 37798/13 (ECHR, 11 Jul 2017). On the municipal bans, see *Dakir v. Belgium*, App No 4619/12 (ECHR, 11 Jul 2017). Compare previously: *SAS v France*, App No 43835/11 (ECHR, 1 Jul 2014).

[44] This includes, *inter alia*, the salaries and pensions of clergy and that of teachers of religion (in state schools), as well as funding for the maintenance and renovation of buildings.

it: it is a right, not an obligation. Increasingly, however, state and private financing from abroad is being seen as a threat (yet again, primarily in relation to Islam). In November 2016, the Minister of Justice declared that he intended to introduce effective instruments to control this type of funding.

In 2016, the federal government announced an increase in the budget of 3.3 million euros in order to pay the salaries of 80 new imam positions[45]. In 2017, the Minister of Justice pleaded for an increase in the number of recognised mosques[46].

Belgian policies aimed at stronger financial support of Muslim communities have long been motivated by the principle of equal treatment[47] (Islam being demographically the second religion of the land, yet receiving limited funding), but nowadays state funding is seen as a means of preventing financing from abroad and even as an instrument to control religious life. State funding on this basis has become, to an important extent, security-oriented[48].

V. Effects of the Measures on Religious Freedom

In this section, we discuss a number of problematic effects that the measures described in Section III might have on the various dimensions of the freedom of religion, as well as on other rights and principles guaranteed in the Belgian Constitution and in the ECHR.

1. Effects of Legislation *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

A. *Migration and Citizenship Legislation*

a) *Revoking nationality*

The measure of revoking someone's Belgian citizenship is not in itself a limitation of the freedom of religion. However, given the high rates of dual nationality among Belgians especially with North African, Arabic and Turkish roots, there is an indirect link with groups that are mostly Islamic. Moreover, this link is not coincidental: these groups are consciously targeted by the measure. Because of this, human

[45] S. Andries, 'Meer moskeeën en imams tegen radicalisering', *Het Nieuwsblad,* 18 Feb 2016.

[46] Belga News Agency, 'Minister Geens: We moeten aantal erkende moskeeën maximaliseren', *De Morgen,* 18 Mar 2017.

[47] See, for example, the government's argumentation (for its involvement in the organisation of Islam) in the Constitutional Court, 28 Sep 2015, No 148/2005.

[48] See R. Torfs, 'Church Financing - Towards a European Model' in B. Basdevant-Gaudemet and S. Berlingo (eds), *The Financing of Religious Communities in the European Union* (Leuven, Peeters, 2009), p 344: 'In the security model, religious groups do not receive support because they are doing something positive or useful, but are supported because they are not doing certain negative things'.

rights organisations have voiced the concern that the measure appears to create second-class citizenship based on descent, ethnicity and religion[49].

The Belgian Constitutional Court had to make a pronouncement on the constitutionality of the provision by way of a preliminary ruling in a pending case concerning an individual convicted of belonging to a terrorist organisation[50]. The Court concluded that the possibility of revoking the citizenship of individuals with dual nationality did not violate any (of the invoked) rights or principles, including the right to non-discrimination, the principle of *non bis in idem* or the right to family life.

b) *Deporting foreign nationals born in Belgium*

The newly introduced possibility of deportation of non-EU nationals (including those born in Belgium) in case of suspicions of a violation of public order (see Section III.2.a.ii above) is by and large aimed at the same target group and is arguably problematic as well.

First, 'public order' is not defined in legislation, which begs the question of what crimes —or suspicions thereof— might provide grounds for deportation. The fact that mere *suspicions* of public-order violations may lead to deportation adds to the legal uncertainty, especially since legal recourse against the decision will not stay deportation[51]. Finally, deportation can be problematic in its impact: either because the deportation may result in a situation where an individual who is suspected of having committed crimes will not be prosecuted or, conversely, since the individual might face excessive punishment, resulting in inhumane treatment.

c) *Newcomers' declaration*

Concerning the newcomers' declaration, there is nothing wrong in principle with a country clarifying its conditions for hospitality and encouraging integration.

However, the draft declaration that circulated was problematic in its selectivity. The declaration was one-sided in its focus on rights and principles that the political majority believed (Muslim) migrants have a hard time accepting: gender equality, separation of church and state, and sexual diversity and autonomy. Strikingly absent were rights with which the majority in society might sometimes have difficulties, e.g., the right to establish religious schools (see Section V), the right to give one's children a religious upbringing, the right to be elected, etc. Fundamental rights are an

[49] See, for example, Human Rights Watch, *Grounds for Concern: Belgium's Counterterror Responses to the Paris and Brussels Attacks*, Nov 2016.

[50] Constitutional Court, 7 Feb 2018, No 16/2018.

[51] For a critique, see, for example, an open letter from over 70 human rights associations, academics and opinion makers: 'Geen tweederangsburgers in onze democratische rechtsstaat', *De Morgen*, 28 Feb 2017.

inextricable system, not a fast-food buffet where the authorities can pick and choose whatever they like[52].

Moreover, even though the declaration will —after comments by critics and the Council of State— no longer be applicable to refugees, even for other non-EU migrants refusing to sign, it cannot automatically lead to rejection of residency (as the government claims). EU obligations preclude such an automatic rejection, requiring instead an individual assessment in each specific case[53].

B. ***Criminal Laws and Provisions***

a) *Private militias and hate speech*

The legislation on private militias is by no means new (1934) and is not overly problematic as it stands[54]. The ban on hate speech did, especially in the past, pose risks for the freedom of expression and, in cases where it concerned religious speech, for the freedom of religion. However, a number of rulings by the Belgian Constitutional Court have limited the applicability of these provisions to *active* incitement, performed with *malicious intent*, which greatly reduced the tensions with freedom of speech[55].

b) *Anti-terrorism legislation*

Direct and indirect incitement to terrorism

Concerning indirect incitement to terrorism without the requirement that such expressions pose a risk of causing actual terrorist acts,[56] it is worth noting what the Council of State said, in its advice, when (direct) incitement was first criminalised in 2013. The Council pointed out that the prohibition should and could not be applied to statements that did not pose a real risk of leading to the commission of terrorism

[52] Related to this, fundamental rights principally bind the government and the state rather than citizens. Government must itself first and foremost respect, promote and guarantee the rights of everyone residing on its territory. This is again something that was conspicuously absent from the draft declaration.

[53] For a critique, see J. Vrielink, 'Een boeketje grondrechten. De Nieuwkomersverklaring kan nooit zoveel gewicht krijgen', *De Standaard*, 2 Apr 2016.

[54] Attempts to amend it to include a ban on radical organisations (see Section III.2.b.1, above) are less self-evident, not only from the point of view of the freedom of association and the freedom of religion, but also on a practical level: experiences in other countries show that banning (what mostly are) *de facto* associations (without legal personality) is of little to no use.

[55] Although one can still justifiably criticise the existing legislation. Still, compared to other European countries, the relevant provisions are, for now, relatively protective of free speech.

[56] It can be pointed out that what goes for indirect incitement obviously goes *a fortiori* for even more far-reaching proposals, such as those on banning the glorification of terrorism or prohibitions on visiting jihadist websites (see Section IV.1.b.ii).

offences because otherwise any sanctions imposed would be liable to conflict with the freedom of speech[57].

The expansion of the provision completely disregarded this criticism. Correspondingly, a number of prominent human rights organisations, including Amnesty International and Human Rights Watch (HRW), considered the new provision to amount to a violation of the freedom of expression. HRW, for instance, pointed out that 'European standards require that for incitement to be a criminal offence there should be a judicial finding of a real danger the act might in practice be committed'[58].

In light of the above, it was no great surprise that the Belgian Constitutional Court found the provision unconstitutional and annulled it[59]. The Court underlined that the 'risk requirement' in the original provision served as an important guarantee against criminalising conduct and expressions that did not have any connection with terrorism, thereby jeopardising free speech. The Court further emphasised that EU Framework Decision 2002/475/JHA —of which the original (2013) provision was the implementation— explicitly requires advocacy of terrorist offences to cause 'a danger that one or more such offences may be committed', again in order not to unduly limit the freedom of expression[60], and that the same held for Directive 2017/541/EU. For these reasons, the Court considered the amended provision to amount to a violation of the freedoms of expression and association.

Travelling abroad for terrorist purposes

The ban on travelling abroad or entering Belgium for terrorist purposes is mainly problematic due to the vague language that it contains. Roughly speaking, there seem to be two possible interpretations or scenarios.

If courts choose a strict interpretation, the provisions contribute little to nothing to pre-existing means (the attempt to commit any terrorism offence could, for instance, already have been punishable previously). The Council of State also noted this in its advice concerning the draft bill[61].

In the alternative scenario, there is a significant risk of overly broad application, resulting in tensions with several rights and principles. This risk is linked to the fact

[57] See J. Vrielink, 'Radicalisme en de rechtsstaat. Strafrechtelijke en penitentiaire bestrijding van terrorisme en (moslim)extremisme in België na de aanslag op Charlie Hebdo' in P. Kruiniger (ed), *Jihad, islam en recht. Jihadisme en reacties vanuit het Nederlandse en Belgische recht* (The Hague, BJU, 2017), pp. 85-95.

[58] Human Rights Watch, *Grounds for Concern: Belgium's Counterterror Responses to the Paris and Brussels Attacks*, Nov 2016.

[59] Constitutional Court, 15 Mar 2018, No 31/2018.

[60] Art 3 Framework Decision 2002/475/JHA, as amended by Council Framework Decision 2008/919/JHA.

[61] *Parliamentary Documents* Chamber 2014-15, No 54-1198/1, 18-19.

that the provisions edge towards punishing mere intentions, without being linked to any specific terrorist act. This too was noted by the Council of State[62]. The Council indicated that this called for 'special vigilance in all stages of the criminal justice system, to prevent the crime from becoming overly wide-ranging'. The Council warned in particular against suspicions based on stereotypes (e.g., concerning people's origin, religion/belief or past) and against hasty conclusions in light of the destination of the travel in question. If this reticence is not observed, the provisions might violate, *inter alia*, the freedom of movement, the prohibition of discrimination and the principle of legality[63].

Despite these potential problems, the Belgian Constitutional Court ruled that the new provisions were constitutional[64]. In doing so, the Court refused to impose any specific interpretation, in accordance with the Constitution, which *prima facie* would seem to allow for the broad interpretation indicated above.

(Temporarily) closing down extremist mosques

The legislation allowing mosques to be closed down if there are indications that acts that qualify as terrorist offences are being carried out there only came into force on 26 June 2017.

It is as yet unclear what the effects will be when the measure is applied. However, closing down mosques, even temporarily, risks, in the eyes of the Council of State[65], to amount to a disproportional limitation of the fundamental rights of the individuals responsible for the mosque and of other believers. On a practical level, moreover, it can be questioned whether the (temporary) closure will not simply lead to radicalised elements going elsewhere, as the measure seems to amount to little more than symptom control.

C. ***Penal and Correctional System***

a) *Separation of radical inmates*

Concerning measures taken in the context of the correctional system, first, the approach of quarantining prisoners (see Section III.2.b.i above) is not self-evident in light of several rights and principles.

[62] Ibid, 17. Compare *Parliamentary Documents* Chamber 2014-15, No 54-1198/3, 10, 11 and 14-15.

[63] Finally, the proportionality of the provisions' sanctions can be questioned. In a number of situations, someone who actually commits a terrorist act may incur the same punishment as someone who travels abroad or to Belgium in order to attempt to do so, but without success.

[64] Constitutional Court, 18 Jan 2018, No 8/2018.

[65] Council of State, advice No 59.402/2, 15 Jun 2016, *Parliamentary Documents* Chamber 2015-16, No 54-1473/3, 9.

To begin with, segregating prisoners on the basis of (the intensity of) their belief is a form of unequal treatment on the basis of religion, which must be justified. First, there are issues concerning the pertinence of the distinction: what exactly is 'radicalisation'? And when is someone 'radicalised' and/or when do they constitute a risk of 'radicalising' others? All of this is hard to establish in practice, and more importantly, it is a matter of degree. Nonetheless, the measure (segregation) attaches dichotomous consequences to this assessment.

Still concerning pertinence, people can be extremely religious or 'radical' without posing any danger by themselves or for radicalising others. Radicalism need not be a problem as long as it does not assume violent forms. Conversely, recent attacks have shown that these are often committed by moderately religious (or even seemingly a-religious) individuals.

Finally, one can raise questions from a practical point of view: experiences with isolation suggest that the isolated individuals become exponentially more radicalised, and furthermore, the measure risks creating solidarity among moderate inmates. In this regard, it may be noted that other countries, including France, have ended their isolation experiments upon finding that it only served to deepen radicalisation networks in prisons.

b) *Chaplains*

As described earlier (see Section III.2.b.ii above), spiritual care in prisons is heavily impacted by the struggle against extremism, resulting in Islam being 'favoured' financially, as compared to other religions[66]. From the perspective of the religious freedom and non-discrimination rights of the individual prisoner, this seems problematic[67].

Concerning Islam itself, the greater interference with organisational autonomy that the greater policy (and funding) attention has brought about is no less problematic. Chaplains are increasingly utilised by the authorities as mere instruments for detecting radicalism and countering radicalism, which leads to pronounced tensions with the freedom of religion (especially where it concerns the trust and confidentiality that ought to exist between a prisoner and their religious counsellor).

[66] The Minister of Justice could not inform parliament about the criteria used to distribute the chaplaincies' budget among the different religions: see *Bulletin Parliamentary Questions and Answers* Chamber No 122, 26 Jun 2017, 190 (question No 985).

[67] A. Overbeeke and J. Vrielink, 'Religious Assistance in Institutions: Belgium' in R. Balodis and M. Rodríguez Blanco (eds), *Religious Assistance in Public Institutions, XXVIII Annual conference of the European Consortium for Church and State Research* (Madrid, Comares, 2018).

2. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

A. *Migration: No Visas for Imams Wanting to Preach at Unrecognised Mosques*

As mentioned, less than a fourth of the 400 mosques in Belgium are recognised. Due to this fact, the *de facto* visa ban instituted by the federal government not only affects the position of the (non-EU) religious personnel concerned, but it also limits the religious rights of religious communities. The latter are no longer able to engage non-European religious ministers (imams) if they have an unrecognised status.

In case the measure is not nullified by the courts, it will put strong pressure on Muslim communities to enter the state-subsidised regime by attempting to get recognised. Given the difficulty of obtaining such recognition, especially since the Flemish Minister of the Interior has decided to stop all recognition procedures for mosques[68], a large percentage of mosques will be denied the services of religious ministers.

The new visa policy seems problematic in light of the constitutional principle of non-discrimination and the (equal) freedom to select religious personnel by only limiting the right of unrecognised communities to choose non-EU citizens as religious leaders. Likewise, the measure seems to be in tension with Article 9 ECHR (which protects the organisational freedom of religious communities, including the choice of religious personnel)[69] and Article 14 ECHR (non-discrimination).

Finally, on a practical level, these new visa policies —targeting the vast majority of the mosques in Belgium— are likely to (further) undercut the trust between Muslim communities and state authorities.

B. *Criminal Law: Burqa Ban*

Even though both the Constitutional Court and the ECtHR have not found burqa bans to be a violation of fundamental human rights[70], such measures still seem problematic both from a human rights perspective and from a practical point of view.

Specifically concerning Belgium, there is a pronounced problem with the ban's scope, which is extremely broad, whereas exceptions are very limited. A strict application would therefore lead to bizarre consequences, especially since intent is not required: negligence suffices for a sanction to be imposed. As such, examples of what the ban (formally) prohibits include wrapping oneself up warmly in a scarf and cap

[68] See *Parliamentary Documents*, Commission of the Interior, 2 May 2017.

[69] See, for instance (on the selection of imams from abroad), *Lamaiz El Majjaoui and Stichting Touba moskee v. Netherlands*, App No 25525/03 (ECHR, 14 Feb 2006).

[70] At least not given a neutral formulation and modest penalties for violating such bans.

in winter, wearing dust masks against smog on a bicycle, mascots at sporting events and even wearing bandages after an accident or plastic surgery.[71]

The ECtHR accepted only 'living together' as a legitimate aim that could justify a general ban[72]. However, concerning that goal, the question remains whether it is not a matter of individual freedom to decide to have contact with other people in the streets. Moreover, the estimated number of women wearing a face veil in Belgium ranges from 200 to 270, which begs the question whether they can —even practically— amount to the alleged threat of 'living together'. Finally, the ban appears to foster resentment in Muslim communities, seemingly contributing to (rather than countering) radicalisation.

C. *Funding and Finances*

Due to the small number of mosques funded by the Belgian state, Muslim communities are left to other sources, including funding by foreign state actors and foreign private institutions. While the federal government has increased the budget for the payment of salaries for imams by 40%, this effort will be meaningless if the Flemish Region continues its new policy of not recognising additional Muslim communities (see Section IV.2.a above) (and even revoking recognition of some formerly recognised communities)[73]: the federal government only finances the salary of imams if a community is recognised at the regional level.

VI. Educational Measures to Tackle Radicalisation AND Extremism

A young Belgian of Moroccan descent, schooled in Flanders, was involved in the 2015 Paris Bataclan and Stade de France attacks. His changing religious attitude had been detected at the school level, but no further action was undertaken. This situation, regarded as potentially omnipresent in the French and Flemish school systems of the Brussels agglomeration in particular, was an important element in the development of a number of deradicalisation programmes in schools[74].

[71] Obviously, the ban is not applied in this manner. Mostly, only niqabs and burqas give rise to legal intervention. However, that merely suggests discrimination in the ban's enforcement.

[72] As opposed to the Belgian Constitutional Court, which also found women's rights and security to be justifications for a general ban. The ECtHR, however, rejected women's rights as a legitimate aim, while it found security unable to legitimate a general ban in the entirety of the public sphere. For a comparison between the rulings of the Belgian Constitutional Court and that of the ECtHR, see J. Vrielink, 'Boerkabattle: Grondwettelijk Hof vs. Europees Hof', *De Juristenkrant* 2014, No 295, 2.

[73] Belga News Agency, 'Homans stelt erkenning moskeeën uit', *De Standaard,* 1 May 2017.

[74] See, for instance, Flemish Department of Education, *Handvatten voor de preventie, aanpak en omgnag met radicalisering binnen onderwijs* (update 29 May 2017), p. 17.

1. Legislation, Policies and Programmes

In 2015, a group of Islam experts was created in order to prevent and tackle religious radicalisation in Flemish schools; the experts support and provide advice to school authorities, educators and pupils[75]. Schools are seen as an important locus for preventing radicalisation and for detecting changing attitudes among (Muslim) pupils[76]. Flemish schools operate on the basis of two specific scenarios, depending on the level of danger in the situation at hand (an acute threat to security being the decisive factor)[77].

Since education is a community competence, policies have to be developed under the communities' responsibility. However, this does not mean that the federal authorities are not involved. On the contrary, given the security risks, federal and community authorities act in close collaboration in this field. One such collaborative measure concerning radicalism is laid down in a 2014 protocol agreement (*Protocolakkoord*) between the federal State Security authority (*Sûreté de l'Etat*) and the Flemish Department of Education. The agreement facilitates and regulates the exchange of information and personal data, enabling both authorities to better fulfil their respective tasks. The document itself is confidential[78], but one has to assume that the exchange of personal data, most likely related, *inter alia*, to religion, has several implications for fundamental rights (privacy).

2. Autonomy of Religious Schools

Autonomy of religious schools is protected under Article 24 § 1 Constitution, which stipulates: 'Education is free; any preventive measure is forbidden; the punishment of offences is regulated only by law or decree'. The article entails that citizens are free to establish their own schools on any religious or non-religious basis they like, and that such (religious) schools are eligible for state funding if they meet certain criteria.

In practice, Catholic education is even more widespread than state education, especially in Flanders. About 60% of all Belgian secondary school students go to Catholic schools, and in Flanders this number is close to 70%. Some minority religions organise education in Belgium as well. Judaism, for instance, has a longstanding tradition in this area. Especially in Antwerp, a high percentage of Jewish children (as high as 95%) receive their education at a Jewish school. For Brussels, where most Jews are more liberal, this percentage is significantly lower. A number of (primary)

[75] Ibid, 3.

[76] *Documents Flemish Parliament* 2014-15, No 366/1, p. 4.

[77] Ibid, pp. 7-13.

[78] The confidential character of the protocol agreement was confirmed by the Flemish Minister of Education in *Questions and Answers Flemish Parliament* 2016-2017 (question No 165, 2 Dec 2016).

Protestant schools are present in Belgium as well, predominantly in Flanders, commonly known as 'Bible schools' (*Scholen met de Bijbel*).

Up until quite recently, there was but a single recognised Islamic school in Belgium. When it was established in 1989, it encountered strong opposition both in public opinion and at the political level. Since 2011 and 2012, respectively, two additional schools have been recognised. All three schools are located in the Brussels conglomeration, and all concern primary education. The first secondary Islamic school was recognised in 2015[79]. Attempts to establish secondary schools elsewhere have been met with resistance and dissuasion (including from state authorities).

Specific (recent) measures to limit religious schools' autonomy, with a view to countering extremism, have not been taken. However, a quarter of a century ago, Flemish legislation introduced a regime that provided that religious schools had to operate under the religious authority of a single religious body, enabling supervision and control of the 'religious quality' of its religion teachers and the religious education offered[80]. This policy could also be employed vis-à-vis Muslim schools, to the extent that they are seen as a source of concern in the context of radicalisation and extremism.

VII. Conclusion

All in all, what the totality of anti-terrorism and anti-radicalisation measures reveals is a change in atmosphere and attitude concerning religious freedom (and related liberties, rights and principles), under the impulse of 'securitisation'.

More specifically, this change entails a move away from the traditional liberal and autonomy-friendly interpretation of the Belgian Constitution towards a more suspicious, restraining and restrictive attitude aimed at utility, supervision and control.

Especially where it concerns Islam, this new attitude has become widespread and nearly ubiquitous. This is evidenced by the overwhelming majorities with which many of the measures are passed[81], and the speed with which this is done.

Historically speaking, the present attitude comes rather close to the system that caused the 1830 Belgian revolution. At the time, the meddlesome policies of the Dutch King William I —in the domains of religion, freedom of speech and (religious) education— led to the southern provinces seceding, wanting to establish a system wherein people could develop themselves in true and absolute freedom ('*la liberté en tout en pour tous'*). Ironically, the country would seem to be returning to where it started.

[79] R. Torfs and J. Vrielink, 'Law and religion in Belgium' in G. Robbers and W. Cole Durham (eds), *Encyclopedia of Law and Religion* (Leiden, Brill, 2016), pp. 38-39.

[80] Legislation opposed by Protestant schools (with argumentation based on autonomy rights), given the fact that Protestantism is characterised by its plurality of denominations and confessions. Constitutional Court, 4 Mar 1993, No 18/93.

[81] The burqa ban, to give but a single example, passed with but a single dissenting vote.

SECURITISATION OF RELIGIOUS FREEDOM: THE CZECH REPUBLIC

Jiří Rajmund Tretera [1]
Záboj Horák [2]

I. Social context

1. The Religious Situation in the Czech Republic

The religious situation in the Czech Republic can be characterised by the following facts:

a) The average inhabitant of the Czech Republic is known not to be a very zealous believer. Truth to be told, most inhabitants have a weak relationship with organised religion.

> 'The Czech lands are frequently seen as a predominantly atheistic, or at least irreligious, territory, especially in journalistic and political reflections. However, sociological findings from 2006 and 2007 show that Czech society is becoming a society with a high degree of individualized and decentralized religiousness. Some sociologists point out a particular feature of the Czech nature, noticeable in many important individuals since the National Revival in the 19th century, which is the so-called "timid godliness". It is religiousness that is not manifested outwardly through pompous gestures'[3].

b) We should acknowledge, however, that we can observe a certain polarisation in Czech society in relation to religion. At one end of the spectrum, we find

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resolute believers from various religious communities[4] and at the opposite end explicit atheists (some of them even militant atheists). The broad zone between these poles is composed of several shades of agnosticism or of an uncertain orientation, so we can speak of a continuum or a rainbow in terms of the relationship that Czechs have with religion.

c) Religion in the Czech Republic is rich in terms of the number of religious communities, which have been proliferating since the renewal of religious freedom after the fall of the atheist communist regime (1989). Between 1990 and 2019, the number of recognised religious communities in the country more than doubled from 18 to 41.

> 'About 80% of the members of religious communities belong to the Roman Catholic Church. According to the Czech Bishops' Conference 3,887,400 baptized Catholics live in the Czech Republic, among a total number of 10,512,000 inhabitants. The Roman Catholic Church is followed in size by the Czechoslovak Hussite Church, which developed from Catholic modernism and unites both Catholic and Protestant aspects of worship and teaching with the former Hussite tradition, and by the Evangelical Church of Czech Brethren, which unified the original Lutheran and Reformed Czech congregations. Each of these two churches has about 100,000 members'[5].

d) A long-term trend observed in the Roman Catholic Church, the Czechoslovak Hussite Church and the Evangelical Church of Czech Brethren

> 'has been heading towards a decline in the total number of their members. The willingness of their members to declare an affiliation with their religious communities has been decreasing. It is thought that this trend is connected with the diminution of interest of the public in associating in general, which [is] strongly [reflected] in both religious and nonreligious spheres. In terms of attending church services, this downturn is not considerable. At the same time, however, the activity of said three religious communities in the field of health care, welfare work, culture and education has been extending, so a large proportion of the public not belonging to these religious communities is affected by the activity thereof'[6].

All three churches have established networks of charitable organisations, religious schools and institutions that arrange a variety of activities for both

[4] According to the Pew Research Center report 'Religious Belief and National Belonging in Central and Eastern Europe' of 10 May 2017, 29% of Czechs believe in God, which is a relatively high number keeping in mind the fact that people do not like to admit that they belong to a minority opinion. A comparison with data from countries in which religious belief is predominant can be misleading and can ultimately yield false conclusions.

[5] Tretera and Horák, 'Czech Republic', p. 84.

[6] J. R. Tretera and Z. Horák, *Religion and Law in the Czech Republic* (2nd edn, Alphen aan den Rijn, Wolters Kluwer, 2017), p. 22.

children and adults. These networks have been expanding year after year. In addition, the number of clergymen and lay pastoral workers —these are individuals who provide pastoral care in public institutions outside church structures— has also increased. They provide care in the army, prisons and hospitals, and offer post-traumatic intervention for members of the police and fire rescue services and for victims of natural and man-made disasters[7] and crime. Pastoral workers can be found at immigrant centres for those seeking asylum, and are engaged in the resocialisation of released prisoners. In recent years, they have assisted in efforts to integrate immigrants into Czech society. All of these activities are provided in cooperation not only with the three above-mentioned churches but also with many others, and they are provided to all inhabitants and immigrants without regard to their religious convictions or lack thereof.

The above-mentioned activities on the part of these religious communities are welcomed by the public, and they are perhaps more closely monitored by the public than are the liturgical and social life inside the religious communities, their parishes, monasteries and church societies.

e) We now turn to the subject of smaller —both traditional and new— religious communities. The number of members and congregations (e.g. parishes, preaching stations) is on the rise; in some cases, they have grown rapidly over the past 20 years.

Most newly registered religious communities were founded only after 1990 and are either entirely new or new to the country. A large number of these groups were introduced to the country in the past 10 years. This shows that the common view of Czech society as being entirely irreligious is incorrect. Many originally irreligious people seek out religion and find a spiritual home in newly founded religious communities of either Christian or eastern origin. It is not only new religious communities that have seen increases in their membership and congregations. Most small traditional religious communities have doubled or tripled their membership (from a few thousand to more than 10,000 members) and the number of their congregations and preaching stations (from dozens to even hundreds of locations). As an example, we can take the Congregationalist Church of Brethren (in the Czech Republic and Slovakia), the Pentecostal Apostolic Church, the Pentecostal Christian Fellowship Church and several worldwide religious communities, such as the Unity of Brethren (Herrnhut/Moravian Brethren) and the Religious Society of Jehovah's Witnesses.

[7] Help was provided to all victims, regardless of their religious affiliation, during the catastrophic floods in Moravia in 1997 and in Bohemia in 2002.

Among the religious communities that were founded during the last 20 years and registered during last few years are

> 'five churches from the Movement of Faith, the Salvation Army, the Armenians, and the (theosophical) Community of Christians. Religious communities of Eastern spiritual provenance (Hare Krishna Movement, Czech Hindu Religious Society, Diamond Way Buddhism, and Vishva Nirmala Dharma) have mostly Czech members. Muslim communities continue to grow thanks to immigration, but relatively slowly. They number about 4,500 to 10,000 persons. The main stream of immigrants to the Czech Republic does not come from Islamic countries, but from Ukraine and Vietnam. The Jewish communities consist of somewhat over 3,000 members'[8].

2. Recent Statistics on Migration

As of 31 December 2016:

- 496,413 foreigners were residing in the Czech Republic, which is about 4.7% of the population. The largest groups were citizens of Ukraine (110,245), Slovakia (107,251) and Vietnam (58,080)[9].

In 2016:

- 1,478 foreigners asked for international protection;
- 148 applicants obtained asylum, including 101 refugees from Iraq; and
- 302 people obtained subsidiary protection, with the largest group being refugees from Syria (88)[10].

3. Data on Relevant Socio-economic Issues

As of 31 December 2016:

- 382,889 foreigners were employed in the Czech Republic. The largest groups were citizens of Slovakia (161,559), Ukraine (54,571), Romania (31,522), Poland (31,355), Bulgaria (25,784), Russia (8,290) and Vietnam (6,565),
- 85,628 foreigners were registered as entrepreneurs in the Czech Republic. The largest group were citizens of Vietnam (22,415), Ukraine (22,150) and Slovakia (15,442)[11].

[8] Tretera and Horák, 'Czech Republic', p. 84.

[9] Recent statistics on migration and data on relevant socio-economic issues are excerpted from the document *Zpráva o situaci v oblasti migrace a integrace cizinců na území České republiky v roce 2016* [Report on the Situation in the Area of Migration and Integration of Foreigners on the Territory of the Czech Republic in 2016], Ministry of the Interior of the Czech Republic, Prague, 2017, p. 3.

[10] Ibid.

[11] Ibid.

II. Political and public debate

The main theme in public debate in relation to religion concerns property settlement between the state and religious communities. This has been debated since 2005, when the Constitutional Court ruled that the Parliament of the Czech Republic had an obligation to enact a restitution act that would meet the

> 'legitimate expectations of religious communities in relation to their historic property. The efforts resulted in the enactment of Act No. 428/2012, on Property Settlement with Churches and Religious Societies. Provisions of this legislation have commenced to be fulfilled against considerable opposition by individuals and some political groups, especially left-wing ones, shown mainly in the media'[12].

Some of those opposed have attempted to change the law, while others have been trying to take advantage of this negative sentiment to verbally attack religious communities. So far, however, nobody has been sued or punished for committing a criminal offence motivated by religious hatred.

Another theme in public debate concerns immigration. Although immigration is usually not connected with religion, there is one exception, i.e. immigration from Muslim countries.

As mentioned above, the main streams of immigration come from Russia, Slovakia, Ukraine, Vietnam and some Balkan states. There is hardly any objection among the Czech population to immigration from these countries despite the fact that some of these immigrants have displaced Czechs from some sectors of the economy. For example, the Vietnamese have taken control of nearly all greengrocers and shops with cheap textiles, with the exception of department stores. Similarly, Russian entrepreneurs purchased and now control the main Czech spa in Carlsbad (Karlovy Vary). On the other hand, many immigrants, especially Ukrainians, are filling vacancies in the construction industry and in hospitals, as well as providing cleaning services.

The core part of the Vietnamese immigrant population has lived in the Czech Republic since the late years of the communist regime, which was an expression of friendship between socialist Vietnam and socialist Czechoslovakia.

The same applies to Islamic immigrants

> 'who under the communist regime (1948-1989) were invited from the befriended Arabic or other Islamic countries to study in Czechoslovakia, and who decided not to return home. One of the frequent reasons for this has been their entering into marriage with a person of the Czech or Slovak nationality and [subsequently starting] a family in Czech Lands'[13].

[12] Tretera and Horák, *Religion and Law in the Czech Republic*, p. 38.

[13] J. R. Tretera and Z. Horák, 'Immigration and Religion in the Czech Republic' in Agustín Motilla (ed), *Immigration, National and Regional Laws and Freedom of Religion* (Leuven, Paris and Walpole, MA, Peeters, 2012), p. 38.

This group of immigrants mostly originated from Afghanistan, Iraq, Libya and Syria.

There are no objections in Czech society to either of the above-mentioned groups of 'old immigrants' because they have integrated well into Czech society and they have a good economic situation.

III. Legal and political framework

1. Definition of Extremism, Fundamentalism and Radicalisation

The term *extremism* is not defined in Czech law. However, the Ministry of the Interior of the Czech Republic uses the definition published in the 'Report on the Issue of Extremism in the Territory of the Czech Republic in 2002', which is part of Government Resolution No 699 of 9 July 2003[14].

According to the report:

> 'The term extremism should be understood as clear ideological attitudes which deviate markedly from the rule of law and constitutional law, show elements of intolerance, and attack democratic constitutional principles as defined in the Czech constitutional order. … Extremist attitudes are eligible to transform into destructive activities, and, whether directly or in terms of their long-term consequences, act destructively against the existing democratic political and economic system-i.e., they endeavour to replace the democratic system with an antagonistic one (a totalitarian or authoritative regime, dictatorship, or anarchy). … World literature on politics usually distinguishes left-wing from right-wing extremism, as well as religious, environmental and (in some cases) nationalist extremism (regional extremism). The latter three forms have clearly appeared in the Czech Republic only very rarely, or not [at] all'.

Furthermore, the Czech Republic is bound by European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 10(2) of the convention concerns limits on the freedom of expression. The decisions of the European Court of Human Rights are essential.

The Charter of Fundamental Rights and Freedoms of 1991 (as the second part of the Czech Constitution) also contains basic provisions forbidding extremism.

The term *extremism* is also used in judgments of the Czech courts, often in connection with the interpretation of the term *movement*[15].

[14] An English translation of the resolution and the report are available on the website of the Interior Ministry's Security Policy and Crime Prevention Department at <http://www.mvcr.cz/mvcren/article/documents-on-the-fight-against-extremism.aspx> (accessed 25 Jul 2017).

[15] Opinion of the Criminal Division of the Supreme Court of the Czech Republic Tpjn 302/2005 of 13 Dec 2006 and resolutions of the Supreme Court of the Czech Republic 5 Tdo 79/2006 of 26 Apr 2006, 5 Tdo 337/2002 of 24 Jul 2002 and 3 Tdo 1174/2004 of 10 Mar 2005 and resolution of the Regional Court in Brno 4 T 98/2009 of 16 Dec 2009.

The term *fundamentalism* is often used in Czech media, primarily in relation to Islam, but its meaning is not clear. An explanation of this term is being researched with the help of academic institutions, and particularly those concerned with Islamic studies.

The term *radicalisation* is used in translations of international documents, such as 'The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism' of 24 November 2005.

2. Legislation *Expressis Verbis* Adopted to Tackle Extremism

The Czech Criminal Code 2009 contains a large number of provisions against crimes motivated or influenced by extremist attitudes.

The following crimes should be considered:

- defamation of a nation, race, ethnicity or another group (s 355);
- incitement to hatred of a group or restricting their rights and liberties (s 356);
- genocide (s 400) or denying, contesting, subscribing to and substantiating genocide (s 405);
- crimes against humanity (s 401);
- apartheid and discriminating against a group of people (s 402);
- founding, supporting and/or promoting a movement aimed at oppressing human rights and freedoms (s 403);
- expressing support for a movement aimed at oppressing human rights and liberties (s 404).

3. Legislation Indirectly Relevant to Extremism

The Czech Criminal Code contains provisions concerning a number of crimes that can be but are not always manifestations of extremism:

- restricting the freedom of religion (s 176);
- public menacing (s 272);
- persecuting civilians (during a war conflict) (s 413);
- violence against individuals or a group of people (s 352);
- disorderly conduct (s 358);
- murder (s 140);
- causing bodily harm (ss 145-146);
- illegal restraint (s 171), extortion (s 175);
- violation of freedom of association or assembly (s 179); and
- causing property damage (s 228).

The new Czech Misdemeanour Act 2016 contains provisions aimed at tackling extremism indirectly. A misdemeanour can be committed by either a natural person or a legal entity, and both can face punishment.

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

The main institution for tackling extremism is the Ministry of Interior of the Czech Republic. The ministry's Security Policy and Crime Prevention Department publishes an annual report on extremism in the Czech Republic[16]. The report provides an assessment of the ministry's plan for combating extremism and outlines plans for the following year[17]. The same department publishes a summary of situation reports on a quarterly basis.

Another relevant document is the 'National Security Audit' drafted by the Ministry of the Interior of the Czech Republic in 2016 in response to a directive from the Prime Minister. This general document was written by more than 100 experts from various fields of knowledge. Its aim is to identify specific security threats and to adopt relevant preventive measures.

The audit divides security threats into the following categories: terrorism, extremism, organised crime, influence of foreign powers, security aspects of migration, environmental threats, anthropogenic threats, cyberthreats, energy, security of raw materials and industry, hybrid threats and their impact on the security of Czech citizens[18].

IV. Impact on religious freedom

1. Impact of the Legislative Framework on Extremism on the Religious Freedom of Religious Communities

> 'The basis for limitations to freedom of religion or belief is Article 16, section 4 of the Charter of Fundamental Rights and Freedoms, which stipulates: "The exercise of these rights may be limited by law in the case of measures necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others"'[19].
>
> 'Religious communities are further restricted by certain provisions of Act No. 3/2002, on Churches and Religious Societies; section 5, for example, bans the formation and practice of dangerous religious communities. Under section 22, subsection 1, letter c) thereof, the Ministry of Culture is allowed to commence

[16] See 'Report on Extremism in the Territory of the Czech Republic in 2016', Ministry of the Interior Security Policy and Crime Prevention Department, 22 May 2017, <http://www.mvcr.cz/mvcren/file/final-report-on-extremism-cz-2016-pdf.aspx> (accessed 18 Jul 2018).

[17] The plan for combating extremism in 2017 was approved by Resolution of the Government of the Czech Republic No 394/2017 of 22 May 2017.

[18] Czech and English versions of the 'National Security Audit' are published at <http://www.mvcr.cz/cthh/clanek/audit-narodni-bezpecnosti.aspx> (accessed 26 Jul 2017).

[19] Tretera and Horák, *Religion and Law in the Czech Republic*, p. 44, s 98.

> proceedings on the cancellation of the registration of religious communities or their unions, should they carry out activities contradicting the legal order. The fact that a religious community does not gain legal personality earlier than after qualifying for the registration, completing an application therefor, and being truly registered, may be deemed as a certain restriction, although understandable'[20].

So far, no religious community has been banned under the above-mentioned provision.

> 'Provisions in the administrative and criminal law may be used to combat extremism (restriction of the right to freedom of expression, of association, of assembly, of petition or the labour law-e.g., the impossibility of extremists to exercise certain professions in the security field)'[21].

2. Impact of the Legislative Framework on Individual Religious Liberty (e.g. the Rights of Women and of Children)

The legislative framework on extremism has had no impact on the individual religious liberty of women or of children.

3. Impact of Policies on the Religious Freedom of Religious Communities and their Affiliated Institutions and on Individual Believers

The policies aimed at combating extremism have had no impact either on religious freedom of religious communities and their affiliated institutions or on individual believers.

V. Educational measures to tackle radicalisation and extremism

1. Laws, Policies and Programmes

Measures aimed at preventing extremism in the Czech Republic are described in the above-mentioned 'National Security Audit'. According to this document, several different extremism-prevention projects have been implemented. A number of these projects were very carefully planned and have had a positive impact. That said, there have been at least as many unsuccessful projects as successful ones. This can be explained by the lack of public interest and the cautious approach to the question of extremism on the part of some politicians. The remedy can be sought in the introduction of long-term educational programmes.

[20] Ibid, s 99.
[21] 'National Security Audit', p. 32.

In our opinion, the professional activities of the Interior Ministry, the Security Intelligence Service and the Czech police have been very successful in the fight against extremism and should be promoted by the media and by governmental and civic institutions.

2. Autonomy of Religious Schools

The autonomy of religious schools[22] has not been restricted in connection with the implementation of educational measures to tackle radicalisation and extremism. The curriculum at religious schools in the Czech Republic is very similar to that of public schools. Religious elementary schools follow the compulsory school-attendance guidelines according to the relevant legal provisions. Diplomas issued by religious primary and secondary schools are recognised in the public sphere.

According to the results of public competitions, many religious schools have received high grades in terms of the quality of the teaching they offer.[23] It can be assumed that they would be willing participants in implementing programmes aimed at preventing extremism.

3. Rights of Children and Parents

The above-mentioned educational activities and information about the dangers of extremism should be addressed to parents through local governments, and directly to children through schools, youth organisations and religious communities.

VI. Conclusion

The high degree of religious freedom achieved in the Czech Republic since the fall of the communist totalitarian regime, which promoted atheism, should be maintained. Pastoral care plays an important role outside religious communities, which caregivers can provide to anyone without regard to their religious adherence.

We can appreciate the very high standard of ecumenical cooperation among all Christians and the solidarity of all religious communities in the Czech Republic. These good relations stem not only from past oppression and the common fight against Nazism and communism, but also from their current position as minorities in a similar economic situation and as communities engaged in property settlement negotiations among themselves and with the state.

[22] There are about 140 religious schools in the Czech Republic, including about 90 Catholic schools. They are attended by more than 2% of all pupils.

[23] See Z. Horák, *Církve a české školství* (Praha, Grada, 2011), p. 16.

The relatively moderate attitude and a high level of awareness within religious communities can help in detecting and combating extremism. These things are necessary to promote individual and collective religious freedom.

Under the current conditions in the Czech Republic, we can expect that religious communities will continue to display a good level of mutual understanding and respect, and that their cooperation will help prevent extremism. Expanding religious freedom can help improve the level of trust between the state and religious communities at the national and local level.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN FINLAND

Matti Kotiranta [1]

I. Social context

The religious and socio-political map in Finland has long remained fairly stable. For centuries, the majority of the Finnish population (5,487,308 in 2015) has belonged to the Evangelical-Lutheran Church of Finland (72.9% in 2015). The second-largest religious group in Finland is the Finnish Orthodox Church (comprising just over 1% of the population, with 58,265 members (in 2015). These Christian national churches have played a major role in Finnish society and have had great political influence in the development of religious freedom in Finland [2].

Between 1980 and 2008, the membership of the Lutheran Church increased considerably; however, due to the increase in total population, its relative share decreased (to 80.7% in 2008, down from 90.2% in 1980). The Orthodox Church, Jehovah's Witnesses and the Free Church of Finland are also among those communities whose membership has grown. The number of members of the Catholic Church has more than quadrupled (from 3,051 in 1980 to 13,069 in 2015), yet it is still a relatively small community. The membership of Pentecostal congregations is at approximately the same level as the Orthodox Church; however, not all members of Pentecostal congregations are registered as members of religious communities. The number of registered Pentecostals was 8,726 in 2015.

Looking at the statistics from 2010 to 2015 regarding the members of religious communities, Finland remains a country with a predominantly Christian tradition. In a short period of time, however, much has changed. Recent surveys show that

[1] Matti Kotiranta is a professor of Church History at the University of Eastern Finland.

[2] See M. Kotiranta, 'Religion and the Secular State in Finland' in Javier Martínez-Torrón and W. Cole Durham, Jr. (eds), *Religion and the Secular State: National Reports* (Madrid, Servicio publicaciones facultad derecho, Universidad Complutense Madrid, 2015), pp. 265-272.

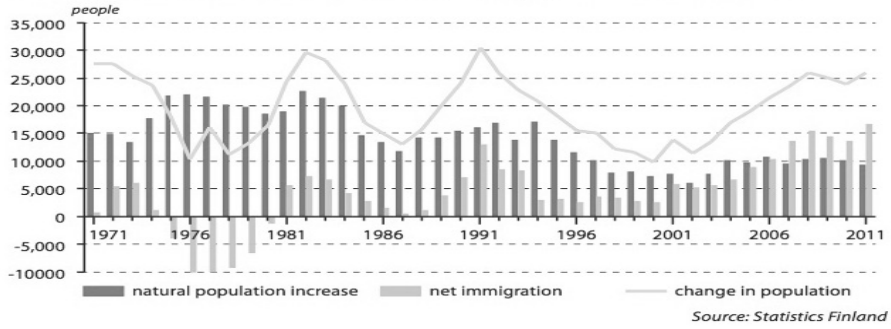
the number of Muslims increased tenfold in Finland from 1990 to 2015. However, no solid information is available about the percentage of Muslims in Finland. It is currently estimated at around 60,000. Few Muslims have organised themselves into registered religious groups, but their registered numbers have clearly increased early in the 21st century (from 810 in 1990 to 1,201 in 2000 and 13,289 in 2015). There are also 1,336,106 (as of 2015) inhabitants of Finland who do not belong to any religious community. This group's total number has almost tripled since 1990 (from 510, 608 in 1990 to 1,336,106 in 2015).

	1990	%	2000	%	2015	%
Total population[1]	4,998,478	100	5,181,115	100	5,487,308	100
Evangelical Lutheran Church	4,389,230	87.8	4,409,576	85.1	4,004,369	72.9
Other Lutheran churches	2,588	0.1	2,228	0.1	977	0.0
Greek Orthodox Church of Finland	52,627	1.1	55,692	1.1	58,265	1.1
Other Orthodox churches	800	0.0	1,088	0.0	3,425	0.0
Jehovah's Witnesses	12,157	0.2	18,492	0.4	18,286	0.3
Free Church in Finland	12,189	0.2	13,429	0.3	15,409	0.3
Roman Catholic Church	4,247	0.1	7,227	0.1	13,069	0.2
Islamic congregations	810	0.0	1,201	0.0	13,289	0.2
Adventist churches	4,805	0.1	4,316	0.1	3,458	0.1
Pentecostal Church in Finland	-	-	-	-	8,762	0.1
Church of Jesus Christ of Latter-Day Saints	2,883	0.1	3,307	0.1	3,259	0.1
Baptist congregations	2,565	0.1	2,436	0.0	2,657	0.0
Methodist churches	1,251	0.0	1,260	0.0	1,415	0.0
Jewish congregations	1,006	0.0	1,157	0.0	1,133	0.0
Others	712	0.0	920	0.0	1,293	0.0
No religious affiliation	510,608	10.2	659,979	12.7	1,336,106	24.3

Over the relatively short period since World War II, Finland has become part of an ever more mobile and globalised world and changed from being a country of net emigration to one of net immigration. The number of migrants in Finland has almost doubled since 2000. In 2011, the number of migrants arriving in Finland was 29,500, which is more than at any time since Finland's independence in 1917.

[3] See Statistical Yearbook of Finland 2016, Statistics Finland, 30 December 2016. For details, see <http://www.stat.fi/til/vaerak/2015/01/vaerak_2015_01_2016-09-23_tau_006_fi.html> (accessed 9 Aug 2017).

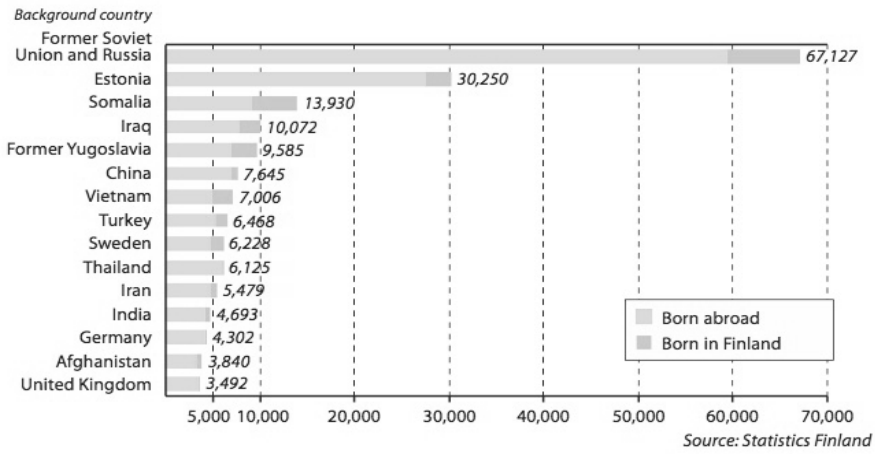
Natural population increase, net immigration and change in population in Finland, 1971-2011



According to Statistics Finland, there were approximately 183,000 foreign nationals living in Finland at the end of 2011.

> 'Including those granted Finnish citizenship, the number of people of foreign origin permanently residing in the country was 257,000, or about 5% of the total population. Approximately 220,000 of these people were born abroad. Among people of foreign origin, 59% were of European background, 23% were of Asian background and 12% were of African background[4]. The number of foreigners in Finland is still low compared with that of other Nordic countries and most European countries. The reasons for this include Finland's relatively limited need for foreign workers, the uniqueness of its language and the country's remote location'.

Largest groups among population of foreign origin, 2011



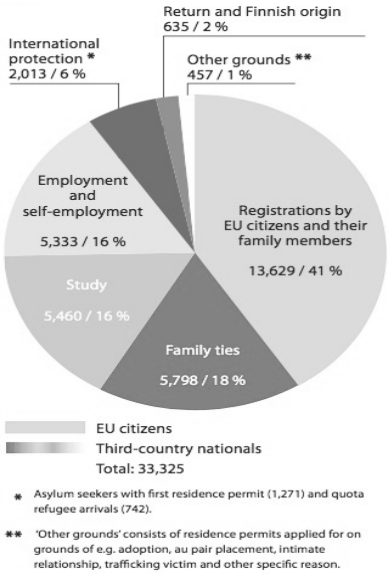
[4] For details see, 'Liitetaulukko 8. Väestö uskonnollisen yhdyskunnan mukaan 2003-2011', *Tilastokeskus*, <http://www.stat.fi/til/vaerak/2011/01/vaerak_2011_01_2012-11-30_tau_008_fi.html> (accessed 30 Jan 2019). For more detail, see *Government Resolution on the Future of Migration 2020 Strategy* (Helsinki, Ministry of the Interior, 2013), p. 5, <http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/FIN/INT_CERD_ADR_FIN_22740_E.pdf> (accessed 15 Feb 2018).

According to the Government Resolution on the Future of Migration 2020 Strategy (GRFM Strategy), foreigners' main reasons for moving to Finland are family, study and work (this is elaborated later on in this chapter). More than half of all migrants come from outside the EU and are known as 'third-country nationals'. Migration to Finland from EU member states has also increased significantly. Third-country nationals and EU citizens are subject to various entry and residence requirements and permit procedures[5].

> 'The number of first residence permits granted to third-country nationals has been between 12,800 and 19,600 every year since 2005. In 2011, the Finnish Immigration Service (FIS) granted 17,683 first residence permits on grounds other than international protection, and the Finnish police granted about 60,000 permit extensions. The biggest groups of recipients granted residence permits were citizens of Russia, India and China'[6].

Due to the freedom of movement within the EU for EU citizens and their family members, it is, according to the GRFM Strategy, difficult to obtain precise information on citizens of EU member states who migrate to Finland, particularly those who come on a short-term basis. According to the GRFM Strategy, approximately 13,600 EU citizens migrated to Finland in 2011 and registered their stay. It is estimated that there are about 50,000 EU citizens working in Finland on a temporary basis. These people are principally from Estonia and other EU countries close to Finland.

Registrations by EU citizens and residence permits granted to third-country nationals, 2011[7]



5 Ibid, p. 7.
6 Ibid.
7 Ibid.

Historically, there have been many reasons for emigration from, and immigration to, Finland. In the past, people primarily left the country for economic reasons, migrating to the United States, Canada and, in the 1960s-1970s, especially to Sweden[8]. During the last one hundred years, more than 1 million Finns have moved abroad, nearly 500,000 of them before, and about 730,000 after, World War II. Before the war, the majority of emigrants moved to North America and, after the war, about 75% went to Sweden. Approximately half of them have returned. According to Jouni Korkiasaari (1992, 1993), emigration has generally followed economic development in target countries; during booms, it has increased, and during recessions, it has correspondingly decreased.

Table 1. Emigration from Finland in 1860-1999[9]

Destination	1860-1944	1945-1999
Sweden	(45,000)	535,000
Other Europe	(55,000)	125,000
United States	300,000	18,000
Canada	70,000	23,000
Latin America	1,000	5,000
Asia	500	6,000
Africa	1,000	4,000
Oceania	3,500	20,000
Total	**476,000**	**736,000**

Since several wars and conflicts have broken out around the world in the last 20 years, many refugees have come to Finland, for political reasons, to find a safe place to live until the situation in their home country stabilises. The first official refugees

[8] For more detail about about immigration and emigration between Finland and Sweden in 1960-1984, E. Heikkilä, *Siirtolaisuus Suomesta Ruotsiin 1960- luvulla ja tämän päivän maastamuuton kuva - mitä olemme oppineet, mitä opittavaa vielä olisi*? (Helsinki, Siirtolaisuusinstituutti, 2014), p. 8, <http://www.migrationinstitute.fi/files/pdf/presentation/Elli_Heikkila_PohjolaNorden_28042014.pdf> (accessed 30 Jan 2019); see also J. Korkiasaari and I. Söderling, 'Finnish Emigration and Immigration after World War II: Siirtolaisuusinstituutti (Åbo, Migrationsinstitutet Turku, 2003), pp. 1-3, <http://www.siirtolaisinstituutti.fi/files/pdf/artikkelit/finnish_emigration_and_immigration_after_world_war_ii.pdf> (accessed 2 Feb 2019).

[9] Table 1 by Korkiasaari and Söderling, 'Finish Emigration', p. 3.

in Finland (some 200 people) came from Chile in the 1970s. Chileans were surprised, as there were still few foreigners in Finland at that time[10].

In the 1990s, most refugees came from Eritrea and Somalia, and most of them were Muslims. In the wake of humanitarian crises and wars in Afghanistan, Iraq, Syria and the former Yugoslavia, the number of asylum seekers has increased, especially from Iraq and the former Yugoslavia. The Ministry of the Interior (MI) has not yet released any data on the religious identity of immigrants. The record number of asylum seekers (especially from Iraq) in 2015 will influence how Finland deals with migration for years to come. The increase in the number of migrants granted residence permits will probably increase the number of applications for citizenship and family reunifications. The significance of return and removal will continue to be emphasised.

However, migration does not just involve asylum seekers. In accordance with the government's programme, Finland will continue to promote labour force migration that strengthens employment and public finances. The MI is working on several national legislative projects related to labour migration.

On 14 June 2017, the MI set up a project to prepare the government's migration policy programme. The programme is intended to lay down Finnish migration policy guidelines for the current government's term in office and was completed on 26 January 2018[11]. The programme also means tackling radicalisation with good migration policy in order to combat extremism and terrorism.

II. Political and public debate

Over the last few years, there have been two main clusters of themes related to the securitisation of Finnish society: the European debt crisis and the migrant crisis in the spring of 2015. The European Union has been experiencing a *debt crisis* (often also referred to as the Eurozone crisis or the Euro crisis) since the end of 2009. The crisis has had a significant adverse economic impact, with unemployment rates in Finland reaching 10.7% (as of 20 June 2017), and it has slowed economic growth. Job loss and decreased job security, tax pressure and very tight budget cuts have become a part of everyday life in various segments of the Finnish population.

With the wars and humanitarian crises in Syria and Afghanistan, Finland faced an unprecedented migrant crisis in the spring of 2015. The record number of asylum

[10] See interview with Alfonso Padilla in M. Rinta-Tassi, 'Ensimmäiset pakolaiset tulivat Suomeen Chilestä 1970-luvulla - "Meitä pelättiin, eikä linja-autossa istuttu viereen"', ('The first refugees came to Finland from Chile in the 1970s - "We were afraid, and people didn't sit next to us in the bus"', 30 Aug 2015, <Https://yle.fi/uutiset/3-8265638 >(accessed 15 Feb 2018).

[11] For more detail, see 'Work in Finland - Government Migration Policy Programme to Strengthen Labour Migration', <http://urn.fi/URN:ISBN:978-952-324-184-8> (accessed 16 Jan 2019).

seekers in 2015 will burden the branch of the Finnish administration that deals with migration for years to come.

Of these two, the public and political debate directly or more loosely related to religion is the migrant crisis. More concretely, the public debate is about the possibility of religiously motivated terrorism among asylum seekers who have come to Finland from conflict areas. In this context, it is worth mentioning that the tension between religion and secularity does not normally play a very significant role. For most Finns, religion is a private affair and is not of great importance in political debate; tension arises perhaps more frequently from ignoring religion in the public domain.

In recent years, there have been numerous terrorist incidents with a religious aspect in Belgium, France, Germany and the United Kingdom, all leading to lively public and political debates as to how the EU and its member states should deal with extremism and prevent radicalisation. To some extent, this debate has also taken place in Finland. In public debate, violent religious extremism is mainly seen in Finland as connected to Islam. In part, this also concerns so-called extreme right-wing groups that possess strong anti-immigration feelings.

Violent, extremist Islamist thinking is not widespread in Finland, and the risk of organised radical Islamist terrorism is low[12]. The Muslim community in Finland is very moderate, and it has condemned on several occasions the use of religiously justified violence. However, the Syrian conflict has reinforced some extremist Islamist thinking in Finland, and the threat of terrorist attacks has increased in people's minds. The ideological support from extremist Islamic movements for terrorist organisations has not directly increased the risk of violence in Finland, but it has increased the fundraising and recruiting of members for foreign terrorist organisations, mainly from the big cities of southern and western Finland[13]. Also, suspicions of the presence of

[12] The first Islamist terrorist attack to take place in Finland (in Turku) occurred on 20 Aug 2017, and it was carried out by an individual actor who had been radicalised in a very short time.

[13] Since the start of the Syrian conflict, several Finnish Muslims have left Finland for the conflict zones of Syria and Iraq:

- at least 44 people, including 36 men and eight women, and 31 Finnish citizens;
- 18-50 years old, the largest group made up of 21- to 24-year-olds;
- representing 17 different ethnicities, including members of the parent population;
- the first ones left in 2012;
- most of them have left from the big cities of southern and western Finland.

See *Väkivaltainen ekstremismi Suomessa. Tilannekatsaus* 2/2014 (*Violent Extremism in Finland. Review 2/2014*. The Ministry of Interior), <http://intermin.fi/documents/1410869/3723676/ Vakivaltainen-ekstremismi-Suomessa-tilannekatsaus-2-2014.pdf/4548b2a9-64f0-4b24-bf03-dd66b9ca6a1b> (accessed Aug 2017). See *Violent Extremism in Finland: Reviews 2/2015 and 1/2017*. See also the very interesting research by N. Johanna Nuolioja, 'The radicalization phenomenon in the Helsinki metropolitan area: Muslim opinion-leaders comment the debate on radicalization' (University of Helsinki, Department of World Cultures, Master's Thesis 2015), <https://helda.helsinki.fi/bitstream/

terrorist infiltrators among asylum seekers who have come to Finland from conflict areas has slightly increased.

One key issue in the debate over radical Islam has been whether the state should adopt a stricter approach to Islamic radicalisation, i.e. towards individual actors or small groups motivated by radical Islamist propaganda or terrorist organisations encouraging them. The Finnish Security Intelligence Service (Supo) has addressed this public concern by screening around 350 target individuals in Finland[14]. Another branch of public debate is the concern over how different Muslim congregations relate to the right of religious freedom in Finnish society. In other words, do Muslims have a different understanding of what is meant by religious freedom without any reservation in favour of the Quran or Sharia law?

Finland is not considered to be a likely or priority target of terrorist attacks. However, the possibility of a terrorist attack cannot be completely discounted. In addition to Finnish targets, terrorists may attempt to strike representatives or facilities in Finland of countries considered prime targets, especially if security measures are deemed lax. Major international events organised in Finland could also be targeted.

After the Westminster Bridge attack (22 March 2017) and the London Bridge and Borough Market attacks (3 June 2017), Supo announced that, while the threat of a terrorist attack had increased in Finland, there was no reason to panic: 'Finland remains one of the safest countries in Europe […] and we do not see any particular cause for concern'[15]. From Supo's point of view, the biggest threat to Finland's internal security are lone actors: individuals who independently perpetrate a terrorist attack or some other wide-scale act of violence.

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handle/10138/159593/The%20radicalization%20phenomenon%20in%20the%20Helsinki%20metropolitan%20area%20Nora%20Nuolioja.pdf?sequence=2>. According to Nuolioja's analysis of the research interviews she conducted, it can be concluded that there are several factors present when defining the phenomenon of radicalisation in a Muslim context in the Helsinki metropolitan area: political grievances, youth, the media, social exclusion and the polarisation of society. These elements in their various forms are interconnected and intertwined in shaping and sustaining the phenomenon.

[14] According to Supo, the number of target individuals has increased especially in the last few years and by about 80% since 2012. 'This trend is assessed to go on, as a consequence of radicalisation and detection of new networks. In addition to the increase in number, the links of target individuals to terrorist activity are also more direct and more serious than before. An increased number of them has either taken part in an armed conflict, expressed willingness to participate in armed activity, or received terrorist training'. See 'Terrorist threat assessment 14.6.2017', Finnish Security Intelligence Service, 14 Jun 2017, <http://www.supo.fi/counterterrorism/terrorism_threat_assessment> (accessed 2 Feb 2017).

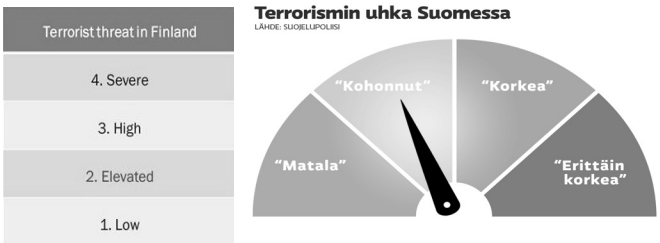
[15] 'Supo Director Antti Pelttari statement, Terrorismi (Terrorism)' *YLE-News*, 14 Jun 2017. The very same day, Supo publicly introduced a four-step **threat-level assessment process**, which Supo uses to communicate with citizens regarding the current threat of a terrorist attack. For more, see 'Terrorist threat assessment 14.6.2017':

On 10 October 2001, Finland's Ministry for Foreign Affairs submitted a report titled *Terrorism and Finland* (last updated 31 December 2004) to the Finnish government. It states that the government should adopt a zero-tolerance approach towards terrorism and radicalisation:

> 'Finland condemns terrorism in all its forms. Terrorism is a threat to the implementation of human rights, democracy and the rule of law, as well as to internal security and international peace. Finland underlines the importance of international cooperation and collective action as well as of respect for human rights and for the rule of law in the [fight] against terrorism'[16].

The report stresses the following measures:

- *Bringing those responsible for terrorist acts to justice;*
- *Strengthening the role of the United Nations conventions against terrorism;*
- *Strengthening transatlantic cooperation to combat terrorism (through the exchange of information, effective inter-authority cooperation and cooperation against the financing of terrorism);*
- *Concentrating efforts to resolve regional conflicts (in particular, conflicts in the Middle East);*
- *Strengthening the system of international law;*
- *As a preventive action in the long run, eradicating poverty and enhancing good governance, democracy and respect for human rights in order to help deny terrorist groups a breeding ground;*
- *Strengthening international efforts at non-proliferation and arms control;*



Threat levels are used to describe the terrorist threat against Finland and Finnish interests. The factors taken into account when assessing the threat level include the available intelligence, operational capacity and motivation of terrorist organisations or individuals and groups linked to them, as well as the time span of possible attack plans. The aim of the classification is to provide a clear picture of the nature of the threat against Finland and to determine whether the threat level has changed from the previous assessment. If the threat level increases to level 4, that would indicate an immediate threat of terrorist attacks and massive governmental actions.

[16] Ministry of Foreign Affairs 'Terrorism and Finland' (Helsinki, 2004), p. 2, <http://formin.finland.fi/public/default.aspx?contentid=55713&nodeid=15145&contentlan=2&culture=en-US> (accessed 16 Jan 2019).

- *Underlining the central role of the UN Security Council in actions against terrorism*[17].

The report stresses the importance of preventive work. In order to attain lasting results in the fight against terrorism, it is essential to consider the conditions that breed extremist ideologies and terrorism as a political tool:

> 'In order to prevent terrorism and eliminate the breeding ground for terrorist acts, measures to eradicate poverty and to enhance good governance and respect for democracy and human rights are necessary. Efforts have to be made as well in finding solutions to regional conflicts. These objectives are pursued by Finland in long-term development cooperation with all partner countries'[18].

III. Legal and political framework

1. Definition of Extremism, Fundamentalism and Radicalisation

There have been many attempts to define extremism, fundamentalism and radicalisation, but no generally accepted definitions exist. Nor does Finland have a unique definition for these terms in its legislation. However, the authorities in state administration have provided their own framework of interpretation. Common to the various definitions is that radicalisation is the process by which a person comes to support extremist and terroristic ideologies; then extremism and terrorist violence are perceived as the instruments of a certain political agenda and, therefore, that they differ from common crime.

The newest form of religiously motivated extremism/terrorism (distinct from nationalistic and regionally limited terrorism that is mainly aimed at creating separate states), which operates globally, is devoid of clearly defined objectives and is aimed at having a highly destructive impact. It is primarily associated with a network of extremist Islamist groups. The best-known examples of this new kind of international terrorist organisation are al-Qaeda and ISIS. There are often underlying factors behind terrorism, such as social inequality and repression. Actions aimed at diminishing these factors will also weaken the breeding grounds for terrorism.

In the Finnish legal system, functions vital to protecting society are mentioned in a government resolution of 27 November 2003, which states that an offender performs an act of terrorism if their purpose is to: 1) arouse extreme fear among the population; 2) unduly force a government, any other authority or an international organisation to do or tolerate something or omit doing something; 3) unduly repeal or change a country's constitution, significantly shake its legal system or cause particularly extensive damage to its economy or its basic structures; or 4) cause particularly extensive

[17] Ibid.
[18] Ibid, p. 15.

damage to the financial circumstances of an international organisation or the basic structures of such an organisation.

2. Legislation Enacted to Prevent Terrorism

In Finland, the measures required by the EU's Framework Decision on combating terrorism have been implemented by amendments to legislation that went into effect at the beginning of February 2003.

A new chapter (Chapter 34a (HE 188/2002)) on terrorist offences was added to Finland's Criminal Code. It contains provisions on the punishment applied for offences committed with terrorist intention (Section 1)[19] and for the preparation of such offences (Section 2), the offence of directing a terrorist group (Section 3), the facilitation of the activities of a terrorist group (Section 4)[20] and the financing of terrorism (Section 5)[21]. It also contains a definitions provision (Section 6)[22], a provision on the right of prosecution (Section 7)[23] and a provision determining the liability of legal entities (Section 8). Certain minor amendments were also made to the Criminal Code, and the Coercive Measures Act was adjusted accordingly. The law was updated with supplements on 3 April 2014, 1068/2014 (HE/2014)[24], and 2 June 2016, 919/2016 (HE 93/2016)[25]. Neither of these laws deals with the subject of religious beliefs.

Finland ratified the International Convention for the Suppression of the Financing of Terrorism on 28 June 2002. The convention and the nationally implemented legislation entered into force on 28 July 2002.

[19] Section 1 of the new chapter on terrorist offences provides for such offences for which an increased sentence may be passed when the offence has been committed with terrorist intentions. The list of offences in Section 1 corresponds to the list of offences included in the Framework Decision and, almost without exception, such offences were already subject to punishment before the enactment of the new provisions.

[20] The provisions relating to terrorist groups (Sections 3 and 4) are entirely new. 'Facilitation of the activities of a terrorist group' means certain acts that are committed with the intention of facilitating the criminal activities of a terrorist group as referred to in Sections 1 and 2.

[21] Section 5 is the earlier Section 9b of Chapter 34 concerning the financing of terrorism, with certain adjustments, which is partly based on the International Convention for the Suppression of the Financing of Terrorism and partly on the aforementioned Framework Decision.

[22] Section 6 defines 'terrorist intention', 'terrorist group' and 'international organisation'.

[23] Under Section 7, a decision on prosecution in respect of offences referred to in this chapter must be made by the prosecutor-general.

[24] Added to Chapter 34a of the Criminal Code were Article 4c (Recruitment for a terrorist offence) and Article 5a (Funding a terrorist group).

[25] Added to Chapter 34a of the Criminal Code was Article 5b (Travelling to commit terrorist offences).

The new provisions prohibiting the financing of terrorism were later inserted, in the context of the national implementation of the EU Framework Decision on combating terrorism, into the new Chapter 34a of the Criminal Code on terrorist offences.

In Finland, the implementation of the relevant UN and EU instruments pertaining to the freezing of funds required amendments to the Act on the Enforcement of Certain Obligations of Finland as a Member of the United Nations and of the European Union, i.e. the Sanctions Act (659/1967), and of Chapter 46 of the Criminal Code. The amendments to the national legislation entered into force in May 2002.

The Special Recommendations on Terrorist Financing issued by the Financial Action Task Force (FATF) were partly implemented in Finland by the amendments made to the Act on the Detection and Prevention of Money Laundering, i.e. the Money Laundering Act, which entered into force on 1 June 2003. The most relevant amendment is the extension of the obligation to report suspected cases of money laundering.

3. Legislation Indirectly Relevant to Tackling Extremism and Radicalisation

On the one hand, Finland has no legislation directly addressing the tackling of extremism or radicalisation. On the other hand, there is a lot of legislation (see Section 3.2 and subsequent sections) that has hopefully made an impact on extremism as well as radicalisation. There is also legislation regarding immigration, which is indirectly aimed at hindering extremism and radicalisation. The central legal provision governing immigration into Finland is the Aliens Act (30.4.2004/301). The act provides criteria and procedures for granting asylum. Pursuant to Section 52 of the act, a residence permit can be issued for individual humanitarian reasons when rejection of the application would be unreasonable given the applicant's state of health, ties to Finland or other individual reasons, as well as circumstances in which he or she would end up in a vulnerable state in his or her home country. Religion, as grounds for seeking asylum, has been an issue to varying degrees. Iranian Baha'is and Christians have been the most successful in this regard. In general, religion is not the most important factor for seeking asylum in Finland.[26]

In this context, it is also worth mentioning the government's Internal Security Programme, adopted in September 2004, which set the following goals for combating extremism and terrorism: that Finland will not become a target of terrorist acts and that terrorist acts will not be planned or carried out in Finland. The programme's strategic guidelines are as follows: (1) the police are responsible for practical measures in combating terrorism in Finland, and such activities are based on international

[26] On the subject of immigration and religion in Finland, see S. Sirva, 'Finland' in Agustin Motilla (ed), *Immigration, National Laws and Freedom of Religion* (Leuven, Peeters, 2012), pp. 69-74. Proceedings of the XXIst Meeting of the European Consortium for Church and State Research.

cooperation; (2) activities are based on the EU's strategic guidelines on combating terrorism; (3) pre-emptive measures aimed at preventing terrorist attacks should be effective; and (4) nationally, preparedness for combating terrorism will be maintained at a high level.

Terrorism is mainly countered by inter-authority cooperation between the intelligence services and the police and border guard. The legislation concerning the border guard has been completely revised, and the plan is to increase its readiness to respond to special situations in internal security by providing it with the expertise and equipment needed to counter terrorism and to carry out special operations led by the police.

Terrorism-related threats especially concern the field of the Ministry of Transport and Communications. Already in the 1960s, aircraft hijackings were a common form of terrorism. In recent years, attacks using means of transportation have been carried out in France, Germany and the United Kingdom.

In the field of civil aviation security, the European Commission issued a regulation on 16 December 2002 establishing common rules. In Finland, national regulations were included in an act on security checks in civil aviation. Finland raised its security readiness and security levels after 11 September 2001 and will maintain them at a high level in the future. At the same time, stricter regulations concerning carry-on items and substances in carry-on baggage have been introduced.

At the beginning of 2005, new international agreements on measures to counter terrorist threats in the carriage of dangerous goods entered into force. After September 2001, energy companies increased surveillance at oil refineries and power plants. The threat of terrorism has been taken into account in the regulations and requirements for the construction and operation of new nuclear energy plants.

Also, attacks on electronic communication and information systems have become a commonplace form of terrorism. Such attacks can damage the normal functioning of society and cause a threat to the population. On 4 September 2003, the government adopted a National Information Security Strategy. The strategy received the European Information Security Award in November 2003. At the beginning of September 2004, a new Act on the Protection of Privacy and Data Security in Telecommunications entered into force, aimed at safeguarding the confidentiality, privacy and information security of telecommunications.

Although there is no direct threat of bioterrorism in Finland, the healthcare authorities have increased their preparedness to respond to biological attacks. Within the framework of the European Union, Finland participates in the preparation of programmes to address the threat of biological, chemical and nuclear terrorism. Cooperation has resulted in the elaboration of EU standards applicable to preparedness and responses to such threats.

Several authorities participate in counterterrorism activities in Finland: the Ministry for Foreign Affairs, the MI and its subordinate authorities (specifically the National Bureau of Investigation, Supo and the border guard), the Ministry of Justice,

the Government Secretariat for EU Affairs, the Office of the Prosecutor-General, the Financial Supervisory Authority, the Ministry of Finance, the Ministry of Defence and the armed forces, among others.

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

Most policies tackling radicalisation and extremism are non-legislative. The main resources and tools here involve strengthening information and knowledge exchange between officials and local authorities, as well as among networks of professionals. In Finland, the MI has been very active in this field. As mentioned before, the MI set up, on 14 June 2017, a project for the preparation of the government's migration policy programme. The programme (scheduled to be completed in early 2018) is aimed at tackling radicalisation with good migration policy in order to combat extremism and terrorism. The preparation of the programme will be the responsibility of an intersectoral working group led by the MI with representation from the Ministry of Justice, Ministry of Economic Affairs and Employment, Ministry of Education and Culture, Ministry of Social Affairs and Health, Ministry for Foreign Affairs, Ministry of the Environment, the FIS, the National Police Board and the Finnish Border Guard.

Social work with immigrants has shown that special issues concerning immigrant clients are connected to understanding the language, culture and functioning of Finnish society, to the experiences of everyday racism as well as to the important —and partly contradictory— roles of the family and ethnic community. Culture is changing in the lives of immigrant children and adolescents, and this is continuously a topic of negotiation[27]. It means more equality and tolerance inside Muslim communities.

Prominent universities in Finland, e.g. Helsinki, Tampere and Turku, have established seminars and lectures on Arabic and Islamic studies[28], increasing critical awareness and sensitivity about Islamic culture. Also, Yle (Yleisradio), Finland's national public service broadcasting company, has hosted some roundtable discussions on Islam (entitled *Islam-ilta*) to open a platform for discussions about the religion and its future in Finland[29].

[27] M. Anis, *Sosiaalityö ja maahanmuuttajat. Lastensuojelun ammattilaisten ja asiakkaiden vuorovaikutus ja tulkinnat* [Social Work and Immigrants. Interaction and Interpretations of Child Protection Professionals and Clients (Väestöntutkimuslaitoksen julkaisusarja D 47/2008, Helsinki, 2007). This dissertation is available in elctronic form, <http://www.utupub.fi/bitstream/handle/10024/35938/diss2008Anis.pdf?sequence=1&isAllowed=y> (accessed 16 Jan 2019).

[28] For more, see University of Helsinki, <http://www.helsinki.fi/arabicandislam/> (accessed 16 Jan 2019).

[29] See 'Islam-ilta' (Ajankohtainen kakkonen) *YLE*, 29.10.2013 and 30.10.2013). These vidoes are available on YouTube at <https://www.youtube.com/watch?v=AkgYx-Jfdik> and> (accessed 16 Jan 2019).

IV. Effects of the measures on religious freedom

1. Effects of the Legislative Framework Tackling Radicalisation and Extremism on Religious Freedom

General principles of constitutional law and the fundamental rights of other people are the foremost limitations to freedom of religion. In Finland, legislators have been very strict and neutral, avoiding conflict with the constitutional norm on religious freedom[30] even while fighting against terrorism and radicalisation. There are no general prohibitions of certain religious communities. The only reasons for prohibitions are violations of criminal law. A specific prohibition of a certain religious association is possible only if criminal law (Chapter 34a of the Criminal Code on terrorist offences) is violated.

The new Freedom of Religion Act contains provisions that concern membership in religious associations, the procedures involved in joining or leaving a religious association, the oath and affirmation and the application of the law on assembly to the public practice of religion. To put it more precisely, the law enacts exhaustively and in detail the legal status, foundation, rights and obligations of churches and registered religious associations.

Under the Freedom of Religion Act, religious associations[31], e.g. Arabic and Muslim faith communities, may accept their order of association, and then it must be approved by the authorities, i.e. the National Patent and Register Board, provided that the order of association is not illegal. In Finland, however, Sharia law does not play any role, so it is not a matter (order) that registered religious associations could

[30] The relevant section of the Finnish Constitution of 2000 on freedom of religion and conscience states:

1. Everyone is entitled to the freedom of religion and conscience, implying the right to profess and practise a religion, the right to express one's convictions, and the right to be a member of a religious community; and
2. No one shall be under any obligation to participate in the practice of religion against his or her conscience.

[31] In the Finnish context, three different types of legal person can be distinguished in religious associations. (1) The status of the Evangelical Lutheran Church under public law is ensured in the constitution. (2) In the new constitution, there is no direct provision for the Finnish Orthodox Church regulating its position in society. In this respect, the legislative status of the Orthodox Church differs from that of the Lutheran Church. The Orthodox Church is the subject of the new law concerning the Orthodox Church of 2007 (HE 985/2006). (3) In Finland, a registered religious association is a special type of community. Its foundation and legal status are governed by Section 2 of the Freedom of Religion Act. Such a religious body gains the status of a legal person, that is, it can acquire property, enter into contracts and be a litigant in court and with other authorities once it is entered in the register of religious associations. In this respect, the regulation observes the principle otherwise observed in Finnish community law, whereby the community achieves legal capacity once it is entered in the register of associations kept by the authorities, in this case the National Patent and Register Board.

choose by themselves. There has not even been a discussion of how principles of equality apply to the application of Jewish and Sharia law, although the latter has given rise to some public concern.

2. Effects of the Legislative Framework on Individual Religious Liberty (e.g. the Rights of Women and Children)

The public debate has touched on two issues regarding the protection of women and children in the migration crisis: (a) the rights of women and children in the crisis and (b) fears about unfair deportations of women and children to conflict areas, e.g. Afghanistan, Syria and Iraq.

(a) In 2015, over 32,000 asylum seekers arrived in Finland. In the past, asylum seekers in Finland were, to a large extent, young men. The situation has changed in many ways. A typical asylum seeker is no longer a young, solitary traveller. Now, 60% of those leaving conflict areas are women or children. Children are at high risk of becoming victims of human trafficking.

The Dublin Regulation is the cornerstone of EU legislation on international protection. Finland is committed to observing the Council of Europe Convention on Action against Trafficking in Human Beings. Recently, the FIS has received much public criticism for setting the bar too high when evaluating whether a person is in a vulnerable or highly vulnerable position. It has been argued, for example, that a child's poor health or being in a parent's sole custody is not sufficient for that child to be granted a residence permit on the grounds of being in a highly vulnerable position or of potentially becoming a victim of human trafficking. The FIS has stressed that the authorities in a victim's home country must be unwilling or unable to protect the victim from threats posed by, for example, criminal organisations.

The FIS has also been criticised for not knowing what happens to victims of human trafficking who are refused entry. The FIS has answered this, emphasising the following:

> 'no Finnish authority has a statutory obligation, not to mention the right, to track the citizens of other states abroad. If it had, this would violate [individuals'] legal protection. Finland is bound by non-refoulement. We do not return people if they may be subject to the death penalty, torture, persecution or other inhumane or degrading treatment. We are not aware of a single case in which an asylum seeker who has been refused entry to Finland has fallen victim to such acts or conditions of non-refoulement'[32].

[32] Esko Repo, Director of the Asylum Unit, Finnish Immigration Service. Press releases, Press and Communications Services, 18 Aug 2016.

In Finland, each application for asylum is handled individually, and the FIS decides in exceptional cases to examine individual applications more closely. Health problems do not usually mean that an applicant is refused entry and returned to another EU member state. However, if for some reason, the applicant is, for example, unable to take care of his or her child, the application for asylum can be processed in Finland if this is in the best interests of the child.

(b) Fear about unfair deportations of women and children to conflict areas, e.g. Afghanistan, Iraq and Syria, has led to a very lively public discussion in Finnish newspapers.[33]

Despite the strict policy of the FIS, it has done superb work with minors who arrive in Finland without a guardian. The FIS describes its policy on this matter in the following manner on its website:

> 'Unaccompanied minors under 16 years of age are accommodated in group homes. The training of the staff and the services provided in these group homes are the same as in Finnish child protection facilities. Children who have already obtained a residence permit but who do not have family in Finland live in family group homes.
>
> Asylum seekers between 16 and 17 years of age are accommodated in supported housing units.
>
> Asylum seekers who have reached the age of 18 are accommodated in reception centres for adults and families.
>
> Unaccompanied minors can also be accommodated in another place intended for children.
>
> In addition to accommodation, other basic needs of children who do not have a guardian in Finland will be taken care of at group homes and supported housing units. The children will receive social and health care services, such as professional care, food, and financial support. The services also include professional care and fostering plans. The children will receive schooling and other education according to their age and educational level. They will also receive legal aid, and interpreter services are available if required'[34].

According to the FIS's protocol, every child who does not have a guardian will be designated a representative whose duties include looking after the child's interests in every situation. The representative uses the right of action that belongs to the guardian of a minor child and helps the child with official matters. The representative

[33] See, for example, 'Turvapaikanhakijoiden palautuslento lähti, yli 200 ihmistä osoitti mieltä lentoasemalla - Sisäministeriön Nerg: "Ketään ei lähetetä kuolemaan"' ('Return flight of asylum seekers left, more than 200 people expressed their opinuion at the airport - Ministry of the Interior Nerg said: "No one is sent to death"') *Helsingin Sanomat* 4 Apr 2016 and *Helsingin Sanomat* 5 Apr 2017.

[34] Finnish Immigration Service, <http://www.migri.fi/asylum_in_finland/reception_activities/reception_services/children_without_a_guardian> (accessed 15 Feb 2018).

is present, for example, at the asylum interview that is part of the processing of an asylum application[35].

3. Effects of the Policies on Religious Freedom of Religious Communities and their Affiliated Institutions (Schools, Publishing Houses, etc.) and of Individual Believers (e.g. the Rights of Women)

For more details, see Sections 4.1 and 4.2 above and Sections 5.1, 5.2 and 5.3 below.

V. Educational measures to tackle radicalisation and extremism

1. Laws, Policy and Programmes

The matter of violent extremism has not led to changes in the Finnish school system. There has been no demand to ban private religious schools. This is partly due to Finland's high-quality school system, current school laws and the new law on religious freedom (453/2003). According to the law, every student in comprehensive and upper comprehensive schools has a right to religious teaching *according to his or her own confession*. The communal school system is responsible for the organisation and funding of religious teaching. Students who do not belong to a church or religious community participate in ethics classes. The increasing number of students representing different cultures has created a need to train qualified teachers for Muslim religious education. Implicitly, there is a need to challenge intolerance and develop Islamic cultural sensitivity to avoid extremism.

2. Autonomy of Religious Schools

The communal system of comprehensive schools has the main responsibility for providing compulsory education in Finland. Compared with the total number of schools, the proportion of licensed private schools is small. The English school in Helsinki is a Catholic foundation. Licences have also been granted to a few comprehensive schools that are based on religious faiths: there are 17 Christian schools and two other faith-related schools. For children attending these schools, teaching and educational equipment are free of charge. There are some 25 religious preschools[36].

[35] Ibid.

[36] See 'Christian Kindergartens and Schools', Kr. Koulujen ja päiväkotien liitto, <https://kristillinenkoulu.fi/briefly-in-english/> (accessed 16 Jan 2019). On the Finnish education system in general, see M. Kotiranta, 'Religion and the Secular State in Finland', pp. 281-283; and M. Kotiranta, 'Finland' in Gerhard Robbers and W. Cole Durham Jr. (eds), *Encyclopaedia of Law and Religion*, Volume 4: Europe (Leiden/Boston, Brill, 2016), pp. 110-111.

3. Rights of Children and Parents

Children also enjoy the freedom of religion and belief. In the Finnish context, religious maturity is reached only at the age of 18. Until minors have reached religious maturity, it is up to their parents to act on behalf of their children in matters of religion and belief, exercising their right to raise and educate their children according to their religious tradition in conjunction with Article 3 of the Freedom of Religion Act.

When children reach the age of 15, they can, with the written consent of their parents, determine their own religious affiliation. From the age of 12 onward, a child's religious affiliation cannot be changed against his or her will.

According to the new law on religious freedom, every child under school age also has a right to day care arranged by the municipality where they live. The teaching of religion and ethics is a statutory part of day care. In order to enable the participation of as many children as possible, religious education is broadly Christian in scope. As the diversity of children's nationalities and cultures increases, however, there are more and more children in day care whose religious and cultural backgrounds differ from the Finnish tradition. This creates further challenges for religious education in day care.

One particular focus of the immigration discussion in the Finnish context are child protection issues connected to the school environment. According to Merja Anis (2007), children discuss their experiences and involvement in situations within their families, communities and schools. The voice of children in child protection conversations is usually weak unless adults strengthen it. Some children build a stronger voice through conversations[37]. Strengthening the voice of children is essential to improving community cohesion and strengthening the voice of females in Muslim faith communities.

VI. Conclusion

Although Finland, compared to many European countries, has been spared from violent terrorism, the terrorist attacks of 11 September 2001 awakened the nation to a new reality. The events were a watershed moment and initiated new thinking on security issues in Finland. Since 2001, and after several terrorist attacks in Belgium, France, Germany and the United Kingdom from 2014 to 2017, Finland has introduced a wide range of legal and policy measures to prevent terrorism, extremism and radicalisation.

As a member of the international community, Finland participates actively in counterterrorism activities. New emphasis was placed on terrorism in the *Government Report on Security and Defence Policy*, submitted to Parliament in September 2004.

[37] M. Anis, *Sosiaalityö ja maahanmuuttajat*.

For Finland, the most important frameworks in counterterrorism activities are the EU, the UN, the OSCE, the Council of Europe and other international organisations[38]. The UN continues to play a key role as a provider of international norms. When it comes to practical matters, the European Union is the central frame of reference for Finland.

Several authorities participate in counterterrorism activities in Finland: the Ministry for Foreign Affairs, the MI and its subordinate authorities (specifically, Supo and the border guard), the Ministry of Justice, the Government Secretariat for EU Affairs, the Office of the Prosecutor-General, the Financial Supervisory Authority, the Ministry of Finance, the Ministry of Defence and the armed forces.

At the same time, attention has also extended from terrorism to radicalisation and extremism. For instance, the phenomenon of jihadism led Supo to screen around 350 targeted individuals in Finland for the purposes of counterterrorism and the prevention of possible future attacks. However, most policies tackling radicalisation and extremism are non-legislative. The main resource here is the strengthening of information and knowledge exchange between national and local officials, as well as between networks of professionals. In order to prevent terrorism and eliminate breeding grounds for terrorist acts, measures to eradicate poverty and to enhance good governance and respect for democracy and human rights are necessary. These objectives are pursued by the government's migration policy programme, which was set up on 14 June 2017. The programme is also aimed at tackling radicalisation through good migration policy in order to combat extremism and terrorism.

A brief look at Finnish legislation gives the impression that legislators do not have any interest in entering into conflict with the constitutional norm of religious freedom while fighting against extremism and (religiously motivated) terrorism. The reasons for prohibitions are not related to religious beliefs but rather only to violations of criminal law. A new chapter (Chapter 34a) on terrorist offences was added to the Criminal Code in February 2003. It contains provisions on the punishment applied for offences committed with terroristic intent, the preparation of such offences, directing a terrorist group, facilitating the activities of a terrorist group and for the financing of terrorism. The law was updated with supplements on 3 April 2014, 1068/2014 (HE/2014), and 2 June 2016, 919/2016 (HE 93/2016). None of these laws concern religious beliefs.

[38] Ibid, pp. 10-14.

SÉCURISATION DE LA LIBERTÉ RELIGIEUSE RELIGION ET LIMITES DU CONTRÔLE DE L'ETAT EN FRANCE

Francis Messner
Pierre-Henri Prélot

I. Situation religieuse et statistiques récentes de l'immigration

La France est traditionnellement perçue comme un pays « laïque », cultivant une stricte séparation qui relègue le religieux dans la sphère privée et dont population est indifférente à la religion. Dans les faits, elle est encore fortement imprégnée d'une culture catholique marquée par l'humanisme qui tend cependant à s'éroder au profit d'une pluralité de systèmes de pensée où cohabitent diverses traditions religieuses mais également des convictions philosophiques comme l'athéisme ou encore l'agnosticisme et l'indifférentisme. Mais la permanence de la religion catholique reste perceptible dans la vie quotidienne des Français avec la présence, dans les villes et villages, de nombreux édifices religieux, le recours au rite catholique lors de diverses cérémonies commémoratives et de funérailles officielles, ou encore lors des grands débats de société comme le mariage des personnes de même sexe et la fin de vie, qui ont mobilisé une frange non négligeable de la population. La civilisation paroissiale[1] est non seulement en mutation, elle tend à disparaître dans certaines régions. Le diocèse de Tulle fait état de villages où le culte n'est plus dispensé et où les registres de chrétienté ne sont plus utilisés.

L'article 8 de la loi du 6 janvier 1978 modifiée « interdit de collecter ou de traiter des données à caractère personnel qui font apparaître, directement ou indirectement, les origines raciales ou ethniques, les opinions politiques, philosophiques ou religieuses ou l'appartenance syndicale des personnes, ou qui sont relatives à la santé ou à la vie sexuelle de celles-ci ». Par voie de conséquence, les statistiques relatives à l'appartenance religieuse des particuliers ne figurent pas dans les résultats des recensements de la population française par l'INSEE (Institut National de la Statistique et des Études économiques). La connaissance de la sociologie religieuse de la France

[1] G. Le Bras, *L'église et le village* (Paris, Flammarion, 1976).

dépend de la régularité de la publication de sondages. Selon un sondage réalisé par l'IFOP en 2010, 64% des Français se disent catholiques, ils étaient 75% en 1987. Toujours d'après l'IFOP pour *Le Journal du dimanche* en 2011, 4% des Français affirment être protestants, 1% juifs et 2% font partie d'autres religions. En ce qui concerne l'Islam, le rapport de l'INED sur « Sécularisation ou regain religieux : la religiosité des immigrés et de leurs descendants » publié par Patrick Simonet et Vincent Tiberj en juillet 2007 estime à 4,1 millions le nombre de musulmans en France. 49 % d'entre eux déclarent avoir une religiosité forte et seuls 4% se définissent comme « musulmans culturels », alors que 25% des catholiques se déclarent « catholiques culturels ». Notons cependant que les musulmans sont issus de communautés d'origines ethniques diverses qui présentent des niveaux de religiosité très variables.

Les « sans religion », qui regroupent athées, indifférents et agnostiques, concentrent selon ce sondage de l'IFOP de 2010 près de 25% de la population, 36% en 2011 selon le sondage Harris Initiative. Le nombre de sans religion est particulièrement élevé chez les jeunes : 37,5% des 18/34 ans disent n'appartenir à aucune religion. Le nombre des sans religion en France est important si on le compare à d'autres États européens (15 % d'incroyants et d'athées en Espagne par exemple). La ferveur religieuse des catholiques n'est pas très intense, les pratiquants hebdomadaires sont au nombre de 8 %, les pratiquants mensuels au nombre de 9 % et les occasionnels de 31 %[2]. Le nombre de prêtres est en constante diminution : 32267 prêtres diocésains et prêtres religieux en 1990 contre 19640 en 2008. L'atténuation de l'attachement des Français à l'institution catholique se mesure également au nombre de mariages catholiques (74636 en 2010 pour 251654 mariages civils, 61815 mariages catholiques en 2013) et aux baptêmes (302941 pour 824641 naissances, 277639 en 2013). Ces deux derniers chiffres, très inférieurs à ceux des années 1950, ne s'expliquent pas uniquement par l'implantation d'autres religions en France.

La retenue en matière religieuse est également illustrée par la discrétion des hommes politiques par rapport à l'expression religieuse. A l'occasion des élections présidentielles de 2007, les candidats ont été interrogés par un hebdomadaire chrétien sur cette thématique[3]. La quasi-totalité d'entre eux considère que la religion est une expérience spirituelle personnelle ou une affaire privée qui peut jouer un rôle dans la lutte pour la justice sociale.

Les données du recensement de la population de 2014 font état d'une population totale de 65,9 millions de personnes dont 61,7 millions de français et 4,2 millions d'étrangers. Le nombre de français de naissance et de français par acquisition nés en France s'élève à 59,3 millions et les français par acquisition nés hors de France à 2,4 millions. 3,6 millions d'étrangers sont nés hors de France et 0,6 millions sont

[2] CSA, Le Monde des Religions, 2007.
[3] *La Vie*, 5 avril 2007, no 3214.

nés en France. Le nombre d'immigrés (Français par acquisition nés hors de France et étrangers nés hors de France) est de 6 millions.

L'administration a délivré 227 923 titres de séjours (premiers titres) en 2017 dont 88510 pour des raisons familiales, 73324 à des étudiants et 28751 pour des raisons humanitaires. Les pays du Maghreb viennent en tête dans l'attribution des premiers titres de séjours (Algérie 28696, Maroc 27149, Tunisie 15208) suivis par la Chine (15973) et les USA (6788). L'ensemble des titres validés en 2016 se monte à 294208, soit une progression de 7,5 % par rapport à 2015. 80775 d'étrangers ont acquis la nationalité en 2016, dont 68067 par décret et 20708 par mariage (Source : Ministère de l'intérieur, Direction générale des étrangers). 95000 étrangers sont retournés dans leur pays d''origine en 2013. Ce chiffre est en augmentation par rapport aux années précédentes. Le solde migratoire a en effet tendance à se réduire d'année en année.

II. Débat politique et public

Le débat en France s'est essentiellement focalisé sur la prévention de la radicalisation et sur les origines de l'islam radical dont ferait partie l'immigration.

La perception de l'Islam a certes été impactée suite aux actes terroristes, mais sans remettre en cause l'acceptation croissante de cette religion par la société française. 51% des personnes interrogées[4] considèrent que la religion musulmane n'est pas compatible avec les valeurs de la société française, ce qui fait 23% de moins qu'en janvier 2013. De même, 66% des français estiment que l'Islam est une religion aussi pacifiste que les autres et que le jihadisme est une perversion de cette religion. 33% estiment cependant que même s'il ne s'agit pas de son message principal, l'Islam porte malgré tout en lui les germes de violence et d'intolérance.

Les attentats ont cependant entraîné un durcissement en matière de demande sécuritaire. 90% des français sont pour l'augmentation, ou du moins le maintien de l'engagement des forces armées contre le jihadisme au Mali, au Sahel et en Irak, et une majorité pour un durcissement de la lutte contre l'extrémisme au détriment des libertés en France (95% pour durcir les conditions de détention des détenus contribuant à propager les idées extrémistes dans les prisons, 90% pour la déchéance de nationalité des français partant faire le jihad en Syrie, 71% pour la généralisation des écoutes téléphoniques sans accord préalable d'un magistrat, 67% en faveur de perquisitions à domicile sans l'accord d'un magistrat et 61% en faveur de la tenue d'interrogatoires de suspects sans l'assistance d'un avocat[5].

L'islamisme, depuis les attentats, n'est plus uniquement considéré comme une menace pour les quartiers relégués mais comme un danger pour l'ensemble de la

[4] Sondage Isos/Sopra-Steria du 21 et 22 janvier 2015.
[5] Id.

société. Confinés dans un premier temps aux extrêmes, la thématique de l'islam dangereux a maintenant cours parmi les couches les plus modérées de la société. En face, s'est développé un discours rassurant de sécurisation de l'immigration alimenté par les associations anti racistes et de droits de l'homme. Des travaux universitaires ont souligné les limites de ces deux approches souvent motivées par des postures symboliques et politiques. Si divers travaux ont montré que les liens entre migration et actes terroristes est insignifiant, force est cependant de constater que s'il y a peu de migrants parmi les terroristes, presque tous sont issus de l'immigration et tous se revendiquent de l'islam[6].

Partant de ce constat plusieurs explications ont vu le jour.

La première insiste sur le mal-être social et le déficit d'intégration qui touche surtout la deuxième génération de l'immigration. Olivier Roy parle à ce sujet d'islamisation de la radicalité pour montrer que l'aspect religieux est secondaire par rapport à une revendication plus large. Revendication qui existait selon lui dans les mouvements terroristes de la seconde moitié du XX siècle (brigades rouges, fraction armée, action directe) et qui était caractérisée par une jeunesse rejetant l'ordre mondial/occidental dominant.

Inversement, certains auteurs comme Marcel Gauchet[7] insistent sur le contenu même de l'Islam pour y trouver des explications de revendications islamistes mettant ainsi au second plan l'aspect social. L'Islam, version ultime du monothéisme, serait porté par des populations opprimées qui ne seraient pas en mesure de contester la mondialisation consumériste et matérialiste en contradiction avec les textes fondateurs de l'Islam. Cette impuissance raviverait un sentiment de subordination. De même, l'islamologue Gilles Kepel insiste sur l'instrumentalisation des textes fondateurs par l'islam radical. Elle pourrait selon lui être contrecarrée par un effort en faveur de leur approche universitaire (islamologie) qui a été négligée pendant des décennies par l'université française.

Le profil psychologique des jeunes radicalisés a également fait l'objet d'investigations qui font ressortir des personnalités fragiles dont certaines issues de familles à problèmes multiples, ou encore marquées par l'absence du père, la marginalité et la délinquance.

La réponse des pouvoirs publics confrontés au terrorisme et au radicalisme s'est essentiellement déployée dans trois directions : la formation, le soutien à des initiatives de déradicalisation et le renforcement de la sécurité.

[6] Jean-Baptiste Meyer, *Le lien entre migration et terrorisme,* Hommes & Migrations 2016/3, no 1315.

[7] 'Le fondamentalisme islamique est le signe paradoxal de la sortie du religieux', *Le Monde*, 21 novembre 2015.

Les politiques publiques en matière de formation et de recherche comprennent le développement de diplômes d'université de formation civile et civique des cadres religieux et plus particulièrement des ministres du culte musulmans, la création ces deux dernières années de 20 supports de poste en islamologie (2016/2017) rattachés aux différentes disciplines de sciences humaines et sociales et la création, au Ministère de l'intérieur, d'une ligne budgétaire dédiée à des projets relatifs à la connaissance de l'islam en France. La fondation de l'islam de France, créée en 2017, a quant à elle pour objectif de financer la culture musulmane et la formation dite profane des cadres religieux musulmans. S'agissant de circulation des idées, il va de soi que ces politiques doivent être menées sur un long terme pour être efficaces.

Un comité interministériel de prévention de la radicalisation a, dans le cadre du plan national de la lutte contre la radicalisation présenté par le Ministère de l'Intérieur en avril 2014, publié un Guide interministériel de prévention de la radicalisation (mars 2016). Cet outil doit faciliter les signalements des situations de radicalisation, améliorer la coordination et l'animation territoriale du dispositif et renforcer la mise en œuvre de la prévention de la radicalisation. Les préfets ont nommé des délégués chargés notamment d'intervenir dans le cadre de la politique de la ville. Des référents radicalisation ont été nommés par les ministères de l'éducation nationale, de l'enseignement supérieur et de la recherche. De même, ont été impliqués les services sociaux, pôle emploi et les agences régionales de santé. Les personnes signalées comme radicalisées devraient être prises en charge par le biais d'un accompagnement psychologique et un processus de déconstruction. La création d'un centre de déradicalisation à Pontourny (centre de rupture) en 2016, avec une capacité d'accueil de 25 personnes, n'a pas été couronnée de succès. Il a été fermé au cours de l'été 2017. Il devait accueillir des jeunes acceptant de suivre, sur la base du volontariat, un processus de déradicalisation. Le ministère de l'Intérieur réfléchit à la création de mécanismes plus efficaces.

Suite aux attentats du 13 novembre 2015, la France a été placée en état d'urgence. Il a été prorogé jusqu'au 1er juillet 2017 par une loi du 6 juillet 2017. Un projet de loi renforçant la sécurité intérieure et la lutte contre le terrorisme est actuellment en discussion. Il devrait permettre de sortir de l'état d'urgence tout en garantissant la sécurité des populations.

III. Cadre juridique et politique

1. Définition (ou absence de définition) des concepts d'extrémisme/fondamentalisme/radicalisation; définition de la littérature, des comportement (etc.) extrémistes

Si les mots d'extrémisme, de fondamentalisme, ou encore de radicalisation sont d'usage courant dans le discours public sur les religions, il n'existe pas en revanche de définition juridique de tels concepts. Le droit ne définit que le terrorisme, en tant qu'il

constitue une infraction pénale (CP, art. 421-1). En effet, l'acte de terrorisme correspond à un certain nombre d'infractions tout à fait classiques (atteinte à la vie, vol, détournement de moyen de transport, blanchiment…), mais qui ont comme caractéristique propre de se rattacher *« intentionnellement »* à *« une entreprise individuelle ou collective ayant pour objet de troubler gravement l'ordre public par l'intimidation ou la terreur »*.

Les concepts d'extrémisme, de fondamentalisme ou de radicalité sont ambivalents. Originairement, ils sont associés à l'idée de pureté, de retour aux origines ou encore d'ardeur et de sincérité des convictions. En France, les républicains dits *« radicaux »* ont joué un rôle très important dans la vie politique à la fin du 19e siècle. C'est eux qui sont à l'origine de la séparation des Eglises et de l'Etat. Aujourd'hui encore, il existe un parti dit *« radical »*, qui n'a guère de radical que son centrisme et son opportunisme politiques. Appliqués à l'Islam, ces concepts prennent évidemment une connotation purement négative, ils deviennent synonymes de communautarisme, de rejet des valeurs communes, de refus d'intégration voire dans les cas extrêmes de terrorisme et de violence. En l'absence de définition opératoire pour le juriste, ce sont les atteintes ou les risques d'atteinte à l'ordre public qui permettent de saisir un certain nombre de propos ou de comportements qui pourront être qualifiés d'extrémistes, de fondamentalistes ou radicaux.

2. Législation (incluant les règles migratoires et pénales, par exemple la répression des discours de haine) adoptée expressément pour lutter contre la radicalisation et l'extrémisme

On peut s'en étonner, mais si le droit ne définit pas la radicalisation ou l'extrémisme, il existe en revanche un nombre significatif de dispositions visant à lutter contre leurs manifestations. Certaines de ces dispositions sont anciennes, ayant été adoptées sous la troisième République dans un contexte de lutte contre l'extrémisme politique, de droite comme de gauche. Aujourd'hui, on constate un retour de ce type de législation dans un contexte de recrudescence du radicalisme religieux et en particulier du terrorisme.

A. *Répression pénale du discours radical*

Dans la tradition libérale européenne issue des conflits religieux depuis le 16e siècle, l'expression de la pensée est entièrement libre, et toutes les opinions peuvent être soutenues dans l'espace public y compris celles qui choquent, qui heurtent ou inquiètent. Pour la Cour de Strasbourg, la liberté d'expression est ni plus ni moins la *« chienne de garde »* de la démocratie. La parole ne peut être limitée que dans la mesure où elle constitue une infraction pénale à raison du trouble qu'elle cause à autrui. A l'origine, la grande loi sur la presse du 29 juillet 1881 n'avait retenu que les délits d'injure et de diffamation, mais depuis lors plusieurs infractions nouvelles ont été créées afin de réprimer l'expression des opinions radicales.

Tout d'abord, les délits classiques de diffamation et d'injure ont été complétés par les délits de diffamation ***raciale*** et d'injure ***raciste***, visant à protéger les personnes (ou les groupes de personnes), *« à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée »*. Le droit ne protège plus seulement des individus, mais des groupes à raison des attaques dont ils sont l'objet.

Ensuite, si la loi de 1881 avait voulu protéger l'expression de toutes les opinions, en revanche elle réprimait les propos à raison des conséquences qu'ils étaient susceptibles d'entraîner directement. Constitue ainsi un délit la ***provocation*** à la commission de certaines infractions telles que meurtre, incendie, insurrection… La qualification de provocation a été étendue par la suite à de nouvelles infractions, avec notamment en 1972 la création d'un délit de provocation à la haine raciale. Est également réprimée l'apologie de certains crimes d'une particulière gravité, et notamment des crimes de guerre et des crimes contre l'humanité.

Enfin, depuis 1990, le fait de nier l'existence d'un crime contre l'humanité constitue un délit. On notera que cette disposition concerne la seule négation de la Shoah, et que le Conseil constitutionnel français a censuré un texte de loi visant à réprimer la négation du génocide arménien[8].

Les infractions qui précèdent n'ont évidemment pas pour objet direct la répression du radicalisme religieux. La remise en cause de l'existence des chambres à gaz en France a toujours été une spécialité d'une extrême droite non religieuse voire païenne. Mais comme on le sait, elles peuvent également être motivées par une haine qui puise à des sources religieuses. Les opinions antisémites, récurrentes chez les extrémistes musulmans, et ravivées par le conflit israélo-palestinien, sont particulièrement visées ici.

B. *Surveillance des correspondances et des informations*

La surveillance des correspondances et des informations détenues par les individus est une pratique immémoriale du pouvoir. Il existe en droit français une distinction traditionnelle entre les écoutes judiciaires, autorisées par un juge dans le cadre d'une enquête pénale, et les écoutes administratives, pratiquées par l'administration dans un but de sauvegarde des intérêts essentiels de l'Etat. Le régime légal de ces écoutes, administratives comme judiciaires, avait été organisé par une loi du 1991, après que la Cour de Strasbourg ait sanctionné la France pour l'insuffisance de son droit (arrêts Kruslin et Huvig du…). Mais ce dispositif a été complètement modifié, en raison d'une part, de l'apparition de nouveaux moyens de correspondance (téléphone sans fil et Internet en particulier), et d'autre part de la nécessité de renforcer la lutte contre

[8] Voir C. const. 28 févr. 2012, n.º647 DC.- 8 janv. 2016, n.º 2015-512 QPC.- 26 janv. 2017, n.º 2016-745 DC. Voir également CEDH sect. 17 déc. 2013, Perincek c/ Suisse.

la criminalité et le terrorisme. Une loi du 24 juillet 2015 relative au renseignement vient renforcer de façon considérable les pouvoirs des services de police en matière de recueil de renseignements, ceci en vue de protéger les intérêts supérieurs de l'Etat : indépendance nationale, intégrité du territoire et défense nationale ; intérêts majeurs de la politique étrangère ; intérêts économiques, industriels et scientifiques majeurs ; prévention du terrorisme…

La loi de 2015 donne aux autorités en charge du renseignement les moyens juridiques de procéder à des écoutes et des enregistrements, y compris chez les opérateurs privés de communications, et de les exploiter techniquement au moyen d'algorithmes. Elle autorise également sous condition la géolocalisation de véhicules et d'individus. Adoptée quelques mois après l'attentat du Bataclan, cette loi vise à permettre de détecter et de surveiller les déplacements, la correspondance et les connections de personnes radicalisées susceptibles d'être les auteurs ou de projeter des attentats terroristes.

C. *Répression de la consultation de sites terroristes*

La loi **du 28 février 2017 relative à la sécurité publique (article 24) réprime** *« le fait de consulter habituellement et sans motif légitime un service de communication au public en ligne mettant à disposition des messages, images ou représentations soit provoquant directement à la commission d'actes de terrorisme, soit faisant l'apologie de ces actes lorsque, à cette fin, ce service comporte des images ou représentations montrant la commission de tels actes consistant en des atteintes volontaires à la vie »*. La sanction est de deux ans d'emprisonnement et de 30 000 € d'amende *« lorsque cette consultation s'accompagne d'une manifestation de l'adhésion à l'idéologie exprimée sur ce service »*. La mention par la loi des *« motifs légitimes »* de consultation fait suite à une intervention du Conseil constitutionnel qui avait invalidé une précédente rédaction, elle concerne par exemple les chercheurs.

Cette disposition adoptée en 2017 s'inscrit dans le prolongement de la loi sécurité de 2015. Sa fonction est essentiellement prophylactique. Alors que la loi de 2015 vise à permettre de recueillir des renseignements, le texte de 2017 vise à dissuader les individus de consulter des sites diffusant de la propagande en faveur du terrorisme. Internet est un bureau de recrutement planétaire.

D. *Dissolution des associations et des groupes extrémistes*

La loi du 10 janvier 1936 sur les groupes de combat et milices privées, adoptée dans un contexte de forte instabilité politique, autorise le président de la République à dissoudre par décret *« les associations et les groupements de fait »*[9] qui présentent

[9] *Seront dissous, par décret rendu par le Président de la République en conseil des ministres, toutes les associations ou groupements de fait :*

un danger grave pour l'Etat et la paix civile (manifestations armées, groupes de combat, atteinte au territoire national ou à la forme républicaine du gouvernement…). Ces dispositions ont été complétées récemment par la loi sur l'état d'urgence du 20 novembre 2015 qui autorise la dissolution d'associations ou de groupements *« qui participent à la commission d'actes portant une atteinte grave à l'ordre public ou dont les activités facilitent cette commission ou y incitent »*. Une association cultuelle de musulmans installée à Lagny a été dissoute, ainsi qu'une association d'aide aux détenus musulmans soupçonnée de prosélytisme.

E. *Interdiction de sortie du territoire et interdiction d'entrée sur le territoire*

Une loi relative au terrorisme, dont on retiendra qu'elle a été promulguée moins de deux mois avant l'attentat contre Charlie Hebdo, le 13 novembre 2014, met en place un régime d'interdiction de sortie du territoire à l'encontre de *« tout français »*, *« lorsqu'il existe des raisons sérieuses de penser qu'il projette des déplacements à l'étranger ayant pour objet la participation à des activités terroristes, ou sur un théâtre d'opérations de groupements terroristes, dans des conditions susceptibles de le conduire à porter atteinte à la sécurité publique lors de son retour sur le territoire français »*. L'interdiction est prise par le ministre de l'Intérieur pour une durée de 6 mois susceptible d'être prolongée jusqu'à deux ans. Evidemment cette interdiction est facilement contournée, il suffit de se rendre dans un pays voisin (Espagne, Italie…) et de prendre ensuite un avion pour la Turquie, porte d'accès vers la Syrie.

Si l'interdiction de sortie vise les seuls nationaux, la même loi instaure en miroir une interdiction du territoire à l'encontre de *« tout étranger »* dont la présence

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1.º Qui provoqueraient à des manifestations armées dans la rue ;

2.º Ou qui, en dehors des sociétés de préparation au service militaire agréées par le Gouvernement, des sociétés d'éducation physique et de sport, présenteraient, par leur forme et leur organisation militaires, le caractère de groupes de combat ou de milices privées ;

3.º Ou qui auraient pour but de porter atteinte à l'intégrité du territoire national ou d'attenter par la force à la forme républicaine du Gouvernement ;

4.º Ou dont l'activité tendrait à faire échec aux mesures concernant le rétablissement de la légalité républicaine ;

5.º Ou qui auraient pour but soit de rassembler des individus ayant fait l'objet de condamnation du chef de collaboration avec l'ennemi, soit d'exalter cette collaboration.

Le Conseil d'Etat, saisi d'un recours en annulation du décret prévu par le premier alinéa du présent article, devra statuer d'urgence.

6.º Ou qui, soit provoqueraient à la discrimination, à la haine ou à la violence envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, soit propageraient des idées ou théories tendant à justifier ou encourager cette discrimination, cette haine ou cette violence.

7.º Ou qui se livreraient, sur le territoire français ou à partir de ce territoire, à des agissements en vue de provoquer des actes de terrorisme en France ou à l'étranger.

en France constituerait une menace grave pour l'ordre public. Cette interdiction du territoire peut également viser les ressortissants européens, auxquels s'appliquent des dispositions spécifiques.

F. *Etat d'urgence*

> 'Enfin, les attentats terroristes du 13 novembre 2015 ont conduit à l'instauration de l'état d'urgence, qui est un régime d'exception fondé sur une loi d'avril 1955. L'état d'urgence est proclamé initialement par le président de la République, mais après 12 jours il doit être prorogé par le Parlement. Depuis novembre 2015, l'Etat d'urgence a été prolongé par plusieurs lois successivement et sans interruption. L'état d'urgence renforce de façon considérable les pouvoirs de police de l'ordre public (contrôles d'identité, assignations à résidence, interdictions de manifestations, interdiction de circuler…). Ce qui caractérise l'état d'urgence, c'est que les pouvoirs exercés par l'autorité publique échappent au contrôle du juge judiciaire et relèvent du juge administratif (tribunaux administratifs, conseil d'Etat) traditionnellement plus proche du pouvoir. On notera que l'état d'urgence autorise la fermeture provisoire de lieux de culte au sein desquels sont tenus des propos constituant une provocation à la haine, à la violence ou au terrorisme'.

La prolongation de l'état d'urgence pendant une période aussi longue est problématique du point de vue de la protection des libertés. L'efficacité du dispositif en termes de lutte contre le terrorisme semble très relative, alors que l'atteinte aux libertés essentielles est importante. La loi sur l'état d'urgence a permis par ailleurs de traiter un certain nombre d'atteintes à l'ordre public qui n'avaient rien à voir avec le terrorisme islamique. Le nouveau gouvernement a décidé d'y mettre fin, mais seulement après avoir transposé dans la loi ordinaire un certain nombre des pouvoirs reconnus à l'administration par la législation sur l'urgence.

3. **Législation permettant indirectement la lutte contre la radicalisation et l'extrémisme**

Ainsi qu'on a pu le constater, les législations destinées à lutter contre la radicalisation et l'extrémisme religieux se sont considérablement renforcées depuis 2015, en raison des attentats terroristes survenus et de la menace désormais permanente et intense. Mais ainsi qu'on peut l'observer, il s'agit la plupart du temps de mesures à caractère général qui ne visent pas de manière spécifique la violence ou le terrorisme *« religieux »* quand bien même il a déterminé l'adoption de ces textes.

S'agissant des comportements religieux proprement dits, le droit français se caractérise par une volonté d'interdire ou à tout le moins de contrôler ceux qui relèvent d'une pratique radicale de la religion, conduisant sinon à la violence tout au moins à une forte désocialisation et au développement de pratiques *« communautaristes »* en contradiction avec l'idéal d'unité de la communauté nationale. La liberté de religion peut alors se trouver légitimement restreinte afin de protéger les valeurs communes de la société.

Les deux lois sur les signes religieux de 2004 et 2010 attestent de cette volonté de contrôler l'expression des convictions religieuses dans l'espace social, bien que toutes deux participent de logiques assez différentes. La loi du 15 mars 2004 interdit, en application du principe de laïcité, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse dans les écoles publiques. Ce qui est en cause ici, c'est l'idée selon laquelle l'école est de lieu où se construit la citoyenneté commune, citoyenneté qui depuis la révolution de 1789 se veut affranchie de tout lien de sujétion religieuse. Le législateur est parti du postulat selon lequel les jeunes filles, au collège et au lycée, n'expriment pas un choix propre, mais qu'elles sont sous la dépendance de leurs parents à l'égard desquels l'école a pour fonction de les émanciper lorsqu'ils prétendent leur imposer une identité religieuse qu'il leur reviendra de choisir librement.

Quant à la loi du 11 octobre 2010 interdisant *« la dissimulation du visage dans l'espace public »*, elle prohibe des pratiques qui en elles-mêmes sont l'expression d'une radicalité religieuse contraire aux exigences minimales du *« vivre ensemble »*, définies comme une composante de l'ordre public.

La lutte contre le fondamentalisme prend également les formes d'une politique recognitive au bénéfice des communautés désireuses de s'intégrer et dont les membres rejettent explicitement les pratiques ou les discours extrêmes. On peut voir un exemple de cette politique dans le décret du 3 mai 2017 portant création d'un diplôme de formation civile et civique des aumôniers des services publics, qui permettra aux titulaires de ces diplômes de bénéficier d'une rémunération. L'objet principal de ce décret est de permettre la formation d'aumôniers musulmans chargés de lutter contre la radicalisation religieuse particulièrement importante dans les prisons.

La difficulté fondamentale que soulèvent ces textes, comme du reste toutes les législations qui prétendent interdire une pratique jugée trop radicale de la religion, réside dans le fait qu'en religion comme en tout le rigorisme n'est pas en soi illégal, et qu'il n'appartient pas à l'autorité publique, tenue à une exigence de stricte neutralité, de définir les pratiques acceptables et celles qui ne doivent pas l'être. De surcroît, le présupposé d'un lien entre pratique religieuse radicale et violence terroriste, fréquemment mis en avant, est loin d'être établi. Au contraire, depuis 2015 une grande partie des attentats terroristes ont été commis par des personnes dont le passage à l'acte, extrêmement rapide, n'a été précédé d'aucune radicalisation et même parfois d'aucune pratique religieuse.

4. Soft law/recommandations/politiques de lutte contre la radicalisation et l'extrémisme

En ce qu'elle est l'expression d'une politique publique de lutte contre le radicalisme religieux, la législation française récente présente une certaine cohérence qui se retrouve dans l'action concrète des pouvoirs publics, consistant à lutter contre le radicalisme religieux tout en encourageant la pratique paisible de la religion.

Au lendemain des attentats contre Charlie Hebdo et l'hypermarché kasher de janvier 2015, le ministre de l'Intérieur Bernard Cazeneuve a mis en place une *« instance de dialogue »* avec les Français de confession musulmane. Cette instance de dialogue a donné lieu à trois rencontres officielles en juin 2015, mars 2016 et décembre 2016. La première rencontre a été l'occasion de *« travailler, avec les représentants de l'Islam, autour de 4 thèmes » :*

1) La sécurité des lieux de culte et l'image de l'islam ;
2) La construction et la gestion des lieux de culte ;
3) La formation et le statut des aumôniers et des cadres religieux ;
4) Les pratiques rituelles.

Quant aux deux rencontres suivantes, en mars et décembre 2016, elles avaient respectivement pour thème la prévention de la radicalisation d'une part, et la promotion d'un *« islam pleinement français »*, à travers le financement du culte et la formation des cadres religieux, d'autre part.

On peut voir également une manifestation de cette politique balancée des pouvoirs publics dans leur refus de donner satisfaction à des demandes religieuses dont ils estiment que la prise en compte imposerait des contraintes excessives, et dont ils considèrent de ce fait que le refus d'y renoncer est l'expression d'une forme de radicalisme religieux chez ceux qui les formulent. Pour s'en tenir à un seul exemple, celui des menus confessionnels, la pratique en France dans les cantines des services publics est de ne pas servir de porc aux musulmans et aux juifs, et de leur proposer systématiquement un plat de substitution le jour où du porc est proposé. En revanche, la revendication d'une nourriture casher ou hallal est généralement jugée exorbitante. Ainsi qu'a pu le dire le Conseil d'Etat à propos des menus servis aux prisonniers, l'administration pénitentiaire *'n'est pas tenue de garantir aux personnes détenues, en toute circonstance, une alimentation respectant leurs convictions religieuses »*, mais il lui revient *« de permettre, dans toute la mesure du possible eu égard aux contraintes matérielles propres à la gestion de ces établissements et dans le respect de l'objectif d'intérêt général du maintien du bon ordre des établissements pénitentiaires, l'observance des prescriptions alimentaires résultant des croyances et pratiques religieuses'*[10]. Cette pratique d'une gestion médiane des demandes religieuses, consistant à prendre en compte les moins onéreuses pour mieux rejeter les plus exigeantes en termes d'aménagement, est assez courante en France, elle correspond à une conception de l'aménagement de la liberté religieuse où l'effort doit être réparti de part et d'autre.

[10] Conseil d'État, 10 février 2016, n.º 385929.

IV. Effets induits par les dispositions contre la radicalisation sur la liberté de religion

1. Effets des dispositions contre la radicalisation et l'extrémisme sur la liberté de religion, les communautés religieuses et leurs institutions affiliées (écoles, maisons d'édition)

Les effets de la législation visant à lutter contre la radicalisation religieuse sont difficiles à mesurer précisément. Comme on le sait, la tradition juridique française est hostile au communautarisme, et en ce sens on peut penser que la législation visant à lutter contre l'extrémisme religieux, pour autant qu'elle soit efficace, a pour effet d'empêcher la structuration de communautés radicalisées.

Concrètement, s'agissant des écoles, la création d'écoles privées en France est soumise à un simple régime déclaratif, mais les autorités académiques sont en droit de vérifier le niveau d'éducation atteint par les enfants. Elles ne le font que très peu en pratique, faute de moyens. Il existe un certain nombre d'écoles privées confessionnelles qui défendent une vision orthodoxe de la religion (catholiques et juives surtout), mais il est difficile de parler de radicalisation et d'extrémisme au sens où la doctrine diffusée n'est pas une doctrine de violence. De la même façon, le droit qu'ont les autorités publiques de surveiller les lieux de culte permet d'éviter les regroupements de musulmans radicalisés autour d'imams diffusant des discours de haine ou de violence. Depuis 2016, plusieurs mosquées ont été ainsi fermées en application de la loi sur l'état d'urgence, en raison des dérives radicales observées.

L'analyse de cette législation du point de vue de la liberté de religion est complexe. Elle implique en effet de déterminer jusqu'à quel point les pratiques radicales de la liberté de religion doivent être protégées au titre de la liberté de religion. D'une part, il n'appartient pas à l'autorité publique de juger quelles sont les bonnes et les mauvaises pratiques de la religion. Mais d'autre part, la liberté de religion comme toute autre liberté n'est pas absolue, elle doit se concilier avec le respect de l'ordre public et des droits d'autrui. De ce point de vue, on peut considérer que l'interdiction de pratiques extrêmes telles que le port du voile intégral porte atteinte à la liberté de religion des femmes qui souhaitent le porter librement, et c'est d'ailleurs cet argument de la liberté individuelle qui explique le refus par la plupart des Etats européens d'adopter une législation similaire. Cela étant, comme l'on sait, l'argument du *« vivre ensemble »* qui a pu être invoqué pour justifier une telle interdiction a été jugé pertinent par la juridiction constitutionnelle française[11] mais aussi par la Cour européenne des droits de l'homme[12].

[11] Conseil constitutionnel 7 octobre 2010, n.º 2010-613, Loi interdisant la dissimulation du visage dans l'espace public.

[12] Cour européenne des droits de l'Homme, Grande Chambre, 1er juill. 2014, SAS c/ France

De fait, la politique française de lutte contre le radicalisme religieux est indissociable d'une politique recognitive simultanée au bénéfice de la communauté des pratiquants modérés. C'est particulièrement vrai à propos de l'Islam, dont les autorités publiques s'attachent à favoriser l'intégration pacifique sur le territoire national. En ce sens, on peut considérer que la lutte contre le radicalisme religieux contribue à consolider la liberté de religion pour ceux qui en font un usage paisible. Mais il va de soi également que la lutte contre le radicalisme religieux produit à rebours un indéniable effet de stigmatisation à l'encontre de l'ensemble de la communauté, assimilée aux violences de quelques uns, ce qui ne facilite pas cette politique de soutien (construction d'édifices du culte par exemple).

2. Effets de la législation sur la liberté de religion individuelle (droits des femmes, droits des enfants…)

L'atteinte à la liberté religieuse individuelle résulte essentiellement de l'interdiction de certaines pratiques, en particulier dans le cas de la France, le port de signes religieux dans la sphère publique. Cette question concerne principalement les femmes et les enfants, et plus marginalement les hommes (port du turban sikh par exemple).

En ce qui concerne les enfants, la loi du 15 mars 2004 interdisant à l'école le port de signes religieux ostensibles (voiles, turbans et keskis, kippas, croix, bandanas …) a fait l'objet de critiques au motif légitime qu'elle portait une atteinte exorbitante à leur liberté religieuse. Ici encore le Conseil constitutionnel français[13] et le juge européen[14] ont validé la loi, la Cour de Strasbourg estimant que '*l'interdiction de tous les signes religieux ostensibles dans les écoles, collèges et lycées publics a été motivée uniquement par la sauvegarde du principe constitutionnel de laïcité…'*, qui constitue aux yeux du juge européen un objectif '*conforme aux valeurs sous-jacentes à la Convention…'*. Seul le comité des droits de l'Homme des Nations unies a émis un avis différent[15]. Concrètement, si l'on doit parler de liberté religieuse, c'est plus encore celle des parents, et le droit qu'ils ont de transmettre leur propre religion à leurs enfants, que celle des enfants proprement dite, qui est en cause ici.

L'atteinte à la liberté religieuse des femmes a été dénoncée à l'encontre de la loi du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public. Alors que le port de la burqa ou du niqab a été interdit en France en tant que symbole de soumission et d'avilissement des femmes, c'est précisément au nom de leur libre choix que des femmes ont mis en cause la loi française devant la Cour de Strasbourg.

[13] Décision n.º 2004-505 DC du 19 novembre 2004 Traité établissant une constitution pour l'Europe.

[14] Cour EDH, 4 décembre 2008, Dogru et Kervanci.- Cour EDH 30 juin 2009, Aktas, Ghazal, Singh et a.

[15] Communication n.º 1852/2008 du 16 décembre 2008, Bikramjit Singh.

Et de fait, les enquêtes de terrain établissent que c'est souvent contre le vœu de leur famille et de leur entourage que des femmes, souvent jeunes, décident de dissimuler complètement leur visage.

3. Effets des politiques publiques sur la liberté de religion des communautés religieuses et de leurs institutions affiliées et sur les particuliers

En ce qui concerne les politiques de lutte contre l'extrémisme et la radicalisation, elles visent comme on l'a dit à faciliter l'exercice des pratiques religieuses dans le cadre de la laïcité tel qu'il s'est construit depuis la révolution française, et à exclure de la société les pratiques radicales. Si ces politiques publiques, administratives mais également jurisprudentielles, produisent des effets incontestablement positifs pour les groupes religieux et les individus intégrés, en revanche leurs effets négatifs sur la pratique religieuse des individus et des groupes extrémistes sont plus difficiles à mesurer précisément. On peut penser toutefois, en l'absence d'instrument de mesure de l'efficacité des politiques publiques, qu'elles rendent plus difficile l'extériorisation des pratiques extrêmes, qui pourront le cas échéant se réfugier dans la sphère purement privée où elles échappent au regard des autorités.

V. Mesures éducatives visant à lutter contre la radicalisation et l'extrémisme

1. Lois. Politiques. Programmes

En France l'enseignement religieux n'est pas organisé au sein de l'école publique. Il relève pour l'essentiel de la sphère privée, ce qui signifie qu'il échappe au contrôle des autorités. Il existe un système d'aumônerie dans les écoles secondaires publiques, mais les aumôneries sont très peu nombreuses, et elles sont quasi exclusivement catholiques.

L'école publique est organisée dans un cadre de neutralité religieuse stricte, qui fait obstacle à l'expression des convictions religieuses, que celles-ci émanent des enseignants ou des élèves. Les signes religieux sont prohibés dans les locaux scolaires. Les crucifix ont été retirés progressivement au tournant du 20e siècle.

Il n'existe pas de droit à l'objection de conscience consacré au profit des élèves, qui leur permettrait de contester les enseignements dispensés à l'école (sciences naturelles, biologie, histoire, éducation sexuelle…). De même l'assiduité aux enseignements est obligatoire, et les élèves ne peuvent se prévaloir de leurs convictions religieuses pour ne pas suivre certains enseignements[16].

[16] Voir notamment CE 14 avril 1995 Koen.

2. Autonomie des écoles religieuses

La liberté de l'enseignement est consacrée en France en tant que principe constitutionnel, et le régime d'ouverture des établissements privés est un régime déclaratif. La plupart des écoles privées en France sont confessionnelles, essentiellement catholiques. Il existe également un certain nombre d'écoles protestantes et juives, ainsi que, depuis quelques années, des écoles privées musulmanes. Une grande partie des écoles privées sont associées au service public de l'enseignement, et elles bénéficient de financements publics. Mais un certain nombre d'écoles restent *'hors contrat'*[17]. C'est parmi elles que se trouvent les établissements qui pratiquent un recrutement mono confessionnel exclusif, et dont les pratiques religieuses sont les plus rigoureuses. Le contrôle de ces établissements par l'administration est très difficile, essentiellement faute de moyens financiers et humains pour opérer ces contrôles. Le gouvernement avait décidé en 2016 de soumettre la création des écoles privées à un régime d'autorisation préalable, afin de contrôler en amont la création de nouvelles écoles, notamment musulmanes, mais le dispositif mis en place a été censuré par le Conseil constitutionnel[18] pour des raisons techniques qui laissent envisager une réécriture du dispositif. Quoiqu'il en soit, on retiendra que parmi les motifs invoqués par le gouvernement, figurait la volonté de mieux contrôler les projets portés par des mouvements religieux radicalisés.

Indépendamment de cette question des écoles prives confessionnelles, l'enseignement de la religion proprement dit relève du choix des familles, et cet enseignement est dispensé hors de l'école[19]. Il n'existe aucun contrôle public de cet enseignement religieux, en sorte que l'endoctrinement des enfants reste tout à fait possible. Evidemment, l'intégration de l'enseignement religieux dans les programmes scolaires, comme c'est le cas dans de nombreux pays européens, peut être comprise positivement comme un moyen de prévenir les risques de dérive radicale ou sectaire. Mais même là où il existe un enseignement public de la religion, la participation aux enseignements de religion dans le cadre scolaire n'est jamais obligatoire, et les parents ont toujours le droit de préférer pour leur enfant un endoctrinement par un gourou.

3. Droits des enfants et des parents

La question des droits des enfants et des parents dans le cadre scolaire a déjà été évoquée plus haut. On peut résumer la situation ainsi :

[17] C'est par un contrat que se matérialise l'association des écoles privées au service public de l'enseignement.

[18] Décision n.º 2016-745 DC du 26 janvier 2017 loi relative à l'égalité et à la citoyenneté.

[19] Si l'on excepte comme on l'a dit le cas particulier des aumôneries de l'enseignement public.

1) A l'école publique, le système de laïcité interdit l'expression des convictions religieuses. L'instruction religieuse est dispensée dans le cadre privé, en toute liberté pour les parents.
2) Le principe de la liberté de l'enseignement autorise la création d'écoles confessionnelles où les parents pourront inscrire leurs enfants en fonction de leurs préférences religieuses.
3) Il n'existe pas de droit à la liberté religieuse propre à l'enfant. Juridiquement, la majorité religieuse coïncide avec la majorité civile, même si dans les litiges (notamment familiaux) les juges prennent en considération la volonté de l'enfant.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL - THE GERMAN SITUATION

Matthias Pulte [1]

I. Introduction

Up until now, the securitisation of religious freedom in Germany has mainly been provided for by Article 4 Basic Law (Grundgesetz, GG) and the broad jurisprudence of the Federal Constitutional Court of Germany, which has always tried to strike a balance between positive and negative religious freedom and the rights of individuals and religious communities against the possessive and over-regulating tendency of the state [2]. One feature of Article 4 GG should be mentioned to understand the special role of this human right in the German legal context. In contrast to other basic laws in the Constitution, Article 4 GG does not contain any written reservations. Therefore, restrictions of this fundamental right can only be taken from the Constitution itself. However, the reasons for the restriction must be weightier than the freedom claim in Article 4 GG [3]. This always has to be determined in each individual case.

The present conditions concerning religious extremism and the need for deeper state control have triggered a discussion on the extent of religious freedom in an open and secular society. The focus of the discussion has been on the Muslim communities in Western societies. They are alien to our culture, language and way of thinking. This religion has not undergone an enlightenment yet, as Christendom did in Europe. This results in fear spreading throughout society. Security standards have been raised to the same level as they would be in response to the danger of Islamic terrorism. The question of the range of religious freedom and its legal limitation can

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[2] See H. Hofmann, 'Commentary on Article 4 GG' in Bruno Schmidt-Bleibtreu and Franz Klein (eds), *Grundgesetz Kommentar* (München, Luchterhand, 2004), pp. 241-243.

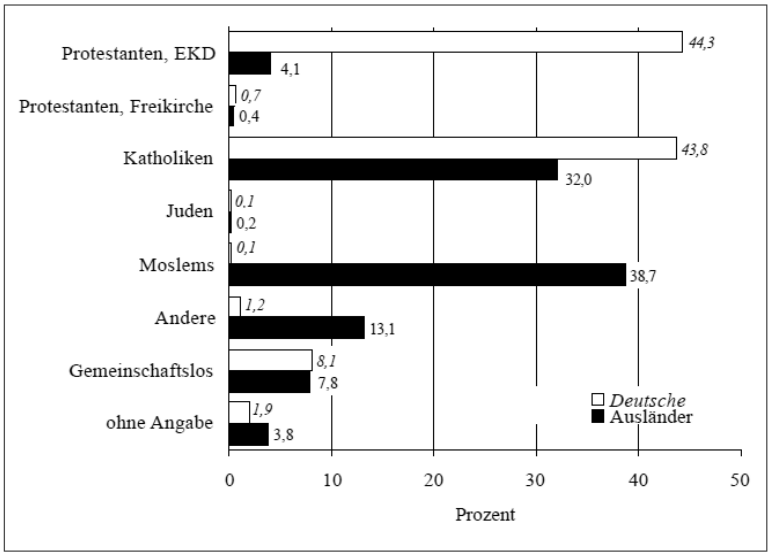
[3] See C. Gramm and S. U. Pieper, *Grundgesetz* (Baden-Baden, Nomos, 2008), pp. 158 ff.

only be answered if the social data provide a sound basis for interpreting existing and eventually new laws.

II. Social context of the debate on the limits of religious freedom

The former Federal Republic of Germany was a country of believers, mainly Christians (84.5%), followed by Muslims (2.5%) and people who did not ascribe to any religion (11.2%)[4]. Under these circumstances, Christian churches played a major role in German society and had a great political influence in developing the meaning of religious freedom in the country. This socio-political framework existed without any alternative until German reunification in 1990.

Fig. 1: Believers and Non-believers in West Germany in 1987[5]



Following reunification, things changed abruptly, though not in an unexpected way. The Communist regime in the German Democratic Republic had pursued an anti-religion policy for more than 40 years. As a result, East Germany, where 92% of the population in 1949 were Christians, became the most dechristianised nation in

[4] See P. Antes, 'Religionen in Deutschland. Der Mauerfall und seine Folgen für die religiöse Landschaft in Deutschland' (2005) *Uni-Magazin Hannover*, pp. 6-9; C. Wolf, 'Religionszugehörigkeit in Westdeutschland 1939-1987. Eine Zusammenstellung nach Bundesländern auf Basis von Volkszählungsdaten - Einschließlich einiger Angaben zur Pluralisierung der Religionszugehörigkeit', 1999, <http://www.uni-koeln.de/wiso-fak/fisoz/Mitarbeiter/Wolf/Veroeffentlichungen/Religion.pdf> (accessed 15 Sep 2017).

[5] C. Wolf, 'Religionszugehörigkeit in Westdeutschland 1939-1987', p. 7.

the Eastern hemisphere. That was the situation in 1987. Both German societies and states were secular. The main difference was the legal and practical position of the two states regarding the position of religion within society.

Since German reunification in 1990, there has been a significant social change in the situation of religion in civil society, and the situation continues to change. While more than 75% of the population identified as Christians in the old German Federal Republic, there was a minority of 2-3% Muslims and a group of about 22% who did not belong to any denomination. Current statistics show greater diversity and a significant and ongoing decline of Christianity in German society. The Muslim community has started becoming more and more self-confident in German society, especially since 2001. While there has been no real debate in civil society on the question of the relationship between the state and religion on a multireligious level, the perspective changed after the first decade of German reunification especially in light of religious-motivated extremism.

Before analysing the statistical data from the 'Religion monitor'[6] in Germany, one has to keep in mind that 'membership of a religious community' is an ambivalent term. It only says something about an individual's formal membership in a religious community and says nothing about their beliefs. In addition, the fact of not belonging to a religion also says nothing about the motivations of such people. In this respect, the statistical data can only provide a general idea of the religious situation in Germany. Collecting statistical data regarding Muslims in Germany is very difficult because of the low level of organisation within the Muslim community. Only 20% of Muslims in Germany belong to a particular mosque or Islamic association. The majority could be called cultural Muslims. In statistical terms, these people are grouped among non-believers (*Konfessionsfreie*).

According to the most recent statistics from 2015, Germany remains a predominantly Christian country. Former Federal President Christian Wulff already claimed this fact in 2010, when the role of Islam in German society and its relationship to German traditions began being openly discussed in politics[7]. In addition, Wulff stated that, since the first Muslim guest workers came to Germany and stayed there with

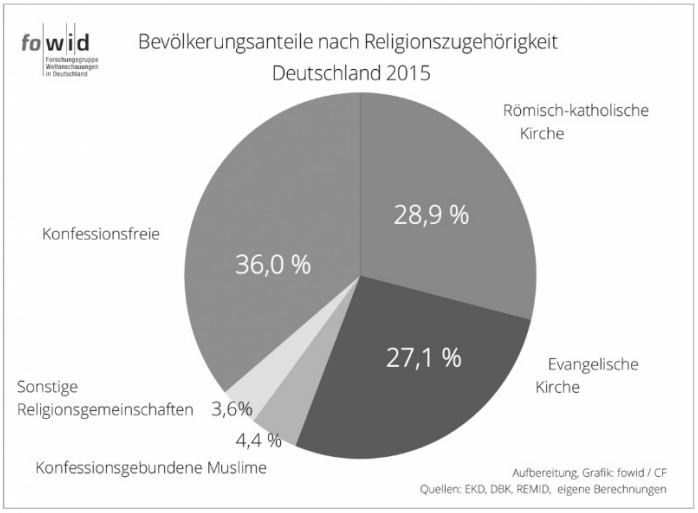
[6] The 'Religion monitor' is an interdisciplinary research project on religion and religiosity in relation to social cohesion in Germany and 13 other countries. Bertelsmann Stiftung (ed), Religionsmonitor. Verstehen was verbindet. Religiosität und Zusammenhalt in Deutschland, Gütersloh 2013, <https://www.bertelsmann-stiftung.de/de/unsere-projekte/religionsmonitor/> (accessed 15 Sep 2017).

[7] See C. Wulff, 'Speech at the opening ceremony of the Synod of the Protestant Church in Germany (EKD)', 7 Nov 2010, <http://www.bundespraesident.de/SharedDocs/Reden/DE/Christian-Wulff/Reden/2010/11/20101107_Rede.html> (accessed 15 Sep 2017).

their families for more than one generation, Islam is a part of Germany just as the Jewish and Christian traditions are[8].

In 2015, the total population of Germany was 82,200,000. Some 23,760,000 people were members of the Roman Catholic Church, while 22,270,000 people belonged to Protestant churches. An estimated 3,600,000 people were Muslims, and 102,000 belonged to Jewish communities. Some 29,610,000 people were not registered in any religious community.

Fig. 2: Believers and Non-believers in reunified Germany in 2015[9]



A survey on religious identity in Germany conducted by the IfD Allensbach in 2016 stressed that 16.53 million people said that religion and religious belief were very important in their life. Even in light of the slow but steady decrease in the numbers of people ascribing to any religion, this survey is still relevant. Over the last 10 years, this percentage has remained more or less at the same level.

The main reason for religious diversity in Germany can be seen in the migration of workers in the 1960s and early 1970s when the German economy needed a large number of workers for its basic industries. Since then, Turkish migrants have accounted for the majority of Germany's Muslim population. A study called 'Muslim life

[8] See C. Wulff, 'Speech to mark the Twentieth Anniversary of German Unity', 3 Oct 2010, <http://www.bundespraesident.de/SharedDocs/Reden/DE/Christian-Wulff/Reden/2010/10/20101003_Rede.html> (accessed 15 Sep 2017).

[9] See Forschungsgruppe Weltanschauungen in Deutschland, 'Religionszugehörigkeiten in Deutschland 2015', 20 Dec 2016, <https://fowid.de/meldung/religionszugehoerigkeiten-deutschland-2015> (accessed 15 Sep 2017).

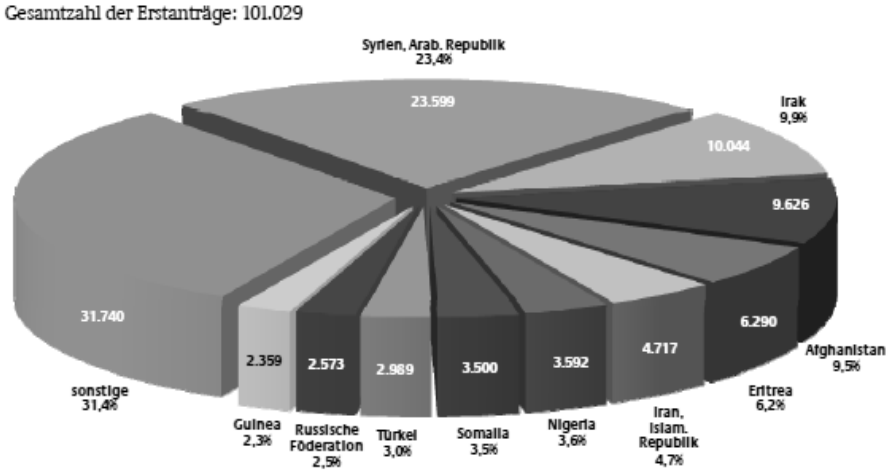
in Germany' states that 74% of these Muslims belong to the Sunni community, 13% are Alevites and 7% are Shiites[10]. According to the aforementioned survey, Muslims account for 4.6-5.2% of Germany's entire population. Some 36% of them claim to be 'very strong believers'. Another 50% say that they are more or less religious. Turkish migrants remain the biggest group of Muslims in Germany, with approximately 2.5 million Muslims in the country with Turkish origins, followed by a group of nearly 500,000 Muslims from South-east Europe and 350,000 Muslim migrants and refugees from the Near East. The rest of the Muslim population comes from all over the world, but mainly from Africa. Looking at this data, one has to conclude that the Muslim community in Germany is very heterogeneous. One also has to take into account that the regional distribution of Muslims in Germany is very diverse. In highly industrialised regions, for example, the percentage of Muslims is higher than the average in society. Some 98% of them live in western Germany and the western part of Berlin. According to the study mentioned above, nearly 50% of Muslims living in Germany are German citizens.

A second reason for the increase in religious diversity in Germany was the fall of the Iron Curtain at the end of the 20th century. Between then and 2005, the Jewish population increased to 108,000 people. During that period, most of them came from Eastern Europe and Russia. Since 2005, however, this number has decreased slightly, reaching 99,692 in 2015. The reasons for this decrease have not been clarified in the literature or any surveys that have been conducted.

There are many reasons why people migrate or immigrate to Germany. In the past, the reasons were mainly economic. In recent years, conflicts in various parts of the world have led to an increase in the number of refugees looking for a safe place to live, at least until the situation in their home country stabilises. In the 1990s, for example, most refugees came from the former Yugoslavia and Afghanistan. In recent years, Germany has also opened its borders especially to refugees from Syria and Iraq. However, refugees from various African countries have also been trying to make it to Germany via Italy. They mainly come from Eritrea, Guinea, Nigeria and Somalia, but they account for a minority (15.6%) of all refugees. From January to June 2017, 101,029 refugees applied for refugee status in Germany. The following figure shows that two-thirds of them came from Arab countries. At least three-quarters of them are cultural Muslims, if one takes into account that Islam is the leading religion in their home countries.

[10] S. Haug, St. Müssig and A. Stichs, *Muslimisches Leben in Deutschland, im Auftrag der Deutschen Islam Konferenz* (Berlin, Bundesamt für Migration und Flüchtlinge, 2016), p. 97.

Fig. 3: Refugees to Germany (January-June 2017)[11]



If you compare the statistics from the first half of 2017 with statistics from 2016, you will notice that the number of applications fell from 387,675 to 101,026, which means a nearly two-thirds decrease in the number of applications[12]. It seems that the peak of the refugee flood has passed. At the moment, the number of incoming refugees appears to be at the same level as 2014.

This data leads to the conclusion that the refugee problem and the discussion about this problem are not, first of all, a question of foreign religious cultures overwhelming a culturally Christian society. The statistics presented here also show that the majority of migrants come from Islamic cultures. Most of them are Muslims. This fact is reminiscent of the situation of Jewish communities in Germany after the fall of the Iron Curtain. There was quite a lot of work to be done to help co-believers find their way in a new society and in the local religious community. It seems that the Muslim communities have a comparable challenge. One major problem is that three-quarters of Islamic associations and mosques belong to the Turkish community, which has its own particular way of interpreting Sunni Islam.

III. Political and public debate

The political debate on the limits of religious freedom in Germany does not focus on Christianity. Traditionally, the German Constitution (Article 4 GG) has maintained

[11] See Bundesamt für Migration und Flüchtlinge (ed), *Aktuelle Zahlen zu Asyl*. Ausgabe: Juni 2017, <http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-juni-2017.pdf?__blob=publicationFile> (accessed 5 Nov 2017), p. 8.

[12] Ibid, p. 6.

the right of religious freedom for everybody. Constitutional law only contains limits on this human right where there is a danger to other human rights of individuals or the democratic order of the state is undermined. Churches and other denominations have made arrangements with these limitations mainly because of the fact that they demand freedom of belief in modern societies all over the world. Most of these religions also have a positive view of the Universal Declaration of Human Rights. The social sciences have lost sight of the question of the importance of religion in a civil society since the second half of the 20th century. Religion is disappearing as an effective force in society and politics[13]. Since 9/11 and because the Western world does not have an answer to the question of how to react to terrorism motivated by religion, the debate on interactions between religion and society has once again become a focus of academic and political discussions.

The discussion concentrates mainly on the question of how the state may behave towards Islam and especially Muslim sects like Salafists or comparable groups. The major problem in the German debate is not only Islamic extremism but also the question of how different Muslim confessions relate to the right of religious freedom without any reservation in favour of the Quran or Sharia law, as this is pointed out in the two Islamic declarations of human rights: the 1990 Cairo Declaration on Human Rights in Islam and the 1981 Universal Islamic Declaration of Human Rights. Both of these declarations clearly state that human rights are subordinate to Sharia law. The fact that there is a different understanding of what is meant by religious freedom, whether it is unconditional or has reservations, complicates the political discussion more than the academic discussion.

The federal and the state administrations established Islamic round tables to provide a platform for discussions with Muslim associations. The German Islam Conference (DIK) was initiated by the federal administration in 2009. The main goal of this institution is to support the better integration of the Muslim population into German society. From time to time, the DIK has been criticised by politicians because of the limited impact of its advisory board, which includes more than 100 people. One major point of criticism is the impression that not all of the members of the DIK accept the values of a democratic and religiously neutral civil society[14].

The academic debate on religious freedom focuses on the relationship between freedom of religion and democratic minimum standards in civil society. Analyses

[13] See A. Liedhegener, 'Religionsfreiheit und die neue Religionspolitik. Mehrheitsentscheide und ihre Grenzen in der bundesdeutschen Demokratie' (2008) 55(1) *Zeitschrift für Politik. Neue Folge,* p. 84.

[14] See M. Lau, 'Integrationseuphorie verflogen', *Die Welt*, 29 Apr 2007; 'Integration. Muslimrat attackiert Schäuble', *Focus*, 30 Apr 2007; J. Kaube, 'Der Schariavorbehalt', *Frankfurter Allgemeine Zeitung*, 3 May 2007; T. Denkler, 'Islamkonferenz in der Kritik: Zwischen Männerschwimmen und islamistischem Terror', *Süddeutsche Zeitung Online*, 7 May 2013.

show that there is diversity in the guarantee of religious freedom between democratic states and theocratic or other non-democratic regimes. There is no doubt that, even in democratic societies, religious freedom cannot be guaranteed in an unlimited fashion[15]. A major problem occurs when people with different religious and political backgrounds enter Western societies. The relations between traditional religions and the secular state are from time to time identified as a religious weakness of more and more secularised religions. Fundamentalists identify themselves as religious elites, standing with their values over a decadent post-modern society. Because of this phenomenon, the debate is difficult, even with academic Islamic theology in Germany. Looking at Islamic theology at German universities, professors represent a modern and liberal Islam that does not cover the scope of understandings of Islam in German society. Even the DIK does not consider these theological standpoints as authentic interpretations of the Quran. This leads us to an academic discussion of Islam that is more or less a discussion led by non-Islamic believers. The main topic of discussion deals with the delimitation of religious freedom and extremism motivated by religion. This extremism has to be identified. It is not only extremism leading to terrorism but also religious positions that contravene the legislation of civil society in various areas, such as social, healthcare, culture and education. It is a more or less open question if, for example, dividing sports education, in the interest of Muslim girls, into girls and boys groups in a co-educational school can be legally enforced[16]. It is a question of interpreting Article 4 GG to determine if civil servants are allowed to wear a Muslim headscarf at work[17]. The jurisprudence in these religion-motivated cases varies but is consistent regarding the relevant facts. It is a question of interpretation whether actions motivated by religion promote religious radicalisation in every case. The German courts tend not to make general decisions but to decide on the basis of the specific facts in the cases in front of them. While participating in swimming lessons in co-educational classes is generally part of the secular education covered by Germany's education policy, the question of wearing a headscarf is not necessarily a signal against the state's secular and democratic order. Even a civil servant is allowed to refer to their right to religious freedom insofar as the religious freedom of others has

[15] See D. de Nevé, 'Grenzen der Religionsfreiheit' in Adrian Loretan (ed), *Religionsfreiheit im Kontext der Grundrechte. Religionsrechtliche Studien Teil 2* (Zürich, Theologischer Verlag Zürich, 2011), pp. 165 ff.

[16] See 1 BvR 9/97 - BVerfGE 96, 288 <303>; BVerfG Decision of 8 Nov 2016, 1 BvR 3237/13, <http://www.bverfg.de/e/rk20161108_1bvr323713.html>.

[17] See BVerfE, Decision of 27 Jan 2015, 1 BvR 471/10, 1 BvR 1181/10, <http://www.bverfg.de/e/rs20150127_1bvr047110.html>. The court stated: 'A general ban on headscarves for teachers at state schools is not compatible with the Constitution'; LAG Berlin, Decision of 9 Feb 2017, 14 Sa 1038/16. The court stated: 'The Berlin state administration has to pay a two-month salary to an assistant teacher because she was not employed [because she wanted] to wear a headscarf in service'.

not been interfered with. The current discussion in politics, ethics and law is about the tension between religious freedom and security of the state and the people.

Udo Di Fabio, a former judge at the *Bundesverfassungsgericht*, identifies a certain tension between religion and democracy. While democracy tends to mediate through legislation and high court jurisprudence, he opts for rediscovering the basic values of democracy, meaning freedom, sovereignty of the people's will and the limitation of power. These values are opposed to any form of absolutism. Religions have a tendency to be absolute in their doctrines and their demands for obedience. Reconciliation between these two opposing systems requires a process of enlightenment[18]. The predominant European religions have already undergone such a process. Islam as a whole is far from this transformation in a way that is compatible with modern societies.

The former president of the German Conference of Catholic Bishops, Karl Cardinal Lehmann, has stated that religious freedom needs an atmosphere of tolerance. Tolerance for him cannot be misunderstood as a form of laissez-faire. It is a specific service to the community whereby individuals do not declare that their personal opinions are absolute or describe others as intolerable. Tolerance is not only an individual attitude but also an unwritten constitutional principle. In the latter sense, tolerance provides the framework for searching for the truth. However, it has limits. A minimum of common morality is necessary, which excludes racism and all other forms of discrimination, human rights violations, genocide and terrorism. Under these conditions, the state has to provide open spaces for the free personal development of all citizens[19]. Individual freedom comes to an end where tolerance is denied.

It is a great challenge to fulfil both freedom of religion and security in modern societies. This challenge cannot be met by populists who want to close the borders. In a globalised world, open societies have to seek a balance between needs and values to guarantee as much freedom as possible and to exercise as much control as necessary. There are no nostrums to solve this delicate ethical, social and legal problem.

IV. Legal and political framework

1. Definition of Extremism, Fundamentalism and Radicalisation

A. *Extremism*

First of all, one has to face the fact that there is no official or unique definition of the term 'extremism' in German politics, legislation or administration. Germany

[18] See U. Di Fabio, *Gewissen, Glaube, Religion. Wandelt sich die Religionsfreiheit?* (Freiburg, Herder, 2012) pp. 121-142.

[19] See K. Kardinal Lehmann, *Toleranz und Religionsfreiheit. Geschichte und Gegenwart in Europa* (Freiburg, Herder, 2015), pp. 83-88.

does not have a law on extremism. The instruments of the Constitution and laws, especially criminal law, are used instead. In the political sciences, there are several approaches to defining extremism, mainly in the context of the extreme right and left wings of the political spectrum. Referring back to ancient philosophy, extremism is the political aim of rejecting an existing social and political order. The respective ideological justification and the political objective of the actors are not important. What is essential for understanding this phenomenon is the fundamental rejection of the existing legal and political situation[20].

The competent authorities in Germany's federal administration and in the administration of the country's individual states (*Bundesländer*) provide their own framework of interpretation. The term 'extremist' refers to individuals who reject the democratic constitutional state and its fundamental values, norms and rules, whose actions are aimed at abolishing the democratic freedom of the democratic order and replacing it with a totalitarian order. Violence is often approved, propagated or even practised as an appropriate means of asserting one's personal goals. Considered extremist are also those actions that endanger the foreign interests of countries through the use of violence or actions directed against the idea of world understanding, in particular against the peaceful coexistence of nations. Extremists are opposed to the fundamental rights and human rights laid down in the Basic Law, to the right of personality, to life and free development, as well as to other basic principles of the liberal democratic order, the sovereignty of the people or the independence of the courts[21].

B. *Fundamentalism*

In the European context today, the term 'religious fundamentalism' is normally used in the context of Islamic fundamentalism. Nevertheless, one should realise that religious fundamentalism is not only a Muslim but also a Christian phenomenon, which arose in the conservative Protestant movement at the end of the 19th century in the United States. This was a movement against the modernistic and liberalistic tendencies in culture, science and society. Fundamentalists identified five ironclad Christian rules that had to be observed under all circumstances: the infallibility of the Bible, the Immaculate Conception and the divinity of Jesus Christ, as well as Jesus's atonement, bodily resurrection and his visible return[22].

[20] See. A. Pfahl-Traughber, *Linksextremismus in Deutschland. Eine kritische Bestandsaufnahme* (Berlin, New York, Springer, 2014), pp. 15-24.

[21] See Bundesministerium des Inneren (ed) 'Extremismus- & Terrorismusbekämpfung', 2017, <https://www.bmi.bund.de/DE/themen/sicherheit/extremismus-und-terrorismusbekaempfung/extremismus-und-terrorismusbekaempfung-node.html;jsessionid=94B1F39B86AF4526789F19EEA6EA204F.2_cid373> (accessed 15 Sep 2017).

[22] See G. Hole, *Fanatismus* (Freiburg, Herder, 1995) p. 32.

Islamic fundamentalism is grounded in the common history of the East and West. The Anglo-American historian Bernard Lewis refers to the application of the concept of fundamentalism to Islam as misleading because it originally applied to Christianity[23]. Therefore, it might be appropriate to speak about neo-fundamentalism in the Islamic context. Neo-fundamentalism is a term brought into the discussion by Olivier Roy to describe a branch of Islamism that aims to promote the use of Sharia law in society. He sees a trend towards neo-fundamentalism in different Islamic movements. While conventional Islamism wanted to produce a political revolution in order to establish an Islamic state (as exemplified in Iran), neo-fundamentalists aim, above all, to change social and cultural conditions[24]. Without going into the details of the theory, one might agree that neo-fundamentalism and Islamism are forms of fanaticism.

At this point, one can distinguish between two forms of fanaticism: on the one hand, essential fanaticism describes a personality trait that makes a person lean towards the extreme due to their individual development, inner urge. Induced fanaticism, on the other hand, is understood as a social or group phenomenon whereby people whose personality structure was not previously suited to fanaticism become fanatical 'by the experienced activity of fanatics or fanatical movements'[25]. Fanatical Islamic groups operating in Germany, according to a report by the national intelligence office (*Bundesverfassungsschutz*), are prone to act in this direction. One example is the Salafist movement. Salafist preachers have been invited to preach in several mosques. They teach their ideology of a form of Islam that is superior to all non-Islamic religions and states, and they call for a theocracy under the regime of Muslim clergy. They also look for publicity. A Salafist network called the True Religion launched an initiative called 'Read', which offered a free volume of a suspect German translation of the Quran. Meanwhile, in 2016, this initiative was forbidden by the state authorities on the grounds that it was a recruitment institution for neo-fundamentalist fighters[26]. The authorities clearly pointed out that this was not a ban on Islam or against the distribution of the Quran but only a ban of a terrorist association operating under the guise of a missionary movement.

[23] See B. Lewis, *Islam and the West* (Oxford, Oxford University Press, 1993), pp. 3-15.

[24] See O. Roy, *The Failure of Political Islam* (Cambridge, MA, Harvard University Press, 1998), pp. 76-84.

[25] Hole, *Fanatismus*, p. 53.

[26] See Bundesamt für Verfassungsschutz, 'Verbot der salafistischen Vereinigung "Die Wahre Religion" (DWR) alias "LIES! Stiftung" durch den Bundesminister des Innern am 15. November 2016', 15 Nov 2016, <https://www.verfassungsschutz.de/de/aktuelles/meldungen/me-20161115-verbot-dwr-lies> (accessed 16 Sep 2017).

2. Legislation *Expressis Verbis* and Indirectly Adopted to Tackle Radicalisation and Extremism.

A. *Penal Law*

Since the foundation of the Federal Republic of Germany, a number of anti-terrorism laws have been passed in the country. The oldest such laws are Section 129a of the German Criminal Law (StGB), adopted in 1976, and the so-called *Kontaktsperregesetz* of 1977, which was initially included in the law to defend the state against the left-wing terrorism of the Red Army Faction (*Rote Armee Fraktion*). The term 'terrorist association' is used in Section 129a StGB to describe organised long-term connections involving more than two people working together to commit terrorist acts[27]. The law of section 129a StGB contains various specific factual circumstances of the case in contrast to Section 129 StGB (on criminal associations). Section 129a StGB covers the formation, membership, support and promotion of a terrorist organisation devoted to committing murder, manslaughter, genocide or other serious crimes[28]. The terrorist purposes of these associations, which are covered in the second paragraph of Section 129a StGB, include a determination and a suitability of the numerous offences mentioned there. Thus, for an offence to have taken place, it must be determined that an act has intimidated 'the population in a considerable way' or has been carried out in pursuit of other unlawful purposes. Furthermore, it is required that they cause significant damage to a state or an international organisation[29]. In the literature, this norm has often been criticised because it is the only criminal offence by which an accused person can be convicted by virtue of their membership in an organisation without any evidence of being involved in committing a crime. Finally, it is an open question whether this norm complies with the German Constitution[30]. That said, this appears to be the only norm in Germany's criminal law that is appropriate for the defence of the secular and democratic state against terrorism. According to Article 4(3) of the Treaty on European Union (TEU) and the German Constitution, the German legislature still has not determined how criminalising the early stages of terrorist or extremist behaviour can be properly legitimised[31].

[27] See T. Fischer, '§ 129a, Bildung terroristischer Vereinigungen, Rn. 4' in *Strafgesetzbuch und Nebengesetze* (München, *C. H. Beck*, 2012), p. 928.

[28] Ibid, p. 927.

[29] Ibid, p. 930.

[30] See K. Hawickhorst, Paragraph 129a StGB - *Ein feindstrafrechtlicher Irrweg zur Terrorismusbekämpfung. Kritische Analyse einer prozessualen Schlüsselnorm im materiellen Recht* (Berlin, Duncker & Humblot, 2011), Part 6.

[31] See M. A. Zöller, 'Erst verschärft, dann wieder entschärft: Die Entwicklung von § 129a StGB', *Bundeszentrale für politische Bildung*, 16 Aug 2016, <https://www.bpb.de/dialog/232724/erst-verschaerft-dann-wieder-entschaerft-die-entwicklung-von-129a-stgb> (accessed 17 Sep 2017); M.

B. *Law on Associations*

Germany's laws on associations can function as substitute laws against any extremism by banning associations. Prohibitions against both right- and left-wing associations that act against the Constitution have a certain tradition in Germany. In 2017, the state administration of Hesse banned a radical Salafist association in Kassel and closed the Medina Mosque as part of the Almadinah Islamic Culture Club. The reason for this was that the association was a platform for promoting hatred and violence. The administration pointed out that the aim of the association was not to participate in interreligious dialogue but only to indoctrinate and radicalise young people before sending them to Iraq or Syria[32].

Sections 21-79 of the BGB (German civil law) provide the legal basis for private associations. In addition to these norms, the German Law on Associations offers the possibility of prohibiting associations if they act against the German Constitution according to Article 9 II GG[33]. This is due to the fact that such an association forfeits its fundamental rights[34]. Section 3 of the Law on Associations specifies the conditions for prohibiting associations and declares the legal consequences:

> 'An association may only be treated as prohibited (Article 9 II GG) if [an] order of the prohibition authority confirms that its purpose or activity is contrary to the criminal law or that it is contrary to the constitutional order or the idea of international understanding. In the prohibition order the prohibition of the association has to be prescribed. A ban is usually connected with the seizure and the confiscation of: 1st the assets of the association, 2nd open claims by third parties, insofar as the confiscation is foreseen in Section 12 para. 1 Association Law and 3rd belongings of third parties, insofar as the claimant deliberately promoted his unconstitutional intentions by the surrender of the articles to the association, or the aforementioned objects are intended to promote these efforts'[35].

Most Islamic associations and mosques are governed by these laws. The amendment to the Law on Private Associations, underlined above, will especially prevent extremist associations from incorporating in order to avoid the consequences of a ban

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A. Zöller, 'Strafrechtliche Verfolgung von Terrorismus und politischem Extremismus unter dem Einfluss des Rechts der Europäischen Union', *Zeitschrift für Internationales Strafrecht,* 2014, pp. 402-411.

[32] See Hessisches Ministerium des Innern und für Sport, '"Almadinah Islamischer Kulturverein e.V." in Kassel ab sofort verboten', 23 Mar 2017, <https://innen.hessen.de/presse/pressemitteilung/almadinah-islamischer-kulturverein-ev-kassel-ab-sofort-verboten> (accessed 17 Sep 2017).

[33] Article 9 II GG: '(2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited'.

[34] See Hofmann, 'Commentary on Article 4 GG', pp. 343 ff.

[35] Gesetz zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz). § 3 Verbot, <https://www.gesetze-im-internet.de/vereinsg/__3.html> (accessed 15 Jul 2017).

on their association, in particular the complete disbanding of the organisation and the forfeiture of its assets.

C. *Laws on Asylum*

The fundamental legal basis for migrants seeking asylum is Article 16a GG[36]. This article has a certain relationship to German history. In principle, asylum should be granted to all victims of political persecution. This regulation was modified and extended to a separate norm from Article 16 II GG to Article 16 a GG in 1993. This provision is much more detailed and precise than the older one from 1949, which, however, granted a higher level of protection to asylum seekers than international law did[37]. The modification of this right was necessary because of European law (Article 14 ECHR), especially the Schengen Treaty, and the desire on the part of European administrations to harmonise the legislation on this particular right in the European legal area. The difference between Article 16a GG and Article 14 ECHR is the fact that Article 16a GG guarantees an independent constitutional basic right of asylum[38].

[36] Article 16a GG (Right of asylum):

(1) Persons persecuted on political grounds shall have the right of asylum.

(2) Paragraph (1) of this Article may not be invoked by a person who enters the federal territory from a member state of the European Communities or from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured. The states outside the European Communities to which the criteria of the first sentence of this paragraph apply shall be specified by a law requiring the consent of the Bundesrat. In the cases specified in the first sentence of this paragraph, measures to terminate an applicant's stay may be implemented without regard to any legal challenge that may have been instituted against them.

(3) By a law requiring the consent of the Bundesrat, states may be specified in which, on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds.

(4) In the cases specified by paragraph (3) of this Article and in other cases that are plainly unfounded or considered to be plainly unfounded, the implementation of measures to terminate an applicant's stay may be suspended by a court only if serious doubts exist as to their legality; the scope of review may be limited, and tardy objections may be disregarded. Details shall be determined by a law.

(5) Paragraphs (1) to (4) of this Article shall not preclude the conclusion of international agreements of member states of the European Communities with each other or with those third states which, with due regard for the obligations arising from the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose enforcement must be assured in the contracting states, adopt rules conferring jurisdiction to decide on applications for asylum, including the reciprocal recognition of asylum decisions.

[37] See H. Hofmann, 'Comment on Article 16a GG' in Bruno Schmidt-Bleibtreu and Franz Klein (eds), *Kommentar zum Grundgesetz* (München, C.H. Beck, 2004), p. 562.

[38] See F. Hufen, *Staatsrecht II. Grundrechte* (2nd edn, München, C.H. Beck, 2009) pp. 335 f.

The change in constitutional law made it necessary to change the ordinary laws on asylum and migration as well as the nationality law. In a second stage, the law on asylum proceedings had to be changed too. In this field, the European administration also wanted EU member states to harmonise the essential features of both material asylum law and of asylum-procedure law. This has been an ongoing process since 2013, especially since the surge in migration from the Middle East and Africa to the European Union[39].

The German laws on asylum (AsylG)[40] include material norms on the temporary admission of individuals persecuted solely on political grounds (according to Article 16a I GG), the deportation of denied asylum seekers and finally the naturalisation of accepted asylum seekers. The Federal Office for Migration and Refugees (BAMF) in Nuremberg, with its various branches, decides on the recognition of politically persecuted asylum seekers and on granting a different form of protection. An asylum seeker is allowed to stay on German territory during the asylum procedure. For this purpose, they receive a residence allowance, which, however, neither constitutes a permanent residence permit nor a temporary right of residence.

According to Section 3(2) AsylG, recognition of refugee status can be refused if there are serious reasons for doing so, e.g. an asylum seeker has committed a crime or has incited others to commit a crime. Section 4(2) excludes foreigners from subsidiary protection if there are serious grounds to assume that they have committed or incited others to commit a crime. Sections 34-43 AsylG regulate the ways to deport people. These norms can be found in the chapters on asylum procedures, which make up three-quarters of the entire law. It is no wonder that these chapters contain only formal grounds regarding the deportation of asylum seekers. Committing a crime while seeking refugee status can be a reason for deportation because criminals have no right to subsidiary protection according to Section 4 II 2 AsylG. If neither asylum nor refugee protection can be granted, the BAMF examines, in the course of the asylum procedure, whether there are grounds for a deportation ban. This obligation to conduct an extensive review is intended to ensure that there is no delay in the processing. Besides the asylum procedure, the responsible authority for foreigners requests an expert opinion from the BAMF and examines whether a deportation ban applies. Finally, a criminal can only be deported to a so-called safe country. In these

[39] See C. Costello and E. Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee', *Reforming the Common European Asylum System*, <https://doi.org/10.1163/9789004308664_014> (accessed 17 Sep 2017).

[40] See Bundesministerium für Justiz und für Verbraucherschutz, 'German law on asylum, Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798), last amended by Article 2 of the Act of 11 Mar 2016 (Federal Law Gazette I, p. 394)', 11 Mar 2016, <http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0017> (accessed 17 Sep 2017).

cases, the German state depends on cooperation with the home country of an individual who has committed a crime to take them back. The German law on asylum does not contain special norms against extremism.

V. Effects of the measures on religious freedom

1. Effects of the Legislative Framework Tackling Radicalisation and Extremism on Religious Freedom of Religious Communities and their Affiliated Institutions

A brief look at the German legislation creates the impression that the legislator has no interest in getting into a conflict with the constitutional norm on religious freedom while fighting against extremism and terrorism motivated by religion. There is no general prohibition of certain religious communities. In every case, the responsible authority has to ensure certain grounds for the prohibition of a mosque or a religious institution. A specific prohibition of a particular association is possible only if criminal law or the above-mentioned laws on associations are violated. If it is an association that operates in the entire country, the federal administration is responsible for initiating the necessary legal steps. Otherwise, the state administration of the relevant German state is in charge. Looking at the norms, the reasons for prohibitions do not concern religious beliefs but only the criminal violation of the law.

Talking about the question of religious extremism, the German legislator and the high court jurisprudence balance the individual rights of petitioners or accused against the principles of religious neutrality and parity of the state according to Article 140 GG and Article 137 I WRV. This can clearly be seen in the judgments on Islamic headscarves[41]. This jurisprudence forced the German states to change certain laws regarding Muslim teachers in public schools and other civil servants in particular. Up until now, the ongoing headscarf debate has revealed a deep suspicion of minorities in the majority of society, especially when the minority appears to be somehow 'extreme' in the eyes of the majority.

In most German states, there remains a wish to establish religious teaching of Islam as an ordinary school subject according to Article 7 III GG. Some counties, such as North Rhine-Westphalia, Hesse and Lower Saxony, can be seen as a kind of forerunner in this field. They have created specific laws and concluded contracts with Muslim communities, according to Article 7 III GG. Due to Germany's federal structure, an overall regulation for the country is impossible. A uniform and concerted solution cannot be found for all states because there are different situations in every region. Rhineland-Palatinate, for example, has only a few areas with a large Muslim

[41] See BVerfGE 108, 282: judgment about the religious-ideological neutrality of the state in the context of employment requirements for civil servants.

population in its industrial areas. In the rest of the territory, the Muslim population is very low. Finally, the worsening political situation in Turkey provoked German states to cancel their contracts with the DITB, an organisation under the aegis of Turkey's Ministry of Religion. Imams and religious teachers sent from the Ankara administration were accused of spying for Turkey while serving under the protection of religious freedom.

2. Effects of the Legislative Framework on Individual Religious Liberty

If the basic law on religious freedom is not abused by individuals or organisations, individual religious liberty in Germany is granted to everyone. In individual cases, it might be difficult to distinguish whether young people and children are truly free in their religious life. The Basic Law gives parents the right to decide on all educational matters for their children. The German states have different laws regarding the age of majority in relation to religious matters. In the states that follow the old Prussian tradition, the age of majority is reached at 14; in other states, following the Bavarian tradition, this is reached at the age of 18.

As to prohibition of discrimination, Article 3 III GG proclaims equality before the law for everyone[42]. The legislator is not able to supervise private lives. The administration is able to take action only in specific cases in public life. In a case in Rhineland-Palatinate in July 2017, a male Muslim police officer was removed from his post because he was unwilling to shake hands with a female colleague. The administration argued that this refusal violated the neutrality and moderation requirement for civil servants[43].

3. Effects of the Policies on Religious Freedom of Religious Communities and their Affiliated Institutions

Germany has instituted a wide range of guarantees of religious freedom for individuals and institutions. The law not only guarantees individual religious freedom and its public dimension but also the participation of religious communities in public affairs. However, these activities are guaranteed by the state only insofar as they are part of the mission and self-conception of the religion in question. The permanent ju-

[42] Article 3 GG (1949): '(I) All persons shall be equal before the law. (II) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. (III) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability'.

[43] See 'Polizist verweigert Kollegin den Handschlag', *Spiegel Online*, 21 Jul 2017, <http://www.spiegel.de/ karriere/rheinland-pfalz-polizist-verweigert-handschlag-und-muss-in-den-innendienst-a-1159175.html> (accessed 17 Sep 2017).

risprudence of the *Bundesverfassungsgericht* shows that a wide range of participation in society is guaranteed for all religions according to their free will[44]. Nevertheless, these guarantees are only upheld under the condition that the followers of various religions and beliefs accept the constitutional framework and the laws for peaceful coexistence.

VI. Educational measures to tackle radicalisation/extremism

1. Laws, Policy and Programmes

Article 7 I GG states that public education is supervised by the state. According to Article 6 II GG, this does not mean that parents have no rights in this matter. In fact, the Constitution organises the obligations of the state in parity with the parents[45].

Article 7 III GG expressly acknowledges the participation of religions in religious education, which is to be taught 'according to the principles of the religious communities' pursuant to the Constitution. The basis for religious education, according to the Basic Law and most of the constitutions of the German states, is formed not only in consideration of the religious neutrality of the state in accordance with the provisions of the respective religion but also in consideration of the provisions of the state. Article 7 GG applies to the German states in which no other rules were applied before 1949 (Article 141 GG, the so-called Bremen clause). In addition to this, there are the constitutional and statutory laws of the German states, as well as the relevant provisions of the church laws. In some states, there was a regulation before 1949 that differed from the provision of Article 7 III GG. In those particular states, the former regulation remains valid. States such as Berlin, Brandenburg and Bremen do not have confessional religious education but provide individual lessons in secular ethics or religious studies for all pupils. These alternative regulations in the German legal system show a strong interest on the part of the state to educate young people in ethics and morals. This is due to the fact that the German state presumes that an ethically educated citizen is a better citizen. The gap between the religious and ethical education of Muslims in Germany may be one of several reasons for extremism and radicalisation. But one also has to realise that this is an individual phenomenon for culturally uprooted people.

[44] See BVerfGE 24, 236: collection for religious purposes is the exercise of religion in the sense of Article 4 GG; BVerfGE 46, 73: right of self-determination also for all institutions assigned to the church; specificity of ecclesiastical labour law.

[45] See B. Pieroth, 'Comment on Article 7 GG' in B. Pieroth and H. D. Jarass (eds), *Grundgesetz für die Bundesrepublik Deutschland* (6th edn, München, C.H. Beck, 2001), p. 267; M. Pulte, *Grundfragen des Staatskirchen- und Religionsrechts. Mainzer Beiträge zum Kirchen- und Religionsrecht* (Würzburg, Echter, 2016), p. 100.

The massive change in the political climate between Germany and Turkey forced the state authorities to cancel treaties with state-dependent Muslim communities that were, according to Article 7 III GG, named as the responsible contact persons for Muslim religious education in schools. At the moment, it is unclear what the future might bring.

2. Autonomy of Religious Schools

A distinction has to be drawn between private schools participating in public education and religious schools that only teach a certain religion. While the former group participates in the public system, it is under the supervision of the state. Article 7 IV GG grants individuals and institutions the right to establish private schools as a replacement or an addition to public schools. In this case, they need the approval of the competent state authority in agreement with existing laws. Article 7 IV GG shows the wide range of rights for all groups in society:

> 'The right to establish private schools shall be guaranteed. Private schools that serve as alternatives to state schools shall require the approval of the state and shall be subject to the laws of the [states]. Such approval shall be given when private schools are not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff, and when segregation of pupils according to the means of their parents will not be encouraged thereby. Approval shall be withheld if the economic and legal position of the teaching staff is not adequately assured'.

It is interesting to see that there is no religious connotation in this article. It shows how the Basic Law guarantees neutrality and parity towards every religion or belief in this particular field. But this norm does not prevent the state from cooperating with certain religions. In Article 23 *Reichskonkordat*, for example, there is the phrase that the state guarantees the right of the Catholic Church to establish and run its own schools at every stage of the educational system.

> 'The retention of Catholic denomination schools and the establishment of new ones is guaranteed. In all parishes where parents or guardians request it, Catholic elementary schools will be established wherever the number of pupils, with due regard for the local conditions of school organisation, appears to be sufficient for a school administered in accordance with the standards prescribed by the state'.

The *Reichskonkordat* obviously gives preference to the Catholic Church in the form of special guarantees. Nonetheless, this regulation does not violate the religious neutrality of the state because Article 7 IV GG offers nearly the same opportunities to all other religions. Religious neutrality in the understanding of the constitutional norm does not necessarily mean absolute neutrality but support for neutrality pursuant to a legal value judgement on the part of the administration instead. The legal framework for schools includes the Constitution and the relevant laws on school administration according to the advice of the responsible ministries.

3. Rights of Children and Parents

Article 6 II GG ensures the right of parents to decide on the comprehensive education of their children. As they grow older, the rights of children themselves have to be taken into account in accordance with Article 2 I GG. When children reach the age of majority, the rights and obligations of their parents come to an end. In accordance with the jurisprudence of the *Bundesverfassungsgericht*, the rights of parents have to be understood as rights in trust. Education against a child's well-being is not ensured by Article 6 II 2 GG. The right to education may be exercised only for the protection of the child and thus for the protection of the community[46]. One of the functions of the state is to oversee the well-being of its citizens. Because of this function and according to the Constitution, an intervention in parents' rights is only legal if it conforms with Article 6 II GG or if other basic laws collide with the parents' rights. In principle, the right of parents can be designed in both form and content by the legislator either because of its watchdog function (Article 6 II 2 GG) or because of the educational sovereignty of the state (Article 7 I GG)[47].

VII. Conclusion

After World War II, comprehensive human rights were guaranteed in the German Basic Law and the constitutions of the German states. All legislation has to follow these principles, which build a broad framework for individual and collective development. The *invocatio Dei* in the preamble to the Basic Law makes clear that positive law has to be justified by an unclassified supra-positive law. It is up to religion and philosophy to give meaning to this term. The jurisprudence of the *Bundesverfassungsgericht* always weighs the different basic rights of individuals and organisations against limitations. Because of these basic legal conditions, it is very difficult in Germany to create laws against extremism or religious radicalisation. Finally, the state can only prohibit extremist organisations or convict individuals for extremist crimes. The tightening of the law on migrants has to be in accordance with (and proofed by) the constitutional law. Even deportation has its limits in either the Constitution or in terms of cooperation with the receiving country. As a result, there were more than 200,000 migrants in Germany in 2017 without a residence permit[48].

[46] Hufen, Staatsrecht II. Grundrechte, p. 275.

[47] See Gramm and Pieper, *Grundgesetz*, pp. 76-78.

[48] See Mitteldeutscher Rundfunk (ed), 'Wer gilt in Deutschland als ausreisepflichtig?', 10 Apr 2017, <http://www.mdr.de/nachrichten/politik/inland/wer-gilt-als-ausreisepflichtig-100.html> (accessed 17 Sep 2017).

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN GREECE

Lina Papadopoulou[1]

I. Social context

Greek society is fairly homogeneous in terms of the population's religious preferences[2], given the fact that the majority of Greeks are, at least nominally, Christian Orthodox (see Table 1)[3]. Although the vast majority of Greeks, for reasons of tradition, still engage in basic religious practices, such as having a Christian wedding ceremony or fasting during the Holy Week of Easter, a significant part of the population are not particularly active believers, i.e. they do not attend church on a regular basis and do not follow the particular lifestyle suggested by the Greek Orthodox Church[4].

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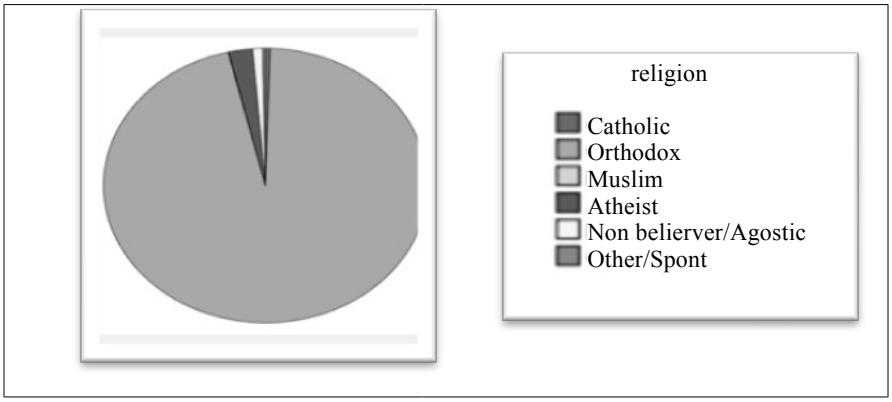
[2] See L. Papadopoulou, 'Greece' in G. Robbers and W.C. Durham (eds), *Encyclopedia of Law and Religion* (Leiden, Brill, 2016) pp. 156 ff.

[3] Tables 1-4 were created by Stella Christoforidou, MSc in Public Law and PhD candidate in Constitutional Law, National University of Athens, and Demetra Papaxanthi, MA student of Political Analysis, School of Economics and Political Studies, Aristotle University of Thessaloniki, based on a Eurobarometer survey carried out in 2016.

[4] A. Sakellariou, 'Moving from traditional religion to atheism in Greek society: "Like a ship distancing from the coast…"', in *Religion going public*, <http://religiongoingpublic.com/archive/2017/moving-from-traditional-religion-to-atheism-in-greek-society-like-a-ship-distancing-from-the-coast> (accessed 1 Sep 2017).

Table 1: Greek religious preferences



In general, one could argue that, given two concurrent phenomena —the increasing number of people leading secular lives, on the one hand, and the recent migratory influx, on the other— Greek society has realised that the Orthodox faith is no longer the only, unchallenged religion in the country.[5] The fact that Greek citizens are not particularly attached to religion can be seen from the answers given by respondents to a question in a recent Eurobarometer survey regarding the values they personally considered to be most important.[6] As Table 2 indicates, religion occupies a fairly low position in the list of values, although it ranks above tolerance, which may be explained by the fact that Greece is currently dealing with a wave of immigration unlike any other in its history. Furthermore, despite the fact that Greeks' standard of living has dramatically decreased due to the particularly harsh financial circumstances that have prevailed since 2010,[7] a survey by the Hellenic Statistical Authority in 2011 showed, as can be seen in Table 3,[8] that the main reason why foreigners moved to Greece from abroad during the year prior to when the survey was carried out was to look for work.

[5] See C. Papageorgiou, 'Immigration and Religion in Greece' in A. Motilla (ed), *Immigration, National and Regional Laws and Freedom of Religion* (Leuven, Peeters, 2012) pp. 110 ff.

[6] Eurobarometer 2016, 86.2, question QD7, <https://dbk.gesis.org/dbksearch/SDesc2.asp?ll=10&notabs=&af=&nf=&search=&search2=&db=E&no=6788> (accessed 1 Sep 2017).

[7] See Hellenic Statistical Authority, 'Survey on the income and the living conditions of households 2016', 23 Jun 2016.

[8] Hellenic Statistical Authority, Table A05, <http://www.statistics.gr/el/statistics/-/publication/SAM07/-> (accessed 1 Sep 2017). The calculations were done by Stella Christoforidou and Dimitra Papaxanthi.

Table 2: Which values are the most important for you?

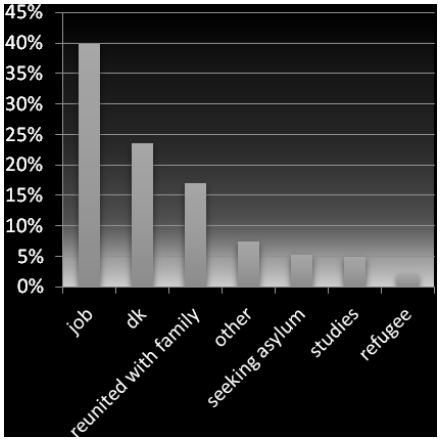
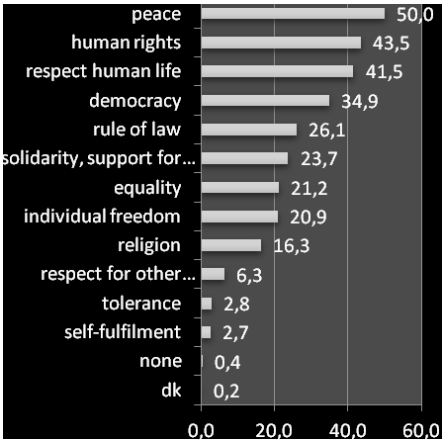
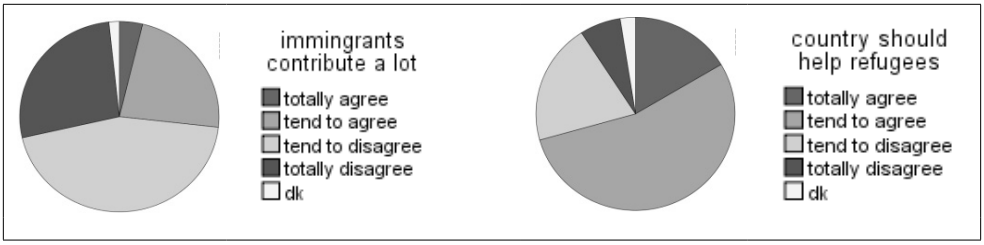


Table 3: Reasons for immigration to Greece



The fact that, despite the financial crisis, immigrants are coming to Greece mainly to look for work, as can be seen in Table 3 above, has created an ambiguous attitude in the population towards the immigration and refugee issue[9]. The above-mentioned Eurobarometer survey shows that even until very recently (see Table 4), the vast majority of Greeks disagreed or tended to disagree regarding the contribution of immigrants to the country's well-being, even though the vast majority agreed that Greece should help refugees (Table 3)[10]. At the same time, Islamophobia has in the meantime dramatically increased.

Table 4: Greeks' stance towards immigrants[11]



[9] A. Markovich, 'Greek hospitality is put to a religious test', 2 Nov 2016, <http://religionnews.com/2016/11/02/greek-hospitality-is-put-to-a-religious-test/> (accessed 31 Jul 2017).

[10] Eurobarometer 2016, 86.2, question QD9.

[11] 'Country' here means Greece; 'immigrants contribute a lot' means they contribute a lot to Greece.

II. Political and public debate

The public debate in Greece is frequently concerned with issues related to religion and the Greek Orthodox Church, including the possible future separation of church and state, a perennial theme haunting public debate in Greece. The most recent example of this issue pertains to the teaching of religious education in schools[12]. So far, religious instruction in schools has been of a confessional kind, while students may be exempted from religious education lessons for religious reasons.

The Greek Orthodox Church rarely fails to take a stand on such issues[13], even if they actually concern the state and not the church itself. It should be noted that the opinion of church leaders exerts an almost irresistible influence on the ruling elites, no matter which party is in power. As a matter of fact, party leaders and other politicians compete with each other in trying to gain the church's support before elections. It is telling that, in the context of recent discussions concerning religious education in schools, the government, supported by two populist-nationalist parties, the left-wing SYRIZA and the right-wing Independent Greeks, attempted, in the end, to calm tensions in order to maintain good relations with the church[14], even going so far as to replace the Greek Minister of Education, who was blamed for displeasing the church.

Another topic that has been discussed in public debate a great deal lately is the establishment and operation of a (large) mosque in Athens. As of January 2018, there were only six official mosques —all of them small in size— functioning in Attica[15]. There has been a consensus between the most popular parliamentary parties on the issue of the construction of a mosque (with the exception of the neo-Nazi Golden

[12] See, for example, 'Schools' religious classes need to change, says education minister', *Kathimerini*, 12 Mar 2016, <http://www.ekathimerini.com/206910/article/ekathimerini/news/schools-religious-classes-need-to-change-says-education-minister> (accessed 27 Jul 2017).

[13] See, for example, 'Church still not satisfied with school religion classes', *Kathimerini*, 12 March 2017, <http://www.ekathimerini.com/216814/article/ekathimerini/news/church-still-not-satisfied-with-school-religion-classes> (accessed 7 Feb 2018); 'Archbishop slams changes to religion lessons at school', *Kathimerini,* 20 Sep 2016, <*http://www.ekathimerini.com/212190/article/ekathimerini/news/archbishop-slams-changes-to-religion-lessons-at-school*> (accessed 7 Feb 2018).

[14] 'State, Church make peace after row on religion classes', *Kathimerini*, 5 Oct 2016, <http://www.ekathimerini.com/212591/article/ekathimerini/news/state-church-make-peace-after-row-on-religion-classes> (accessed 7 Feb 2018).

[15] See K. Tsitselikis, 'Muslims in Greece' in R. Potz and W. Wieshaider (eds), *Islam and the European Union* (Leuven, Peeters, 2004) p. 91; U. Farooq, 'With construction of a new mosque, Greek Muslims look to come out of the shadows', *Religion News Service*, 2 Nov 2016, <http://religionnews.com/2016/11/02/with-construction-of-a-new-mosque-greek-muslims-look-to-come-out-of-the-shadows/> (accessed 7 Feb 2018).

Dawn party and the governing Independent Greeks party)[16]. The financing of the construction and operation of the mosque is a major state initiative that is aimed at, among other things, preventing radicalisation, since it is hoped that it will cultivate a sense of acceptance of the Muslim community by facilitating the practice of their faith. Notably, the mosque received a licence to operate through a legislative provision that was passed by an overwhelming majority in parliament, as opposed to the usual legal procedure that a house of worship needs to undergo. The Supreme Administrative Court (Council of State), reviewed the provision and rather than declaring it a violation of the principle of religious equality, saw it instead as a way to strengthen a religious minority that did not have the proper means to establish a place of worship[17]. On the other hand, the one thing still to be achieved, as the Greek Orthodox Church seems to be impeding the process, is the establishment of a cemetery for Muslims[18].

On the subject of the treatment of Muslims in Greece, they are, along with migrants, Roma, Jews and LGBT, frequent targets of hate speech in the country. As such, the Council of Europe has recommended that the Greek authorities establish a national monitoring mechanism for incidents of hate speech, including, but not limited to, a centralised database for court cases[19]. In a recent global survey, the Anti-Defamation League found that Greece had the highest score (69%) in terms of anti-Semitic attitudes outside the Middle East and North Africa. Anti-Semitic stereotypes have permeated large sections of society as well as some parts of the Greek Orthodox Church, and they sometimes manifest themselves in acts of vandalism against Holocaust memorials. Holocaust denial raises little concern among Greeks, and there was even a decision by a Greek appeals court in 2006 that, in a related case, declared that the 'pen is free' in order to legitimise anti-Semitic speech acts[20].

Metropolitan Seraphim of Piraeus[21] has even blamed Jews for orchestrating the Holocaust and accused what he called global Zionism of a conspiracy to enslave Greece

[16] See, for example, 'Greek parliament approves building mosque in Athens', 16 Aug 2016, <http://www.loc.gov/law/foreign-news/article/greece-parliament-approves-building-of-first-mosque-in-athens/> (accessed 7 Feb 2018).

[17] See judgment of the Council of State (Supreme Administrative Court) 2399/2014 (full chamber).

[18] "Muslims not getting hopes up as building starts on first official Athens mosque", The National, < https://www.thenational.ae/world/muslims-not-getting-hopes-up-as-building-starts-on-first-officialathens-mosque-1.12581> (accessed 27 July 2017).

[19] Council of Europe, European Commission Against Racism and Intolerance, *ECRI Report on Greece*, 5th monitoring cycle, 24 Feb 2015, <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf> (accessed 7 Feb 2018).

[20] E. Polymenopoulou, 'Arts, Censorship and the Greek Law - Blasphemy versus Hate Speech' (2017) 6 *International Human Rights Law Review*, pp. 109-132, 131.

[21] On the bishop's homophobic remarks, see, for example, R. Mackey, 'A Greek Bishop's Anti-Semitic Tirade', *The New York Times*, 22 Dec 2010, <https://thelede.blogs.nytimes.com/2010/12/22/a-greek-bishops-anti-semitic-tirade/> (accessed 7 Feb 2018).

and the Orthodox Church. He has also threatened to excommunicate any member of parliament who voted in favour of extending civil partnerships to same-sex couples.

III. Legal and political framework

1. Definition (or Non-definition) of Extremism, Fundamentalism, Radicalisation

Extremist ideologies are those that undermine the logic of a rival and that totally oppose that rival with the aim of destroying them, this aim being the underlying reason for the activities of the extremist group[22]. Radicalisation as a social phenomenon is open to multiple definitions that coincide and overlap. The following definitions might thus be attributed to it:

- increased social and psychological devotion to extreme political or religious ideologies;
- the adoption of extreme religious and political beliefs aimed at the subversion of conventional ideologies;
- an extreme reaction to the apparent (or so its supporters believe) lack of justice and alienation from the state and the rest of society;
- a personal and ideological transformation from one political stance to another which is (religiously or politically) radical, aimed at overthrowing conventional ideologies;
- when related to terrorism, radicalisation is perceived as a preparatory stage that might lead to politically incited violence[23].

The law does not provide a definition of fundamentalism or radicalisation. Perhaps the most relevant —but not directly applicable— legal provision is Article 81A of the Penal Code on 'racist crime', which penalises acts 'committed out of hatred on grounds of race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability against the victim'.

2. Legislation *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OCJ L 309/15/25.11.2005) was transposed into Law 3691/2008,

[22] Δράσεις κατά της ριζοσπαστικοποίησης και του εξτρεμισμού, Αρχηγείο Ελληνικής Αστυνομίας, Εκπαιδευτικό Εγχειρίδιο, Διεύθυνση Κρατικής Ασφάλειας, Κέντρο Μελετών Ασφαλείας (KEMEA), Oct 2016, p. 8ff [Centre for Security Studies, *Actions against radicalization and extremism, Textbook of the Chief-Directorate of the Hellenic Police, Directorate of State Security*, <http://counter-radicalisation.gr/images/public-pdf/kemea_brochure_a6-2_1.pdf> (accessed 1 Sep 2018).

[23] Ibid, p. 22.

which also established Greece's Authority for Combating Money Laundering, the Financing of Terrorism and for the Audit of Assets. According to Article 7A, the authority consists of three autonomous units, one for the investigation of financial information, a second for enforcing financial sanctions against suspects of terrorism and a third for the audit of assets.

Furthermore, Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States and Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA have been transposed into Greek national law by Law 4360/2013.

A. *Regarding Hate Speech*

The Greek legal order already included legislation that provided for the punishment of acts or deeds aimed at racial discrimination (Law 927/1979). Through this law, the Greek state adopted measures to fulfil its obligations arising from the International Convention on the Elimination of All Forms of Racial Discrimination[24]. States that are signatories to the convention are monitored by the relevant UN committee concerned with the fulfilment of their obligations. In its report of 6 October 2016, the Committee on the Elimination of Racial Discrimination[25] observed the following:

> 'The Committee is concerned about the increase in hate speech since 2009, coinciding with the rise of the Golden Dawn party, essentially targeting migrants, Roma, Jews and Muslims, including through the media, on the Internet and social media platforms. The Committee is also concerned at the increase of racist and xenophobic attacks, particularly against asylum seekers and refugees, which is exacerbated by the economic crisis in [Greece]. Furthermore, the Committee is concerned at the low reporting rate of such crimes, despite some awareness-raising measures taken to that end (arts. 2 and 4)'.

A radical modification of the respective legislative framework was attempted through Law 4285/2014. As stated in the explanatory memorandum to this law[26], the supplementation of Law 927/1979 was deemed necessary:

[24] UN Treaties Collection, I-9464, Treaties series, v. 660, 1969, 212, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280008954&clang=_en> (accessed 2 Sep 2017).

[25] Committee on the Elimination of Racial Discrimination, 'Concluding observations on the twentieth to twenty-second periodic reports of Greece', 3 Oct 2016.

[26] Explanatory memorandum of Law 4285/2014 (Government Gazette of the Hellenic Republic, Issue A 191/10.9.2014), <http://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4f-b76a24/t-l328-eis.pdf> (accessed 1 Sep 2018).

> 'in view of the serious challenges which our country currently faces in its transition to an open society, where the equal protection of all people, independently of their individual natural and cultural characteristics, emerges as a primary obligation of the State. Consequently, the acquisition of a comprehensive, clear and efficient [law] is considered imperative, so as to deal with the serious manifestations of racist and xenophobic behaviour'.

Article 1 of the aforementioned 1979 law was replaced by Article 1 of Law 4285/2014[27], which, in respect of public incitement to violence or hate speech, stipulates (para 1):

> '(1) Whoever intentionally, publicly, orally or through the press or the Internet, or by any other means or methods, incites, provokes or stirs up acts or actions that may lead to discrimination, hatred or violence against a person or a group of persons that are identified on the basis of race, colour, religion, descent, national or ethnic origin, disability, sexual orientation or gender identity, in a manner that might endanger public order or pose a threat to the life, the freedom or the physical integrity of the aforementioned persons, shall be punished with a prison term of between three (3) months and three (3) years and a fine of five to twenty thousand (5,000-20,000) euros'.

Likewise, the Code of Immigration and Social Inclusion (Article 21(5) of Law 4251/2014) stipulates that the deeds mentioned above constitute offences prosecuted ex officio.

B. *Other Kinds of Prohibited Speech*

Article 198 of the Penal Code penalises threats against religious peace and intentional blasphemy[28]. Article 24(3a) of Law 4055/2012 increased the upper limits of the penalties that can be imposed. However, it has been held that individuals do not have the right to civil action within criminal proceedings in such cases[29].

Furthermore, the public approval or denial of certain crimes was made punishable through Article 2 of Law 4285/2014, which replaced Article 2 of Law 927/1979. In particular, it stipulates that:

> 'Whoever intentionally, publicly, orally or through the press or the Internet or by any other means or manner, condones, trivialises or denies the existence or seriousness of crimes of genocide, war crimes, crimes against humanity, the Holocaust and crimes committed by the Nazis recognised by international courts of law or decisions of the Greek Parliament, and such conduct is directed against a group of

[27] Government Gazette of the Hellenic Republic 191/10.9.2014.

[28] See C. Papageorgiou, 'The special treatment of religions in the context of the Greek penal code' in M. Kotiranda and N. Doe (eds), *Religion and Criminal Law* (Leuven, Peeters, 2013) pp. 116 ff.

[29] Areios Pagos (Supreme Civil and Penal Court, Court of Cassation)198/2002.

> persons or a member of such a group defined on the basis of race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability, when such conduct is carried out in a manner that may incite violence or hatred or which is threatening or abusive against a group or member of such a group it shall be punishable by the penalties provided for in paragraph 1 of the preceding article'.

When a draft of Law 4285/2014 was to be voted on in parliament, the parliamentary Science Committee proposed the addition to the article quoted above of a special clause as a waiver of the unjust character of the specified criminal acts in cases where the opinions expressed are covered by the freedom of art or science[30]. However, this addition was not accepted by the parliament. As a result, this provision was judged by a court of first instance to be a violation of the Constitution, and in particular, of the freedom of expression and academic freedom, mainly in terms of the binding character of parliamentary decisions. According to the court[31], the legislator is thus

> '[establishing] and [defining] historical truth in a binding and coercive way, by means of the criminal law, following his/her own version, while historical truth nevertheless constitutes the [scholarly] domain of historical researchers and in some cases [it constitutes also] the subject of further public discussions and concerns'.

On the other hand, this article, in its previous form as Article 2 of Law 927/1979, was not seen[32] as violating the freedom of expression. In fact, in a case where a metropolitan expressed negative views about atheists, the unjust character of his statement was considered waived because, on account of his status as a member of the Greek Church's clergy and the place of publication of his text (on his personal website), he was considered not to have gone beyond what was necessary for the expression of his views as a metropolitan. While blasphemy and restrictions on freedom of expression so as not to offend public morals can be found in Greek judicial practice, expression inciting hatred had never been considered the subject of an outright ban in Greek judicial practice, at least until 2014[33].

Article 4 of Law 729/1979, which was supplemented by Law 4285/2014 on combating racism, constitutes an innovation in the relevant legislation, as it recognises the responsibility of legal persons or associations of persons in cases where

[30] Report of the Scientific Service in the Hellenic Parliament for the Law 4285/2014 <http://www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/t-xeno-epi.pdf> (accessed 27 Oct 2017).

[31] Rethymnon Court of First Instance, court decision 2313/2015 in the so-called *Richter* case concerning the publication of a book that referred to events during World War II on Crete and in which the author, Professor Richter, presented a different image of the German occupants of the island to the prevailing one.

[32] Order of the Advocate-General of Aigion No 26/2011.

[33] Polymenopoulou, 'Arts, Censorship and the Greek Law', p. 124.

> 'one of the punishable offences of the present law was committed in favour or on behalf of a legal person or an association of persons by a natural person acting either individually or as a member of the body of the legal person or the association of persons which he/she represents in any possible way …'.

Law 4285/2014 has also modified some articles of the Penal Code. Specifically, its Article 10 added Article 81A to the Penal Code, titled 'racist crime', a characterisation that constitutes an aggravating circumstance and thus increases the lower limit of the penalty to be imposed. Thus, for example, an insult against the followers of a religious faith is punishable under Article 361 of the Penal Code (on insults), but the penalty to be imposed should be more severe than in a simple case that does not involve racism. It should be noted, however, that a victim of a racist insult has to file a report or make an accusation, while the implementation of the anti-racism legislation mentioned above is pursued ex officio.

One noteworthy case is one where a court decided on the extradition to Kazakhstan of a non-Greek Muslim who had become, as the court stated, 'an ardent fanatic of a Muslim religious group that follows the concepts of "armed Jihad", which is a non-traditional stream of Islam, a radical direction that propagandises and promotes the ideology of terrorism'[34]. The person to be extradited had requested, among other things, protection under Article 3(2) of the European Convention on Extradition. Nevertheless, the court judged that the acts for which the individual was being prosecuted and, more specifically, incitement to racial hatred, were also punishable under Greek penal law (Articles 186, 81A, element a, passage b of the Penal Code and Article 1(1-4) of Law 4285/2014).

The UN Committee on the Elimination of Racial Discrimination (CERD), in its observation of 3 October 2016 on Greece's compliance with Article 4 of the International Convention concerning the country's anti-racism legal framework, stated that[35]:

> 'While noting with appreciation the positive aspects incorporated in the new anti-racism law No. 4285/2014, the Committee remains concerned that the new law is not fully compliant with the requirements of article 4 of the Convention, particularly as it does not criminalize the dissemination of ideas based on racial superiority and does not provide for a procedure to declare illegal and prohibit racist organizations. The Committee is also concerned at the persistence in the State party of the political party Golden Dawn, to which the delegation referred in its opening statement as the most prominent racist organization, inspired directly by neo-Nazi ideas (art. 4)'.

[34] Areios Pagos 1289/2016.

[35] Committee on the Elimination of Racial Discrimination, 'Concluding observations on the twentieth to twenty-second periodic reports of Greece', 3 Oct 2016, <http://docstore.ohchr.org/> (accessed 1 Sep 2017).

Article 199 of the Penal Code criminalises blasphemy. According to this provision: 'anyone who publicly and maliciously and in any manner blasphemes against the Eastern Orthodox Church of Christ or any other religion tolerable in Greece shall be punished with a prison term of up to two years'. It has been held that the act of blasphemy is not committed in a case where pieces of art depicting Jesus Christ and the Virgin Mary in a particular way are exhibited, provided the art is produced for artistic purposes[36]. On the other hand, the owner and administrator of a satirical social networking website called 'Gerontas Pastitsios' (literally 'Elder Pastitsio', a play on the name of St Paisios and the famous Greek dish pastitsio)[37], was convicted by a first-instance court[38] for publishing malicious comments that constituted blasphemy against the divine and against Christianity in general. He was later acquitted by a second-instance court on the grounds of a new provision (Article 8 of law 4411/2016) providing for the cessation of prosecution for criminal offences committed before 31 March 2016 and punishable by imprisonment of up to two years. Regarding Articles 198 and 199 of the Penal Code, CERD expressed its concern and recommended that Greece should abolish Articles 198 and 199 on blasphemy from its Criminal Code.

Additionally, in its report on Greece for 2015[39], the European Commission against Racism and Intolerance (ECRI) observed that the country's anti-racism law did not cover racist insults or defamation and suggested that the law be amended so as to include these racist offences in order to criminalise the public expression, with racist intentions, of ideologies claiming superiority. ECRI also recommended that Greece should apply Law 927/1979 to any case of hate speech in the mass media. It also suggested that the authorities, without violating the independence of the media, should establish a mechanism of self-regulation in the mass media industry to prevent racist comments in the press and on TV and the radio. Furthermore, it recommended that the Greek authorities should ratify the Additional Protocol to the Convention on Cybercrime, as the government declared that it would do in the National Project Plan for Human Rights 2014-2016.

36 Athens Court of First Instance (Criminal Chamber) 28567/2013.

37 'Greece quashes charges in pasta-based "blasphemy" case', *The End Blasphemy Laws Campaign*, <http://end-blasphemy-laws.org/2017/03/greece-quashes-charges-in-pasta-based-blasphemy-case/> (accessed 29 Jul 2017).

38 First Instance Court of Athens 5635/2014.

39 European Commission against Racism and Intolerance, 2015 Report on Greece, 24 Feb 2015, <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf> (accessed 31 Jan 2018).

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

A. *Regarding the Authorisation of the Establishment and Operation of Houses of Worship*

Under an older legislative framework aimed at impeding the activities of people of faiths other than that of the Orthodox Church, for the establishment of any temple, in addition to the necessary permit from the municipal authorities (Article 1 of Compulsory Law 1672/1939), authorisation was required from the minister of education and 'the respective recognised ecclesiastical authority', namely the local metropolitan. The establishment of such a temple also required the submission of a signed request by the interested parties, with verification of the authenticity of the signature by the mayor and an indication of their addresses. According to the law, the minister of education could reject an application if they deemed that the 'real reasons for the construction or operation' were not those that were provided in the application. The need for the prior consent or opinion of the Greek Orthodox ecclesiastical authority was repealed by Article 27 of Law 3467/2006[40], whereas the required consent of the minister is considered to be constitutional to the extent that they act within their circumscribed powers[41].

Law 4301/2014 on the Organisation of the Legal Form of Religious Communities and Their Organisations in Greece did not change the aforementioned legal situation; on the contrary, it might have complicated things to a greater extent. In particular, Article 1 defined a religious community as 'a sufficient number of individuals with a specific confession of faith in a "known" religion who are permanent residents of a specified geographical region and whose aim is to carry out collectively the duties of worship and observance required by their religion'. Furthermore, Article 2 on religious legal persons states that:

> 'An association of persons of the same religious community, which seeks the systematic and organized practice of their religion and the collective expression of the religious beliefs of its members, acquires a legal personality when it is registered in a special register (for Religious Legal Persons) kept in the Court of First Instance where the association has its seat. In order for a religious legal person to be established, a minimum of 300 persons are required, of whom at least one should be a religious worker, member of the clergy or the pastor of the religious community, to whom the performance of religious services has been assigned and who must be [a] Greek or a citizen of a Member State of the European Union or an alien legally residing in Greece'.

[40] See C. Papageorgiou, 'The application of the freedom of religion principles of the European Convention on Human Rights in Greece' in A. Emilianides (ed), *Religious Freedom in the European Union* (Leuven, Peeters, 2011) pp. 187 f.

[41] Council of State (Supreme Administrative Court) 625/2016, 1920/2014, 4202/2012 (Plenary).

Furthermore, Article 9 stipulates that religious legal persons —and not religious communities— can establish places of worship in accordance with the prescribed procedure. Thus, the number of members that should provide their personal details in order to establish a church has increased on the basis of the new legislation. On the other hand, Compulsory Law 1363/1938 on Freedom and Forcible Conversion is still applicable. It is set out in Article 12 that entry into Greece of 'any members of clergy of any religion or faith or leaders of any sect who do not have Greek citizenship is permitted following authorization by the Ministries of Religious and Foreign Affairs' with the exception of the cases exempted by royal decree and the provision that offenders be deported without further stipulation.

Recently, through Article 31 of Law 4375/2016, a Directorate for Social Inclusion was set up in the General Directorate of Nationality and Immigration Policy. It has, among other things, the responsibility of creating and operating an electronic platform for the support of interfaith dialogue aimed at the prevention of radicalisation and fundamentalism.

B. *Regulations to Enhance Immigrants' Integration*

The change in the manner of acquisition of Greek nationality through naturalisation brought about by Law 3838/2010 (O.J. A 49) could possibly be included among the measures that could indirectly help prevent radicalisation. The process, which until 2010 was based primarily on the personal judgement of the administration, was changed by establishing predefined and objective criteria based on law. Among the most important changes was the naturalisation of second-generation immigrants, i.e. of children who had already attended Greek schools for six years. This provision was judged by the Council of State to be unconstitutional[42] on the grounds that judgements concerning the acquisition of Greek nationality cannot be based on formal criteria. Nevertheless, a similar provision was inserted in the form of Article 1 of Law 4332/2015. Law 3838/2010 stipulated that it was possible for long-term legal residents to take part in elections for local municipal governments, a provision that was also found to be unconstitutional and did not enter into force after the aforementioned Council of State decision.

Furthermore, Article 78 of Law 3852/2010 provides for the operation of Immigrant Integration Councils (IICs) in the country's municipalities. The IICs are bodies of the state administration and are responsible for identifying and registering issues of inclusion faced by minority populations in their region, while they may further consult with representatives from minority communities or with the competent authorities.

[42] Council of State (Plenary) 460/2013.

a) *Greek Muslims of Thrace*

According to Article 5 of Law 1920/1991 (paragraph 1), the mufti exercises in his district not only religious duties prescribed in Muslim law but also judicial duties in cases of family and succession law. More specifically (paragraph 2), he has jurisdiction over the Greek Muslim citizens in his district with regard to marriages, divorces, alimonies, guardianship, curatorship, Muslim wills and intestate succession issues, given that these relations are governed by Muslim law[43]. Moreover, a Muslim Studies Department was established in the School of Theology at Aristotle University of Thessaloniki in order to provide a more academic and Greece-based education for Muslim theologians. This initiative was found to be legally sufficient by the Council of State when the latter reviewed, as provided for by the Constitution, the respective presidential decree[44], despite some negative reactions that the decision to establish such a department had caused.

4. Soft Law/Recommendations/Policies Tackling Radicalisation and Extremism

The Second Rhodes Informal Ministerial Conference for Security and Stability was held on 22-23 May 2017, focusing on the issue of partnerships and collaboration in an environment of peace and stability. The participants —foreign ministers and high-ranking officials from Albania, Algeria, Bulgaria, Cyprus, Egypt, Greece, Italy, Kuwait, Lebanon, Libya, Oman, Qatar, Romania, Saudi Arabia, Slovakia, Tunisia and the United Arab Emirates, as well as the Gulf Cooperation Council and the Arab League— had an opportunity to declare anew their desire to promote, in the midst of multiple security challenges in the Eastern Mediterranean, a positive agenda for cooperation for the benefit of their strategically, economically and culturally significant neighbourhood.

In the Joint Communication that was issued[45], religious tolerance and the prevention of the radicalisation of youth emerged as key issues. Equally, the need to combine financial progress with relevant educational programmes that enhance interfaith dialogue was emphasised, along with the need to coordinate and promote collective efforts. Financial and technical support, student exchange programmes and

[43] L. Papadopoulou, 'Trapped in History: Greek Muslim Women under the Sacred Islamic Law' in *Annuaire International des Droits de l'homme*, Vol V, 2010, *Religions et droits de l'homme* (Athens and Brussels, Ant.N. Sakkoulas/Bruylant, 2010) pp. 397 ff.

[44] Council of State, Opinion 85/2016.

[45] Joint communication - Second Rhodes Informal Ministerial Conference for Security and Stability (Rhodes 22-23 May 2017), Hellenic Ministry of Foreign Affairs, <http://www.mfa.gr/epikairotita/diloseis-omilies/koino-anakoinothen-2e-upourgike-diaskepse-tes-rodou-gia-ten-asphaleia-kai-te-statheroteta-sumbiose-kai-sunergasia-se-ena-periballon-eirenes-kai-statherotetas-rodos-22-23-maiou-2017.html)> (in Greek, accessed 29 Jul 2017).

the development of national education systems were identified as priority areas in order to deal with specific issues relating to combating radicalisation.

IV. Effects of measures on religious freedom

1. Effects of the Legislative Framework Tackling Radicalisation and Extremism on the Religious Freedom of Religious Communities and their Affiliated Institutions

The law introducing the institution of religious legal persons has in fact had no effect on the existing situation. Indeed, considering the number of signatures required for the establishment of a legal entity, the process of establishing and operating a house of worship may be seen as having become more difficult.

Regarding the implementation of the anti-racism law, there have been no convictions of any representatives of a religious faith or members of a house of worship on the basis of its provisions despite the fact that certain officials, mainly metropolitan bishops of the Greek Orthodox Church, as has already been mentioned, frequently make comments of a racist nature, particularly of a homophobic kind[46].

2. Effects of the Legislative Framework on Individual Religious Liberty

Among the measures that may possibly have a positive influence and prevent the radicalisation of religious communities is the establishment and operation of IICs, as well as the establishment and operation of a mosque.

Concerning gender equality, the relevant legislation does not provide anything substantial. On the contrary, with regard to the Muslims of Thrace and the application of Muslim law, the current position of the courts has a negative impact on the position of women in Greek society and contributes to their oppression[47]. However, violations also occur in the sphere of the protection of children and adolescents, since Muslim law allows marriage at the age of 15 or under, and the very submission to the jurisdiction of the mufti constitutes a violation of the right to judicial protection.

Furthermore, the school subject of religious education, depending on how it will eventually be applied, can have either positive or negative results. So far, however, the possibility of an exemption from religion lessons, as well as the possibility of minority religions being taught in schools, could be considered to have had quite a positive impact.

[46] In 2018, the metropolitan of Kalavryta, Amvrosios, *stood trial following his comments inciting hatred against homosexuals. He was found not guilty.*

[47] See, in more detail, Papadopoulou, 'Trapped in History', pp. 400 ff.

3. Effects of Policies on the Religious Freedom of Religious Communities and their Affiliated Institutions and on Individual Believers

Compared with the past, the position of religious communities has improved. The introduction of unarmed military service or social service as an alternative has improved the position of followers of other religions. The same positive impact can theoretically result from the establishment and operation of a mosque, as has already been pointed out. On the other hand, the establishment of the institution of religious legal entities has not improved the position of religious communities.

V. Educational measures to tackle radicalisation and extremism

1. Laws, Policy and Programmes

As far as religious education lessons in Greek schools are concerned, according to Ministerial Decision 990//2017 (on the Syllabus for Religious Education in General and Vocational Senior High Schools), the aim of religious education is to teach, among other things, 'the complexity of the modern social and cultural web, as it is formulated on a local, European and global level, as well as [to meet] the special educational and learning needs that emerge from the latter' and consequently the development of a personal identity 'to which religious aspiration and its critical comprehension contribute, regardless of whether someone follows a religion or not', as well as the cultivation of critical religious thought and contact and communication with the 'Other'.

As for Muslim religious schools in Thrace, besides general lessons, the teaching of the Quran, its scripture and of religious music are equally provided for.[48] The teaching of the Quran has also been provided for (through Law 4115/2013) in Greek public schools in Thrace in an attempt to attract Muslim students who might wish to attend religion classes. There is a qualified five-member committee, composed exclusively of Muslims and chaired by the local mufti, that selects Quran teachers through a transparent and inclusive procedure[49].

[48] See Ministerial Decision 200/2016: Syllabus for Muslim Religion Schools in Thrace.

[49] UN Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by State parties under Article 9 of the Convention, Twentieth to twenty-second periodic reports of State parties due in 2015, Greece, CERD/C/GRC/20-22 27 Nov 2015, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/271/41/PDF/G1527141.pdf?OpenElement> (accessed 7 Feb 2018). Furthermore, Article 36 of Law 3536/2007, as amended by Article 53 of Law 4115/2013, stipulates:

'Muslim religion teachers may, if they wish to do so, teach the [Quran] at public schools in the primary and secondary education sectors in Thrace, to pupils who are members of the Muslim minority and have been exempted from … religious education [lessons], and if need be, within the teaching hours, without this teaching being included in the school syllabus'.

2. Autonomy of Religious Schools

Every religion has the right to establish educational institutions for religious purposes, provided that these institutions do not engage in proselytising activities[50]. Thus, religious schools either belong to the public sector or to the Orthodox Church (Law 3432/2006) or other denominations[51], or they may be private. All of these schools are required to follow the same curriculum followed by public primary and secondary schools, although they may add a number of teaching hours for the teaching of their respective religion.

3. Rights of Children and Parents

Regarding the issue of attending religious education lessons, it has been accepted, on the one hand, that it is possible to grant an exemption from attending them while, on the other, the declaration exempting a student does not need to state any specific reasons for doing so, in line with the legislation regarding the protection of the freedom of religion[52].

VI. Conclusion

Greece has not (yet) experienced any serious attacks by religious extremists. The worst forms of extremism include hate speech against the followers of non-majoritarian faiths, especially Jews and Muslims, as well as by religious ministers, especially of the prevailing Orthodox Church against religious or other minorities, as well as attacks against symbols or places of worship, especially synagogues. Owing to this fact, legislation is mainly directed at combating hate speech, whereas other types of religious extremism are dealt with by the Penal Code, which includes racist motives as an aggravating factor in determining punishment. These measures have not had a major impact on religious freedom of either a collective or personal kind, given the fact that so far anti-racist legislation has never resulted in the punishment of a religious minister. Ministers of the Greek Orthodox Church in particular enjoy a tacit immunity to prosecution. This, of course, may have affected minorities who have been the victims of such hate speech.

[50] Papadopoulou, 'Greece' in *Encyclopedia of Law and Religion*, pp. 166 ff.

[51] See N. Maghioros, 'Religion in Public Education - Report on Greece' in G. Robbers (ed), *Religion in Public Education* (Trier, European Consortium for Church and State Research, 2011) pp. 202 ff.

[52] Data Protection Authority, Decision No 34/2015. See also Maghioros, 'Religion in Public Education', p. 196.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN HUNGARY

Balázs Schanda[1]

I. Social context

The history of Hungary as a state began with its adoption of Western Christianity. This fundamental choice is an important part of national identity. Hungary's national holiday is the feast of Saint Steven (997-1038). In the following centuries, the country saw itself time and again as a defender of the Christian world, especially from the 1400s, a century that also saw the rise of the Ottoman Empire.

The memory of the conflict between the Ottomans (which had come to an end by the 18th century) and the peoples of Central and Eastern Europe is still present in nursery rhymes and history books, in compulsory readings and at annual celebrations. In Hungary's stance against illegal migration —especially in terms of the rise of a Muslim presence in Europe— sometimes even rejecting asylum to genuine refugees, the country is building on its historical memory. Although the general attitude to Turks today could be considered amicable, a bad neighbour in Hungarian is still called a 'damn Turk'.

Hungary is neither particularly religious nor especially secular. For the majority of the population, religion and a denominational identity matter, but only a minority practise their faith on a regular basis (about 10% of the population attend church on a weekly basis). About half of the population has a kind of living relationship with a church at least on major holidays, at weddings or for the baptism of their children, their enrolment in religion classes or their annual tax assignment to a religious community. Calvinist Protestantism has shaped the national culture to a great extent, whereas Catholics have constituted the majority since the Counter-Reformation. Nowadays, about 50-60% of the population is Catholic, 15-20% Calvinist, 3% Luther-

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an and 1% Jewish. Other religious communities (Orthodox, Evangelical, Jehovah's Witnesses, etc.) account for 1-2% of the population.

Hungary has not been a destination country for immigrants in the last century. Back in the 19th century, there was significant Jewish immigration, while there was organised German immigration in the 18th century partly to increase the proportion of Catholics in the country. Over 5% of the population of Hungary in the late 19th century left for the United States. The 20th century was characterised by subsequent waves of emigration: much of the political and cultural elite left, fleeing dictatorships in the 1940s and later after the 1956 revolution. A significant percentage of surviving Jews left the country in 1956; otherwise, international migration in the 20th century was neutral in terms of religion: ethnic, political and economic factors were the prime motivators instead.

Hungary is a landlocked country that has had no colonies. Although the country is believed to be on the crossroads between Eastern and Western Europe, the moderate living standard (and the language barrier) does not make it appealing for immigrants. Policies and attitudes to immigrants cannot be described as welcoming. Demographic trends —low birth rates— make immigration inevitable, but Hungarian society is surely not ready to integrate large numbers of immigrants who have a different cultural background. Policies towards ethnic-Hungarian minorities in neighbouring countries are twofold: on the one hand, their integration into Hungarian society causes no difficulties; on the other hand, it is regarded as being in Hungary's national interest that minorities stay in their country of citizenship. Consequently, they are not encouraged to settle in Hungary, but if they do decide to settle in the country, their rapid integration is promoted.

The percentage of resident aliens remains under 2% of the population. The vast majority of them come from other European countries. Chinese nationals constitute the largest non-European ethnic group, followed by Vietnamese: about 20,000 people altogether. Statistics show that there are about 3,000 people of African origin in the country. These figures show that intercontinental and intercultural migration exists, but its scope cannot be compared with what is happening in wealthier countries to the west, north and south of Hungary.

Over the last century, Hungary has lost more people to emigration than it has gained through immigration. In fact, a large portion of immigrants are ethnic Hungarians from neighbouring countries who were cut off from Hungary due to border changes that occurred after World War I. Since the collapse of the communist regime, the migration balance has been slightly positive, with about 5% of the population living and working in other EU countries, and slightly more non-nationals having moved to the country. Their ethnic mix varies from Hungarians to Chinese. The number of Muslims in the country has risen from a few hundred some 30 years ago to a few thousand now, which is still a relatively low figure. In the 2011 census, 5,579 people declared that they were Muslim, half of them living in the capital, Budapest. Half of Muslims claimed a Hungarian identity, alongside Turkish, Arab, Persian and

other identities. A relatively high percentage of these people have higher education[2]. A visible part of the Muslim community is made up of students who arrived from Palestine, Egypt and other Soviet-oriented Arab countries in the 1970s and 1980s and who did not return to their home countries. There is perhaps a larger number of Muslims among current immigrants who are less integrated and who did not respond to the census questionnaire for various reasons. The Muslim communities in the country are probably not at risk of fundamentalist radicalisation.

Hungary has found itself on the so-called Balkan route of migration in recent years. Hungary's border with Serbia has been blocked by a fence since the summer of 2015. This has resulted in a drastic decline in the number of asylum seekers (177,000 in 2015 compared with 29,000 in 2016). Asylum requests can only be filed in transit zones (on the border with Serbia, these are open in Serbia but closed in the Schengen zone). Requests have little chance of approval, as asylum seekers usually arrive through safe countries; consequently, the Hungarian authorities regard them as economic migrants who should have sought refuge in the first safe country where they arrived. Crossing the border illegally constitutes a criminal offence.

Hungary is a relatively calm and safe country with moderate crime rates. Religious radicalisation and religious extremism are not seen as central issues but rather as potential dangers that can and should be prevented by preserving the country's relative religious and cultural homogeneity. Security in the long run is closely connected to the handling of migration, which has become a central political issue.

II. Political and public debate

Since the Charlie Hebdo attack in Paris, the government has clearly communicated that it believes there is a link between migration and terrorism. A series of political actions —a referendum, consultation processes and public campaigns— have been undertaken to prevent migration and to preserve the country's relative cultural homogeneity. Leading politicians have repeatedly stressed the risks or even the impossibility of integrating masses of immigrants who do not share a Judaeo-Christian background. Some have even voiced concerns about the security of Hungary's Jewish community —Hungary being the last country in Europe where Jews outnumber Muslims[3]. In the public debate, Islam is often portrayed as a religion that, for doctrinal

[2] For the results of the census: http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_10_2011.pdf (accessed 10 Jul 2017).

[3] A selection of government news:

http://www.kormany.hu/en/news/more-and-more-people-are-recognising-the-dangers-of-migration (accessed 10 Jul 2017).

http://www.kormany.hu/en/news/the-border-management-system-provides-a-suitable-level-of-security (accessed 10 Jul 2017).

reasons, is not compatible with a constitutional democracy, fundamental rights, gender equality or the separation between religion and the state, and for political reasons, relations between Judaeo-Christians and Muslims are also coloured by the risk of violence. The liberal opposition is slightly more open to immigration or at least to a European response to the challenge of migration. On immigration issues, the government enjoys broader support than on a partisan basis: a considerable number of voters who have not traditionally supported the governing party agree with the government's harsh policy on migration.

III. Legal and political framework

1. Definition of Extremism, Fundamentalism and Radicalisation

There are no special provisions on extremism, fundamentalism or radicalisation, and there is no legal definition of these terms.

2. Legislation *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

There is no special legislation to tackle *expressis verbis* radicalisation and extremism. Hate speech has been a hot legal topic for more than two decades. After the collapse of the communist regime, the Constitutional Court endorsed a liberal approach to hate speech. A decision passed in 1992 stated that offensive or degrading statements were not punishable, whereas incitement to violence was considered a criminal offence in order to protect the dignity of individuals who belong to particular communities (religious, ethnic, etc.). Sensitive communities have sought broader prevention of hate crimes, and some special provisions of the Criminal Code (defamation of national symbols, denial of the Holocaust and of communist crimes) were not regarded as unconstitutional limitations of the right to free speech. The current legislation enables private-law claims for damages in cases of the use of seriously hurtful expressions.

The legislation focuses on existing hatred and the protection of sensitive minorities. The radicalisation of individuals that could lead to extremism targeting the majority population —the social order as such— was not on the horizon of the legislator.

Freedom of expression enjoys special protection. Only incitement to hatred is criminalised: anyone who incites someone else to public hatred against the Hungarian nation or against any national, ethnic or racial group or certain groups of the population may be found guilty of a misdemeanour punishable by imprisonment for up to

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http://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/hungary-must-be-preserved-the-way-it-is (accessed 10 Jul 2017).

http://www.kormany.hu/en/prime-minister-s-office/news/migration-must-be-stopped

http://www.kormany.hu/en/ministry-of-human-resources/news/migration-represents-a-danger-to-europe (accessed 10 Jul 2017).

three years[4]. Incitement to hatred towards a religious community (or a non-religious, anti-religious community) would fall under this provision. The religious sentiments of the population, or certain groups of the population, however, enjoy no protection under criminal law. Mere defamation has not been a criminal offence since 1992, as the Constitutional Court found that this would be a disproportionate limitation of the freedom of expression[5]. Since then, the parliament has attempted to amend the law a number of times in order to penalise hate speech, but the Constitutional Court has up held its liberal approach to free speech.

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

From education law to media law, a wide range of laws could be seen as preventive measures to renew a social consensus and to prevent the rise of extremism. No measure —except those with regard to migration— could be seen as paying any kind of attention to possible religious radicalisation and religious extremism.

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

Known extremist groups are under surveillance by the secret service.

A far-right association called the Hungarian Guard (Magyar Gárda) was dissolved by a court order upon the request of the public prosecutor, as their public appearances, including marches in paramilitary uniforms, caused fear particularly in the Roma community.

IV. Effects of the measures on religious freedom

1. Effects of the Legislative Framework Tackling Radicalisation and Extremism on the Religious Freedom of Religious Communities and their Affiliated Institutions (Schools, Publishing Houses etc.)

As no legislative measures have been undertaken to tackle radicalisation and extremism, these cannot affect religious communities or religious institutions.

2. Effects of the Legislative Framework on Individual Religious Liberty (e.g. Rights of Women, Rights of Children)

The same applies to the individual aspects of religious liberty: as no legislative measures have been undertaken to tackle radicalisation and extremism, these cannot affect individual freedom.

[4] § 269 of the Criminal Code .

[5] Decision 30/1992 (V. 26.) AB.

3. Effects of the Policies on Religious Freedom of Religious Communities and their Affiliated Institutions (Schools, Publishing Houses etc.) and on Individual Believers (e.g. Rights of Women)

Security policies have very little impact on religious institutions. General security measures affect religious communities (e.g. measures against money laundering or the ban on anonymous SIM cards), but these cannot be seen as targeting religion in a special way in any form.

V. Educational measures to tackle radicalisation and extremism

1. Laws, Policy and Programmes

The law on public education provides for tolerance as a fundamental value and goal of education. Liberty, morals, dignity, solidarity, equal treatment, sustainability and respect for the public interest are among the core values defined by the law[6]. The education policy strives for inclusion and equal treatment, but there are no special programmes to tackle radicalisation or extremism. It is probably the case that these dangers are not currently regarded as being very relevant.

2. Autonomy of Religious Schools

Religious schools are bound by the national curriculum but may add special requirements and may also adopt an exclusive character. Religious education may be compulsory at religious schools, and attendance at religious events can also be required by the school.

3. Rights of Children and Parents

With regard to parental rights, there are no national peculiarities. There is no special age foreseen when parental guidance would cease. The Constitution recognises parental rights, and the law also provides for the rights of the child. The courts avoid interfering in religious aspects of family-law cases, like divorce and custody cases.

VI. Conclusion

The general policy in Hungary with regard to religion and security is very simple: limiting immigration by people of non-European origin seems to be the only answer to any questions with regard to religious extremism.

Other forms of extremism (like political extremism) are tackled by a wide range of measures, but in general the threat of extremism is limited in the country.

[6] §1 of Law CXC/2011.

SECURITISATION OF RELIGIOUS FREEDOM: THE REPUBLIC OF IRELAND

Stephen Farrell[1]

I. Social context

Ireland is a predominantly Roman Catholic Country, with 78.3% of the population identifying as such in the 2016 census[2]. However, this marks a sharp decline from the 2011 census, in which 84.2% of the population identified as Roman Catholic. This is part of a wider trend of fewer Irish citizens identifying as Christian in general. In the same period, the Anglican population fell by 2%, the Presbyterian population by 1.6%, Pentecostals by 4.9% and those identifying simply as Christian by 9.1%[3]. There has been a corresponding increase in those describing themselves as having no religion from 269,800 in 2011 to 468,400 in 2016, an increase of 73.6%. Those with no religion now account for just under 10% of the Irish population. The only religious groups to increase in this period were the Muslim community, up 28.9%, or 14,200; the Hindu community, up by 34.1%, or 3,600; and the Orthodox community, up by 37.5%, or 17,000[4]. Though these percentage increases are significant, they still represent relatively small numerical increases, even in a population of just over 4 million. It is possible to link some of these changes to migration, but others are due to societal change. In this period, there was an increase of only about 6,000 in the number of non-Irish people declaring themselves to be of no religion, while the figures for Irish people of no religion increased by around 190,000. In the same period, the number of non-Irish people living in Ireland fell from 544,357 to 535,475.[5] There were also large drops in the number of migrants to Ireland from the United Kingdom

[1] Rev'd Stephen Farrell M.A. (Oxon), Rector of Zion Parish.

[2] Census 2016, Profile 8: 'Irish Travellers, Ethnicity and Religion', Central Statistics Office 2017.

[3] Ibid.

[4] Ibid.

[5] Census 2016, Profile 7: 'Migration and Diversity', Central Statistics Office 2017.

and from Nigeria. There are now about 11,000 fewer British people living in Ireland and some 3,000 fewer Nigerians than in 2011. This means that the largest non-Irish group is now people from Poland, followed by people from the United Kingdom. This has to be read in light of the fact that people from Northern Ireland, part of the United Kingdom, will often simply identify as Irish. The Central Statistics Office has yet to release any data on the religious identity of immigrants, but the only identifiably Muslim country with an increase in numbers coming to Ireland is Pakistan, with 4,562 more people from Pakistan living in Ireland in 2016, or a total of 12,891[6]. Therefore, the increase in the Muslim population must be accounted for among the Irish population or from immigration from other non-Muslim states.

II. Political and public debate

It will be readily understood from the statistics above that the main public debate in Ireland at present is not caused by immigration or by the increase in the numbers in minority religions; rather, the changes in Irish society brought about by a sudden increase in the numbers identifying as having no religion is fuelling a debate on the place of religion in Irish society. In recent months, this has found an outworking in the frivolous and the serious. There have been protests in the Oireacthas, the Irish Parliament, against the continued tradition of opening proceedings with prayer[7]. The Department of Education has issued proposals to stop Catholic faith schools —but not faith schools of minority faith groups— from prioritising children of that school's faith community and tradition in their enrolment policies[8]. Last year's vote that saw Ireland become the first country to introduce same-sex marriage by plebiscite moved from being a debate on the merits of constitutional change to a national affirmation of the importance of love, with any voice that sought to question this risking being labelled a voice of 'hate' or accused of causing distress[9]. The recent Citizens' Assembly, where 100 citizens were chosen at random to look at the possible repeal of the Eighth Amendment to the Irish Constitution, the amendment that values the life of the mother and the unborn equally, managed to surprise wider society by advocating something much more liberal than was expected[10]. There are those who see a militant anti-Catholic bias in the media, and there is a feeling that, as a nation, decisions are

6 Ibid.

7 M. O'Halloran, 'Six TDs refuse to stand for Dáil prayer and reflection', *Irish Times*, 9 May 2017.

8 Education (Admission to Schools Bill) 2016.

9 P. Karp, 'Ads against same sex marriage caused distress to LGBTI people', *Irish Times*, 9 Oct 2017.

10 Forty-eight per cent recommended that termination up to 12 weeks should be available without restriction, and 44% recommended that termination without restriction should be available until 22 weeks. Seventy-two per cent recommended that terminations should be allowed for socio-economic reasons. The Citizens' Assembly, 'First Report and Recommendations of the Citizens' Assembly, The Eighth Amendment to the Constitution'. June 2017.

being made to create space between the state and the Catholic Church without any real consideration of the common good[11]. The 2018 abortion referendum saw a larger than anticipated 66% of the vote in favour of removing the constitutional protection of the life of the unborn, in a situation where the government had signalled its intention to legislate for abortion on demand up to 12 weeks' gestation should the referendum pass[12]. The debate has now moved to the nature of conscientious objection, with the government insisting that Catholic hospitals cannot opt out of offering abortion services. Not only will this be a significant change in Ireland's historic legislative alignment with Catholic social teaching, but it will also represent a notable effort to force Church institutions to bend to the social teaching of the state.

The island of Ireland is not unacquainted with issues of extremism, fundamentalism, radicalisation and terrorism. There has been a level of unease in the press[13] and among politicians[14] that the government has not responded quickly enough to the current threat, and the response of the government is that Ireland has had much of the legislation on its statute books for some time as part of its efforts to combat what it calls home-grown terrorism[15]. It arguably fails to take the threat of Islamist extremism seriously in its insistence on referring to this as the international threat of terrorism, showing a reluctance to acknowledge that Islamic fundamentalists can be home-grown and present in Ireland. This apparent complacency was challenged by the discovery that one of the London Bridge attackers had lived in Dublin and was married there in 2012, leaving Ireland in 2015[16]. In April 2017, a Garda investigation into the threat of Islamist terrorism led to the arrest of a British man and Irish woman in their 20s under suspicion of facilitating terrorist activities abroad and the arrest of an Irish man for funding terrorism[17].

[11] Dame Nuala O'Loan, a prominent critical friend of the Catholic Church, has accused the media of anti-Catholic bias. P. McGarry, 'Nuala O'Loan accused Irish media of virulent anti-Catholic bias', *Irish Times*, 12 Apr 2016.

[12] The Referendum Commission, The Thirty-Sixth Amendment of the Constitution Bill 2018 - The Final Report.

[13] C. O'Keefe, 'What is the reality of the threat posed by Islamist extremists in Ireland?', *Irish Examiner*, 2 May 2016.

[14] As shown in parliamentary questions on the extremist Islamist threat. See Parliamentary Questions to the Minister for Justice, Equality and Law Reform, 16 Sep 2016.

[15] 'Motion re Offences Against the State (Amendment) Act 1988'. Speech by Charles Flanagan TD, Minister for Justice and Equality, 29 Jun 2018. Dáil Éireann, Tuairisc Oifigúil, Vol. 954 No.1, p. 70.

[16] C. Gallagher, 'London Bridge attacker used address of house in Rathmines', *Irish Times,* 7 Jun 2010.

[17] B. Roche, 'Pair arrested in Waterford on suspicion of Islamic terrorism', *Irish Times,* 27 Apr 2017.

III. Legal and political framework

1. Definitions

There is no single authoritative definition of **extremism**, **fundamentalism** or **radicalisation** in Ireland. The previous Minister for Justice tried to offer a definition of the term *radicalisation*, aiming to draw a distinction between legal and illegal stages in that process:

> 'The term "radicalisation" describes the process of acquiring and holding extremist views. Although this activity is not necessarily illegal, some individuals have shown a propensity to move from simply believing in the righteousness of a specific cause to pursuing it violently'[18].

The lack of coherent and accepted definitions risks hampering counter-radicalisation efforts. There is a fear among religious commentators that state agencies so misunderstand what motivates religious people that anyone who sees their primary identity resting in, and their main loyalty being owed to, their faith, counter to the universalist claims of the state, could be labelled an extremist[19]. This echoes similar concerns expressed in the United Kingdom by the Archbishop of Canterbury[20].

Censorship. There has been little effort to define or censor extremist material in Ireland. Ireland has a historically very active Censorship of Publications Board, though it last banned a publication in 2011[21]. It has the power to ban any publication that is obscene or that is intended to advocate the procurement of abortion[22]. It has no overt power to ban material that is extremist in nature, but the lack of a definition of what is extreme may offer it scope were its powers to be tested.

Terrorism. Much of the Irish legislative framework in this area predates the rise of Islamist terrorism. The legislation is not directed at extremism or radicalisation as such, but at its outworking in the form of terrorism. The main body of legislation is contained in the Offences Against the State Acts 1939-1998. These acts were designed to combat the threat posed by the Irish Republican Army (IRA), initially the old IRA after the Irish Civil War and since the 1960s the modern IRA. The 1998 Act was a response to dissident Republicans and the Continuity IRA in the wake of the Omagh bombing. In recent years, Ireland has adopted new laws aimed at international

[18] 'Radicalisation is an issue that all of us must face together'. Speech by Alan Shatter TD, then-Minister for Justice, 17 Jun 2013, Department of Justice.

[19] B. O'Brien, 'Countering extremism requires new responses', *Irish Times,* 10 Jun 2017.

[20] J. Welby, 'Religiously motivated violence', 9 Feb 2016, <https://www.archbishopofcanterbury.org/speaking-and-writing/speeches/lecture-generational-struggle-ending-religiously-justified-violence> (accessed 31 Jul 2018).

[21] 'Register of Prohibited Publications 2012', The Censorship Board, Department of Justice.

[22] There has been no suggestion that this may change in light of the abortion referendum, but the bill to implement the abortion referendum result has yet to be published.

terrorism, and these provisions are arguably more nuanced than the Offences Against the State Acts and are in part aimed at combating extremism or at least identifying it. The Criminal Justice (Terrorist Offences) Act 2005 was introduced to give effect to a number of international instruments[23] aimed at terrorism and extremism and to meet the commitments the state had undertaken as a European Union member state. Specifically, section 5 of the 2005 Act provides that a terrorist group that engages in, promotes, encourages or advocates the commission, within or outside the state, of a terrorist activity is an unlawful organisation within the meaning and for the purpose of the 1939-1998 Acts. Accordingly, the Offences Against the State Acts will apply in relation to any such group. This legislation has a high threshold. It is not triggered by attempts to radicalise but only by attempts to commit acts of terrorism. It is also somewhat out of date insofar as it does not address the challenges posed by lone-wolf attacks, focusing very much on recognisable organisations. It also fails to recognise the role of the Internet and of social media in radicalisation and extremism. The Criminal Justice (Terrorist Offences) (Amendment) Act 2015[24] created three new offences: public provocation to terrorism, recruitment to terrorism and training for terrorism. The act replicates the earlier focus on terrorism but recognises explicitly the role of the Internet and electronic communication in radicalising, recruiting and training others. In welcoming the passing of the bill, the Minister for Justice spoke in terms of radicalisation and extremism in ways that are more subtle than the contents of the legislation:

> 'It is necessary to adopt a multi-faceted approach in seeking to counter the multidimensional nature of the terrorist threat. Prevention, cooperation with Internet and social media service providers, cultural integration, community-relations initiatives, the use of counter narrative … It is vital in a democratic world that fundamental human rights are protected and not compromised as to do so would play into the hands of extremists who seek to impose their views on others and to radicalise those who may be vulnerable and persuaded to go down the dark road of terrorism. This is not solely a fight against terrorism, extremism and intolerance. It is, in many ways, a battle for hearts and minds and Ireland will continue to play its part'[25].

Hate Crime. Ireland is in need of new hate crime legislation. At present, the statute book only contains the Prohibition Against Incitement to Hatred Act 1989. A wide-ranging piece of legislation for its day, this act prohibits the distribution or broadcast of any material if the written material, words, behaviour, visual images or

[23] Primarily the Framework Decision on Combating Terrorism adopted by the Council of the European Union at Luxembourg on 13 Jun 2002.

[24] The act was designed to give effect to European Council Framework Decision 2008/919/JHA, which amends Council Framework Decision 2002/475/JHA on combating terrorism.

[25] 'Minister welcomes passing of legislation to combat terrorist offences at source', press release, Department of Justice and Equality, 26 May 2015.

sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred[26]. In the act, hatred is defined as hatred against a group of people in the country or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation[27]. The act has been criticised as being inadequate for the present day. The Department of Justice's Office for the Promotion of Migrant Integration, while noting that the state's prosecutorial authorities have not brought to the attention of the department any difficulties in bringing prosecutions under the act where the act applies, has pointed to the limited scope of the legislation. It is only concerned with incitement, not with hate crime itself. Most acts of hate crime are dealt with by the broader criminal law, and there are no aggravated offences that take cognisance of the motivation for a hate crime. In addition, the legislation fails to deal with racial abuse or other abuse that is not designed to stir up hatred. The 2008 EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law requires member states, under Article 4, to 'take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance'[28]. The deadline for transposition was 28 November 2010, and Ireland has yet to introduce legislation to ensure compliance. In 2012, the European Union Agency for Fundamental Rights noted that Ireland, in addition to engaging in limited data collection, is 'also limited because criminal law does not define racist or related hate offences as specific offences, nor does it expressly provide for the taking into account of racist motivation as an aggravating factor'[29]. The Criminal Law (Hate Crime) Bill 2015 would have addressed these deficiencies, but with a minority government passing little legislation, this has yet to be passed. The background to the bill was a report by the Irish Council for Civil Liberties and the Hate and Hostility Research group, 'Out of the Shadows: Legislating for Hate Crime in Ireland'[30]. The rationale for the legislation was not to curb extremist speech or to create new laws to criminalise radicalisation; rather, it sought to prevent hate crime targeted at minorities as a means of enabling their fuller integration into Irish society and their fuller acceptance. As such, it ought to be seen as an indirect attempt at countering extremism by removing some of the concerns and hardships that may be said to make people vulnerable to radicalisation.

[26] Prohibition Against Incitement to Hatred Act 1989, s 2(1)(c).

[27] Ibid, [s(1)(1)].

[28] Council Framework Decision on combatting certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA of 28 Nov 2008, Article 4.

[29] European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (Luxembourg, Publications Office of the European Union, 2012), p. 37.

[30] A. Hayes and J. Schweppe, *Out of the Shadows: Legislating for Hate Crime in Ireland* (Dublin, Irish Council for Civil Liberties, 2015).

2. Immigration and Migrant Integration

While the legislative framework on combating extremism and radicalisation is lacking, it ought not to be thought that there are no state-sponsored efforts to tackle these phenomena. In particular, the Office for the Promotion of Migrant Integration works across several government departments to develop, lead and co-ordinate efforts to help migrants integrate in Ireland. The functions include the promotion of the integration of legal immigrants into Irish society; the establishment of new structures for this purpose; the coordination of Ireland's international reporting requirements relating to racism and integration under, for example, the European Commission against Racism and Intolerance and the United Nations Convention on the Elimination of Racial Discrimination; the management of the resettlement of refugees admitted as part of the United Nations Resettlement Programme; and the administration of funding from national and EU sources to promote integration. In 2016, the office joined with the Irish Muslim Peace and Integration Council in hosting a seminar called 'Preventing Radicalisation within the Muslim Community'. In 2017, the Department for Justice launched a new Integration Strategy to run from 2017 to 2020, with as much focus on increasing awareness and cultural sensitivity for all front-line staff as on educating migrants about Irish society[31].

IV. Religious freedom

At present, it is difficult to see how any efforts to tackle radicalisation and extremism are impacting religious freedom in Ireland. Religious freedom is protected by the Constitution of Ireland, as well as by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is not to say that there are no restrictions being imposed on religious freedom in Ireland, but this is being done in the name of equality, not for the purposes of combating radicalisation or extremism. Examples would include efforts by the Department of Education to restrict the amount of time schools give to religious instruction and to sacramental preparation[32] and new legislation to prevent the majority of faith schools from selecting pupils based on their faith[33]. Though this latter restriction on freedom of school enrolment has been advanced in pursuit of equality, the Migrant Integration Strategy 2017 does provide for the monitoring of school enrolment policies to assess their

[31] Department for Justice and Equality, 'The Migrant Integration Strategy: A Blueprint for the Future', <http://www.integration.ie/website/omi/omiwebv6.nsf/page/JWKY-AJEE6A1021139-en/$File/Migrant_Integration_Strategy_English.pdf> (accessed 15 Jul 2017).

[32] C. O'Brien, 'Religion May be out of Core Curriculum for Primary Schools', *Irish Times*, 28 Dec 2016.

[33] Education (Admission to Schools) Act 2016.

impact on migrant students[34]. Recently, Muslim parents who are not in a position to send their children to either of the Muslim primary schools in Ireland (both are in Dublin) have reported difficulties in securing school places, as priority is given to children of the same religious denomination as the school[35]. The recently passed legislation on school admissions provides that only the Roman Catholic Church will be prevented from prioritising children of its religious tradition in the enrolment policies of its schools. This reflects the fact that the Catholic Church controls and runs over 90 per cent of all schools in Ireland. Schools run by minority faith groups will continue to be able to prioritise children of their faith group in admissions, though it remains to be seen if this is subject to constitutional challenge on the grounds that it contravenes the non-discrimination clause in Article 44 of the Constitution of Ireland. This clause prevents the state from discriminating between religious bodies or from favouring one religious body over another[36]. The case law to date has focused on the state offering financial benefits to religious bodies[37], but giving minority faiths the right to prioritise children from their own faith in state-funded schools, while denying this right to the Catholic Church could arguably be an instance of the state discriminating between religious groups.

V. Conclusion

As stated above, although Ireland has had a long history of extremist violence and terrorism of a home-grown variety, it does not currently share the same level of public or political anxiety about extremism and radicalisation as some of its European neighbours. This is in part related to the low levels of migration, especially through the financial crisis, but it is also connected with subjugation of this debate to a more pressing debate around secularism, equality, tolerance and the place of religion in society. While other EU states may grapple with the place of Islam in wider society, Ireland is grappling with the deconstruction of the influence of the Catholic Church in education, healthcare and other areas where the Church has until recently exerted much influence. Recent headlines about Ireland being used as a base for those intending to perpetrate acts elsewhere and warnings from Ireland's Muslims that extremists are trying to radicalise vulnerable and isolated Muslims in Ireland are failing to capture public attention. Religious freedom remains important in Ireland, but its importance will be ignored until those leading the secularising agenda feel that all citizens are free from the influence of the religious beliefs of the majority.

[34] Ibid, [5].

[35] K. Donnelly, 'Muslims Finding it Harder to Get a Place in School', *Irish Independent*, 8 Feb 2017.

[36] Article 44(2), Constitution of Ireland.

[37] See *Campaign to Separate Church and State v The Minister for Education* [1998] 3 I.R. 321; Re Article 26 and the Employment Equality Bill 1996 [1997] 2 I.R. 321.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN THE ITALIAN LEGAL SYSTEM

Roberto Mazzola[1]

I. Social context

What does Italy's religious landscape look like? According to the most recent estimates provided by the ISMU Foundation, as of 1 January 2016, most foreign residents in Italy identified as Christian Orthodox (over 1.6 million), followed by Muslim (just over 1.4 million) and Catholic (just over 1 million). These are followed by foreign Buddhists (estimated at 182,000), evangelical Christians (121,000), Hindus (72,000), Coptic Christians (19,000) and, finally, Sikhs (17,000)[2].

ISMU's research highlights the fact that the majority of immigrants are not of the Islamic faith; indeed, Muslims comprise just 2.3% of the total population (both Italian nationals and foreigners). The largest group of foreigners are Christian Orthodox, at 2.6%, while Catholics constitute 1.7%. This means that, from 4.3% of the foreign population, there are nearly twice as many foreign Christians as Muslims.

It is undeniable that this pluralism generates tension. The recent final report approved on 6 July 2017 by the Parliamentary Commission at the Chamber of Deputies, the 'Jo Cox'[3] Commission on Intolerance, Xenophobia, Racism and the Phenomenon of Hate, highlights that over half of the Italian population (Italy is in second place in Europe) believes that ethnic diversity makes a country a worse place to live. Indeed,

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[2] E. Pace, *Le religioni nell'Italia che cambia. Mappe e bussole* (Roma, Carocci, 2013), pp. 9-12; P. Naso, 'Vecchio e nuovo pluralismo in Italia', in Dipartimento per le libertà civili e l'immigrazione Direzione Centrale degli Affari dei Culti Ministero dell'Interno, Fondo Europeo per l'Integrazione dei cittadini dei Paesi terzi (FEI) - Azione 6/2011 Mediazione sociale e promozione del dialogo interculturale (eds), *Religioni dialogo e integrazione. Vademecum*, pp. 37-46.

[3] Chamber of Deputies, 17th Legislation - *Commissione 'Jo Cox' su fenomeni di odio, intolleranza, xenofobia e razzismo. Relazione finale* (approved by the Commission 6 Jul 2017).

according the National Institute of Statistics (ISTAT), over half of the population 'maintains that a suburb [is degraded] when immigrants move there and that their presence increases levels of criminality'[4]. The report illustrates that Italy is not at all comfortable with integration policies. Indeed, religion is being increasingly used to show that dialogue between cultures is impossible, as well as reflecting the uselessness and even the dangers of intercultural integration processes.

The ethnic-religious pluralism that is associated with migration has reinforced another conviction in society: that immigrants, particularly those who are of different cultures or religions compared to the majority, constitute a real threat to national security. According to the data provided by the Institute of International Political Studies (ISPI), immediately after the economic crisis in 2008, Italians perceived the increasing number of immigrants as being the greatest threat to society. This is particularly relevant in an analysis of the relationship between security, religious radicalism and freedom of worship. According to ISPI, 69% of Italians tend to overestimate the connection between irregular immigration or asylum seekers and Islamic terrorist attacks. In reality, only 11% of attacks can be associated with newcomers, namely, irregular immigrants or asylum seekers. In fact, in the last three years people who were already citizens of the target country carried out most attacks[5]. This demonstrates that it is an error to focus security policy on migration processes and integration policies that neglect the second generation. The numbers leave no room for doubt: of the 51 attacks that occurred in Europe between 2106 and mid-2017 (these figures do not include the attacks in London and Barcelona in 2017), 73% of them were carried out by citizens of the country in which the attack was executed[6]. Fourteen per cent of the attackers were legal residents or visitors from neighbouring countries. Asylum seekers or people holding refugee status carried out only 5% of the attacks, and only 6% of attackers were residing in the target countries illegally[7].

The idea that religious radicalisation and difficulties in integration are linked is no longer sufficient to explain jihadism. This is because most radicalised youth who have contributed to terrorist attacks did not suffer from a lack of integration or marginal socio-economic status. If some of these individuals formed part of an effectively marginalised social stratum where deviance and social unrest are more common, many others were:

[4] Ibid.

[5] F. Reinares, 'Jihadist Mobilization, Undemocratic Salafism, and Terrorist Threat in the European Union' (2017) *Georgetown Security Studies Review*, pp. 70-76.

[6] L. Vidino, F. Marone and E. Entenmann, *Jihadista della porta accanto. Radicalizzazione e attacchi jihadisti in Occidente* (Roma, Istituto per gli Studi di Politica Internazionale, 2017), <https://www.ispionline.it/ > (accessed 19 Sep 2018).

[7] Ibid.

> 'university students or successful professionals who often lived in better conditions [than] those of their peers, speaking the country's language perfectly and maintaining social lives and stable families'[8].

This distorted perception that there is a threat connected to migration puts Italy in line with the European trends indicated by *Eurobarometer 2015*, which shows that 58% of European citizens believe that immigrants are a threat to their culture and religious identity[9]. This is also demonstrated by the fact that within the EU, the percentage of people who view diversity and pluralism as an opportunity for growth and openness in civil society in a country has dropped from 56% to 48%[10].

II. Political and public debate

On 31 March 2017, the First Section of the Cassation Court handed down ruling 24084/2017[11], upholding a ruling concerning a young Sikh in possession of illegal weapons or harmful objects. The initial decision was pronounced by the Court of Mantova on 5 Feburary 2015 for the public use of a *kirpan*. The real problem is obviously not whether the *kirpan* is a dangerous weapon under the terms of Law 110/1975 on Supplementary Rules of the Disciplinary Code for the Control of Weapons, Ammunition and Explosives. This is demonstrated by a part of the ruling that was appealed in which the first judge invoked the need for immigrants to conform to the fundamental values of Italian society. Paragraph 2.3 of the ruling reads:

> 'It is essential that immigrants bring their values into line with those of the western world, which they have freely chosen to enter, and to verify the compatibility of their values with the governing principles and thus their lawfulness in relation to the legal order that governs them'[12].

Whether or not the values of ethnic or religious minorities should adapt to those of the majority is one of the key political and social issues under discussion in Italy

[8] Ibid.

[9] *Public Opinion in the European Union. Standard Eurobarometer 83*, July 2015, <http://www.ec.europa.eu> (accessed 18 Jun 2018).

[10] L. Vidino, *Il jihadismo autoctono in Italia: nascita, sviluppo e dinamiche di radicalizzazione*, *Prefazione di S. Dambruoso* (Milano, Istituto per gli Studi di Politica Internazionale, 2014), <https://www.ispionline.it/> (accessed 8 Jun 2018). Also see L. Vidino, *L'Italia e il terrorismo in casa: che fare? Introduzione di P. Magri, intervista con il Ministro Angiolino Alfano* (Milano, Istituto per gli Studi di Politica Internazionale, 2015), <https://www.ispionline.it/> (accessed 10 May 2018); J. Burke, *Al-Qaeda: The true story of radical Islam* (London, I.B Tauris, 2004); P. Ferrara, *Religioni e relazioni internazionali: atlante geopolitico* (Roma, Città nuova, 2014); A. Mattiello, 'Terrorismo di matrice jihadista: inquadramento concettuale e principali dinamiche geopolitiche' (2015) 6 *Senato della Repubblica. Servizio Affari Internazionali.*

[11] Cassation Court, Crim. Sect. I, Ruling 31 Mar 2017, No 24084.

[12] Ibid.

and beyond. At the core of the discussion are the themes of homogenisation and assimilation as prerequisites for the preservation and maintenance of the integrity of the democratic system. Whether the issue is with Islamic clothing (an argument that is no longer at the centre of the Italian political-legislative debate following the failure to pass various laws relative to the reform of Article 5 of Law 152/1975), regional legislation on places of worship (Lombardy Regional Law 2/2015, Veneto Regional Law 12/2016, Liguria Regional Law 23/2016)[13] or religious radicalisation in prison or the training of ministers of religious minorities who may engage in hate speech or acts of discrimination for ethnic, religious or cultural reasons, at the heart of the discussion is one issue alone: the difficulty in identifying a common nucleus of principles of judicial civility in which both the requirements of security and pluralism are satisfied.

The ruling of the First Section of the Court of Appeal was instrumental in moving the debate from legal principles to ethnic-moral values.

It could be argued that attempts of this nature have already been made recently in Italy through the Cultural Project proposed in 1995 by the then-president of the CEI Ruini at the Ecclesiastical Convention in Palermo[14]. In this case, the issue under discussion was viewed through an anthropological lens and was not social pluralism and religion, but ethnic realism. Today, the issue at the heart of the discussion has changed. It is concerned primarily with the reformulation of social contracts that are necessary in redefining the basic rules for living together. Ethnic and religious minorities living in Italy and Europe are being asked to share the same morals and to subscribe to the same ethnic-philosophical presumptions that are held by the cultural majority.

For some, this is unacceptable, as it is considered an invasion of the most intimate spheres of an individual's life; for others, it is legitimate, as certain factors are indispensable for the protection of democratic order and the safeguarding of fundamental values. This is based on the republican concession of secularism, under which all citizens must remove personal ethnic, cultural or religious elements that are considered incompatible with the public sphere. In this sphere, every member of society must renounce individual elements that provoke divisions and social differences.

[13] See N. Marchei, 'Le nuove leggi regionali 'antimoschee' (2017) 25 *Rivista telematica* (http:// www.statoechiese.it), pp. 1-16. Also see A. Ferrari, 'La nuova legge lombarda sui luoghi di culto. Una risposta sbagliata al pluralismo culturale e religioso', (2 Feb 2015), <http:// www.oasiscenter.eu> (accessed 18 Jun 2018).

[14] See F. Traniello, 'Verso un nuovo profilo dei rapporti tra Stato e Chiesa in Italia', in F. Traniello, F. Bolgiani and F. Margiotta Broglio (eds), *Stato e Chiesa in Italia. Le radici di una svolta*. *Atti del Convegno della Fondazione M. Pellegrino* (Bologna, il Mulino, 2009), p. 48; C. Ruini, *Nuovi segni dei tempi. Le sorti della fede nell'età dei mutamenti* (Milano, Mondadori, 2005), p. 81.

III. Legal and political framework

1. Definition of Extremism, Fundamentalism and Radicalisation

If the meaning of 'radicalisation' is examined under the generic doctrinal profile, what is said for Italy can also be applied to the rest of the world. Internationally, the word 'radicalisation' incites increasing perplexity, as many authorities now determine it to be an intrinsically arbitrary expression, which normally takes a negative connotation, and it is used to stigmatise unpleasant ideas.

> 'Charles E. Allen provided one of the most complete definitions of "radicalisation" during his speech in March 2007 before the US Senate Committee on Homeland Security and Government Affairs. For Allen, radicalisation is: "the process through which a system of extreme values is adopted, including the desire to use, support or facilitate violence as a method of social change"'.

Doctrinally, we can distinguish between 'cognitive radicalisation' and 'violent radicalisation'. The former refers to the process by which a subject adopts ideas that are very much at the extreme of what is considered 'normal', refusing the legitimacy of the existing social order, seeking to substitute it with a new structure that is founded on a set of completely different values. On the other hand, violent radicalisation has an element of action, where the radicalised subject decides to use violence in an attempt to establish their own cognitive radicalisation.

However, it should be noted that the formula established by this definition is clearer and more complete than the generic interpretation recently provided for by the Italian legislator in Draft Law No 2883 on Measures for the Prevention of Radicalisation and Violent Jihadist Extremism, which was approved by the Chamber of Deputies on 18 July 2017 and is currently under discussion in the Senate. Article 1(2) provides a definition of radicalisation, stating:

> '[a] phenomenon [whereby], even if an individual has no link to terrorist groups, they are able to take on the ideologies of the jihadist network, inspired by the use of violence and terrorism, also through the use of the internet and social networks'[15].

It is interesting that this definition includes the notions of 'terrorism' and 'jihadism', two concepts that are linked to the concepts of 'Islamism' and 'Salafism'. This link opens up an extremely complex horizontal interpretation that implies an understanding of various aspects beyond that of the legal, such as the historical and theological. The legal and public administrations are completely unprepared to deal with these profiles. To understand whether a radicalisation process justifies the application of the laws provided for in the legal system in question, first, the difference

[15] Senate of the Republic, XVII Legislatures - draft Law No 2883: 'Actions for deterence of the radicalisation and violent extremism manmade jihadist', 11 Sep 2017.

between Muslim and Islamic must be understood and, within this category, Islamists must be differentiated. According to their *modus operandi* and their relationship with democratic institutions, it is necessary to differentiate between types of Islamists: jihadists and 'rejecters' (both non-violent and 'participatory'). If the former, rejecting democratic participation and resorting to violence, is fully covered by the cases provided for by Article 1 of the above-mentioned law, the latter, who also openly reject every governing system not based on Islamic law yet do not resort to violence, are not covered by the law in question. The same can be applied to the exclusion of so-called Islamic participants, who adhere to an Islamic ideology but who interact with society by participating in public life and the democratic process.

The problem is that the line between these categories is unstable and confused. In general, it can be said that to compare Salafis with jihadists linked to Al-Qaeda or the Islamic State is incorrect for three reasons: first and foremost, for theological-religious reasons; second, for sociological reasons; and finally, because of the legal consequences that such an interpretation may have on religious freedom[16]. With regard to the first point, it is true that Salafism shares a certain closeness in values and principles with Islamic State jihadists; however, the differences can be found in the primary elements: for Salafis, religious practices are important, whereas they are not for radicals; Salafis do not recognise a shortcut to salvation, whereas radicals seek out and practise shortcuts, dispensing with regular practices; for a Salafi, life is a gift from God, which functions as a path to salvation and thus cannot be disrespected, and consequently death cannot be prized[17].

From a sociological perspective, the Islamic State maintains strict control over Salafi participants: the Islamic State recognises a certain freedom and autonomy for women and has a more modern approach to sexual openness, also in its more perverse modes; compared to the Salafi community, rules relative to sexual modesty are not respected; for the Islamic State, and not for Salafis, the culture of respect for one's parents is valued; for Islamic State jihadists, infidels deserve to die, while for Salafis an individual cannot be obliged to convert to Islam.

Such differences, if not taken duly into account, may unjustly limit the right of religious freedom for Muslims who, for the sole reason of marrying a traditional or conservative Islamist, who they may also dislike, are classified as radicals[18].

[16] See O. Roy, Generazione ISIS. Chi sono i giovani che scelgono il califfato e perché combattono l'occidente (Milano, Feltrinelli, 2016).

[17] B. Megale, 'L'evoluzione della minaccia dall'estero all'Italia' in L. Vidino (ed), *L'Italia e il terrorismo in casa: che fare?* (ISPI, Edizioni Epoké, 2015), <http://www.ispioline.it>, (accessed 5 Aug 2017).

[18] See E. Di Minico, 'La propaganda del terrore prima e dopo la crisi del Califfato' in L. Vidino (ed), *L'Italia e il terrorismo in casa: che fare?*; M. Cannavicci, 'Chi sono i radicali islamici in casa nostra, un profilo psicologico' in L. Vidino (eds), *L'Italia e il terrorismo in casa: che fare?* (ISPI, 2015).

2. Legislation Adopted to Tackle Radicalisation and Extremism

Legislation that deals directly with the issue of radicalisation can be found in various legal and administrative acts.

Law 438/2001, which transformed the law in Legislative Decree 374/2001, includes provisions related to personal security and other measures to ensure the functioning of the offices of the internal administration. This law introduces new crimes that integrate what was already provided for by Article 270 of the Criminal Code, modified by Article 2 of Law 85/2006, for which:

> 'Whoever in the State territory promotes, constitutes, organises or manages associations intended to violently establish the dictatorship of [one] social class over another, that is, to violently suppress a social class or to violently subvert the economic or social set of rules implemented by the state, will be punished by imprisonment of five to ten years. Whoever participates in the associations cited in the first [paragraph to this article] is to be punished with imprisonment of one to three years. Penalties will be increased for those who reconstitute, also under a false name or another form, the associations mentioned in the first paragraph to this article, for which dissolution has been ordered'.

Article 1 of Law 438/2001 introduces Article 270 bis of the Criminal Code and considers associative activities aimed at carrying out international terrorist actions or the subversion of democratic order. In particular, such actions are punishable by a minimum of seven to a maximum of fifteen years in prison:

> 'Whoever promotes, sets up, organises, manages or finances associations with [the] purpose [of calling] for acts of violence to be carried out for terrorist ends or subversion of the democratic order'.

Those who merely participate in such associations will face punishment of five to ten years' imprisonment. For the purposes of criminal law, terrorist purposes also exist where 'acts of violence are directed against a foreign country, institution or international organisation'. With regard to those convicted, the article also states:

> 'it is always obligatory to confiscate those items that serve or were destined for the commission of [a] crime and items that are the price, product, profit thereof or that comprise their use'.

A second criminal case is provided for under Article 1 bis of Law 438/2001. This law elaborates on the Criminal Code, adding to Articles 270 and 270 bis[19] Article 270 ter of the Criminal Code, which states:

> 'Whoever, apart from cases of participating in the crime or aiding and abetting, gives shelter or provides food, hospitality, means of transport, instruments for

[19] See L. Lesti, 'Strumenti di legge/1: le esperienze della magistratura' in L. Vidino (ed), *L'Italia e il terrorismo in casa: che fare?* (ISPI, 2015).

> communication to any person who is a member of the associations indicated in Articles 270 and 270 bis is liable to imprisonment for up to four years. The punishment is increased if the assistance given is continuous. Those who commit [such acts on behalf] of a close relative are not subject to punishment'.

In addition to legislation from 2001 is Law 206/2004, which provides new 'rules in favour of the victims of terrorism and attacks of such kind'. This law has the task of safeguarding, from a preventative and security perspective, all victims of terrorism and mass killings, as well as their surviving relatives, carried out in Italy or abroad, provided that they are Italian citizens.

Article 270 quinquies of the Criminal Code, 'Training for activities with international terrorist purposes', was introduced by Article 15 of Law 144/2005 and converted by Law 155/2005, which outlines 'urgent measures to counteract international terrorism'. The same penalty applies to individuals training for terrorism. This article also added punishment for 'enrolment for the purpose of international terrorism' (Article 270 quarter of the Criminal Code.).

Law 144/2005, which was approved to implement the EU obligation arising from the European Convention on the Prevention of Terrorism, signed in Warsaw on 16 May 2005, touches on a series of other issues, including prevention methods relative to patrimony, expulsion of suspected terrorists, residence permits and judicial police functions.

Directly linked to antiterrorism law is a package of laws aimed at regulating one of the most common instruments employed by the administrative and judicial authorities in Italy to combat this phenomenon: the removal from state territory of non-EU citizens through deportation or expulsion, as regulated by Legislative Decree 286/1998 and Articles 235 and 312 of the Criminal Code. Obviously, in conformity with security policies, one measure that has been used repeatedly is that of deportation or expulsion as ordered by the administrative authority in charge of public security for foreigners who pose a threat to public security or public order. If the administrative expulsion provided for by the prefecture or the Interior Ministry is of a purely political nature, at the discretion of the authority, it may require prior notification to the prime minister. Alternative measures or substitute sanctions to the expulsion fall under the jurisdiction of the judicial authority.

With reference to radicalisation and so-called foreign fighters, draft Law No 2883, approved only by the Senate on 9 July 2017[20], should be considered. In particular, Article 1 specifies that the law, in conformity with consolidated international and supranational guidelines, takes into account the resolution of the European Parliament of 25 November 2015 for the prevention of radicalisation and the recruitment of European citizens by terrorist organisations (2015/2063 INI), it 'regulates the adoption

[20] The draft law was never adopted due to the finish of legislative term.

of measures, interventions and programmes aimed at preventing radicalisation and the diffusion of the violent extremism of Jihadist networks, as well as the promotion of deradicalisation, in the areas of fundamental safeguards of religious freedom and recovery in terms of social, cultural and employment integration of involved subjects, for both Italian citizens and international residents in Italy'. To this end, the law provides for the establishment of the National Centre on Radicalisation (CRAD) by the Ministry of the Interior Department for Civil Liberty and Immigration, 'the role of which is to [prepare on an annual basis a] National Strategic Plan for the prevention of radicalisation processes and adherence to the violent extremism of the Jihadist network. [Its] mandate is also to facilitate the recovery of involved subjects in the radicalisation phenomenon. The plan defines the projects, actions and initiatives that must be carried out to facilitate Article 1'. The National Strategic Plan is approved by the Board of Ministries, on the proposal of the Interior Ministry, following the provision of the opinions of the competent parliamentary commissions and the parliamentary committee provided for by Article 4 of the draft law. The CRAD, in accordance with the relevant administrations, identifies the resources available in their budgets, as well as the proportion of European funds allocated to the Radicalisation Awareness Network, to be used in the activities provided for in the National Strategic Plan. In addition to the CRAD, Article 4 of draft Law No 2883 also provides for the establishment of a parliamentary committee for monitoring radicalisation and violent extremism in the jihadist network 'composed of five representatives and five senators, nominated by the Presidents of the Senate and the House of Representatives, in proportion to the number of members in the parliamentary groups'.

Administrative acts include: a decree of the Interior Ministry of 6 May 2004 that provides for a national plan for the management of terrorist events, as well as the procedures and methods of implementation of a crisis unit as Article 6 of Legislative Decree 83/2002, converted into Law 133/2002. This decree provided for the establishment of the Anti-terrorism Strategic Analysis Committee (CASA). The CASA is an institute at the Central Directorate of the Viminale Prevention Police that deals with the national plan for the management of terrorist events. The institute manages law enforcement representatives, the SISDe[21] and the SSMI[22]. The outcome of the meetings of the CASA is sent to the secretary general of The Centre for Studies of Social Investments (CENSIS) as a contribution to the analysis to be carried out by the Department of Strategic Analysis. The CASA is a permanent working group for the sharing of information and intelligence. It has the peculiar feature of being a

[21] The Service for Information and Democratic Security (SISDe) operated up until 2007 and was replaced by the Information and Interior Security Agency (AISI).

[22] The Service for Information and Military Security (SSMI) operated up until 2007 and was replaced by the Information and External Security Agency.

fundamental instrument, at the national level, for analysing internal and international terrorist threats[23].

A ministerial decree of 15 August 2017, introduced by then-Interior Minister Marco Minniti, introduced the concept of 'collaborative prevention' into Italian security policies. This is based on the idea of the decentralisation of security instruments at the local level. This strategy consists of providing for full involvement of local administrators —first municipalities, followed by heads of municipal police bodies, police commissioners and prefectures to provide for forms of efficient and widespread active vigilance and passive defence in urban areas in the presence of the threat of so-called lone wolves. The municipalities and heads of the municipal police, with commissioners and prefectures, are devolved and are granted even greater power to provide for widespread local prevention. This is an inversion of the traditional centre-periphery relationship, increasing responsibility and also autonomy in making decisions related to municipalities and metropolitan areas in an effort to establish a difficult equilibrium between security and freedom.

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

Laws that indirectly address the problem of radicalisation can be found in a series of legislative and administrative provisions.

Article 3 of Law 205/1993 provides for aggravating circumstances that are applicable to all offences punishable by penalties other than life imprisonment if activities are carried out for the purpose of ethnic discrimination, racism or religious hate or to facilitate actions by organisations, associations, movements or groups that have similar outcomes.

The penalty in these cases may increase by half, and eventual mitigating circumstances cannot be considered as prevalent to the aggravation provided for under paragraph 1.

> 'The Decree of the President of the Board of Ministers on Uniform Rules for the Protection of Classified Information amended a decree from 1987 and provided for a new focus for the subject of protecting classified information at the international level. This regulatory framework constitutes a guide for more than 1,700 security organisations that, in national and international territories at various levels of public administration, are called upon to protect classified information for the purposes of national security'.

Some regional laws have introduced regulations concerning places of worship that have an indirect role in combating radicalisation. In the absence of a general law on religious freedom that governs the stuff of houses of worship, regional legislators have created diverse solutions. The latest generation of these regional laws have some

[23] See M. Franchini, 'Alcune considerazioni sulle nuove competenze del Comitato parlamentare per la sicurezza della Repubblica' (2014) 1 *Riv. Ass. it. cost*. pp. 1-5.

common characteristics: Regional Law of Lombardy 62/2015; Regional Law of Veneto 11/2004, as well as Law 23/2016; Regional Law of Liguria 4/1985, as well as Law 23/2016. First, these laws introduce different disciplines for access to building sites and economic contributions for churches with an agreement and for churches without one, with aggravated paths and penetrant controls reserved for the latter (this distinction has only been maintained in the law of the Lombardy Region). Second, they provide for the involvement of political bodies in deciding upon requirements for ambiguous religions. In this sense, the law recalls the fascist ideas that permitted religions that were declared as being contrary to the Constitution a few decades ago. Third, they provide for the need to obtain preventative opinions from citizens' committees, representatives and law enforcement officials, in addition to those of regional police and offices of the prefecture for the drawing up of a plan for religious services. Fourth, they grant municipalities the option of holding a referendum in relation to the contents of the plan without clearly specifying the aspects and the requisites under which the referendum could take place. Fifth, they establish the right to include a commitment to use the Italian language for all activities that are carried out in the realm of the common interest for religious services that are not strictly connected to ritual practices of worship.

All of these provisions are motivated by the common factor of activating forms of preventative control on the organisation and activities of religions, especially on those without an agreement, for the stated aim of increased protection of public order and security. There is an assumption that places of worship pose a greater threat to order and security with respect to other spaces.

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

In general, Italy is lacking in the development of initiatives aimed at deradicalisation and reintegration.

The final report of the 'Jo Cox' Commision on Intolerance, Xenophobia, Racism and the Phenomenon of Hate, approved by the European Commision on 6 July 2017, provides other recommendations: to develop effective training for teachers and educators in collaboration with associations dedicated to the defence of civil rights and family associations; to promote collaboration between various interested parties to counteract discrimination and hate speech (such parties include research insitutes, teachers, magistrates[24], law enforcement and civil society associations); to improve intercultural training programmes for law enforcement, magistrates and civil soci-

[24] See S. Dambruoso, 'Strumenti di legge/2: Nuove proposte. Serve una magistratura specializzata?', ISPI, European Foundation for Democracy (2015), <http://www.ispioline.it> (accessed 2 Oct 2017 2012), pp. 53-65.

ety organisations; to push for bigger social media platforms to follow the European Commision Code of Conduct by adopting, in a transparent manner, effective instruments and filters for the timely removal of offensive or hateful content as reported by individuals or associations.

Article 10 of draft Law No 2883/2017, 'Communication and Informational Activities', provides that a national strategic plan be prepared, with the aim of fostering integration and intercultural and interreligious dialogue, as well as to counter radicalisation and the diffusion of violent extremism of a jihadist nature. The plan provides for projects that develop information campaigns through multimedia platforms in both national and foreign languages, as well as the possible use of similar campaigns promoted by international institutions that Italy is a part of. Additionally, for the same objective referred to in paragraph 1, RAI-Radiotelevisione Italiana Spa, a public radio and television service, is creating a specific multimedia platform for broadcasting informational and educational products in both Italian and Arabic, with methods to be specified in the service contract and within the limits of available resources.

For the same purpose as paragraph 1, the national strategic plan referred to in Article 2 may promote communication activities carried out in collaboration with public and private subjects, as well as in national media[25]. A particular focus is on the culture of pluralism and interreligious and intercultural dialogue and the promotion of gender equality and the countering of religious discrimination, including Islamophobia, in accordance with the provisions of Decree-law 122/1993, converted, with modifications, by Law 205/1993.

5. Effects of the Measures on Religious Freedom

As draft Law No 2883/2017 on the fight to deradicalise has still not been approved, there are no direct consequences in the realm of religious liberty. If there are any consequences, they may be found within the administrative provisions of the contingent and urgent ordinances provided for by Article 54 of the Sole Text of the Local Governing Bodies (*Testo Unico degli Enti locali*) put in place by local governments to limit the use of specific articles of clothing or to limit the freedom of movement of some immigrants that belong to particular religious faiths.

IV. Educational measures to tackle radicalisation and extremism

The information in our possession describes a series of strategies that are yet to be implemented. Preventative intervention in education is provided for by Articles 8,

[25] See M. Manetti, 'Una stagione di fioritura della libertà di pensiero è ormai alle spalle' (2016) 3 *Riv. Ass. it. cost*., pp. 1-9. See S. Mele, 'La strategia di sicurezza cibernetica dell'Italia', *Comitato Atlantico italiano* <http://www.comitatoatlantico.it> (accessed 9 Sep 2017).

9 and 11 of draft Law No 2883/2017. Article 8 provides for a series of preventative interventions in the field of education: i) the National Observatory for the Integration of Foreign Students and Intercultural Education, as provided for in Decree No 718 of the Ministry of Education, University and Research of 5 September 2014, establishes that within six months of the entry into force of the decree, guidelines must be implemented for intercultural and interreligious dialogue aimed at promoting a deeper understanding of the Constitution. Particular reference must be made to the fundamental principles, rights and obligations of citizens for the promotion of a culture of tolerance and pluralism and the supreme principle of state secularism, as well as for the prevention of radical episodes in schools: ii) the above-mentioned National Observatory carries out annual monitoring of initiatives implemented by educational institutions without any new or increased public-sector burdens; iii) networks of education institutions, as referred to in Article 1(70) of Law No 107 of 13 July 2015 may enter into agreements with universities, institutions, bodies, associations or agencies for the development of initiatives in line with the guidelines established in the decree of the Ministry of Education, University and Research to be issued within three months from the date of entry into force of Law No 107; iv) for the 2017/2018 academic year, the National Teachers Training Plan, as per Article 1(124) of Law 107/2015, also provides for initial and ongoing training of teachers, heads of public and parish educational facilities, with the aim of increasing the understanding and skills of global citizenship for educational integration and intercultural learning; v) as per the agreement made in the Permanent Conference for the Relationship between the State, the Regions and the Autonomous Provinces of Trento and Bolzano, the procedures for the implementation of measures to prevent radicalisation and violent jihadist activities were identified for vocational education and training.

Article 9, 'University and postgraduate training projects for the training of professional specialised figures', also provides for: 1) the financing of university and postgraduate training of professional figures specialised in the prevention of radicalisation and violent extremism of a jihadist nature. The training is to be carried out with a focus on interreligious dialogue, intercultural and economic relationships and the development of migrant countries. It will be provided for and organised through agreements between Italian universities and member states of the Organisation of Islamic Cooperation[26], with which Italy has stipulated cultural, scientific and technical cooperation agreements, as well as having authorised the expenditure of 2.5 million euros in 2017 and 5 million euros for 2018, in favour of the Ministry of Education, University and Research. These amounts will be paid by means of a corresponding reduction to the fund referred to in Article 1(200) of Law No 190 of 23 December 2014.

[26] See Y. Pallavicini, *Il ruolo delle comunità islamiche* (ISPI, European Foundation for Democracy, 2015), pp. 101-118.

SECURITISATION OF RELIGIOUS FREEDOM: THE CASE OF LITHUANIA

Donatas Glodenis[1]

I. Social context

Lithuania is ethnically rather homogeneous. Although there were 154 different nationalities living in Lithuania in 2011, the vast majority of the population came from a small number of ethnic groups: 84.2% of the population was Lithuanian, 6.6% Polish, 5.8% Russian, 1.2% Belarusian and 0.5% Ukrainian, while the other 149 nationalities accounted for only 0.6% of the population[2]. The percentage of Lithuanians in the population has actually increased since Soviet times.

When it comes to religion, the majority of the Lithuanian population is Catholic, but there are various minorities, including the historical Sunni Muslim community, which is ethnically Tatar and has lived in Lithuania for hundreds of years. About 77% of the population is Catholic, and the next major religion, Russian Orthodox, accounts for only 4,11%.

Since the adoption of the Law on Religious Communities and Associations in 1995, Lithuania has recognised nine religions as traditional. These include two branches of Catholicism (Latin Rite and Greek Rite Catholics), as well as the Russian Orthodox, Old Believers, Evangelical Lutheran, Evangelical Reformed, Jewish, Sunni Muslim and Karaite religious communities (Table 1 presents data on the size of each confession). As can be seen, aside from Latin Rite Catholics and the Russian Orthodox, the other traditional religious communities are quite small. All the other (non-traditional) religious communities together make up only 0.56% of the population.

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[2] 'Statistika: 84 proc. Lietuvos gyventojų - lietuviai, didžiausia tautinė mažuma - lenkai', *LRT.lt*, 15 March 2013, <http://www.lrt.lt/naujienos/lietuvoje/2/13626> (accessed 14 July 2017).

Table 1. Religious Affiliation of the Lithuanian Population, Data from the 2011 Census

Confession	% of population
Latin Rite Catholics	77.23%
Russian Orthodox	4.11%
Old Believers	0.77%
Evangelical Lutherans	0.60%
Evangelical Reformed	0.22%
Neopagans (Old Baltic Faith)	0.17%
Jehovah's Witnesses	0.10%
Sunni Muslims	0.09%
Pentecostals	0.06%
Baptists and Free Church	0.04%
Jews	0.04%
Charismatic Protestants	0.07%
Seventh Day Adventists	0.03%
Greek Rite Catholics	0.02%
Buddhists	0.02%
Churches of Christ	0.02%
Other confessions	0.15%
None	6.14%
Did not specify	10.11%
IN TOTAL	**100%**

Islam has been present in Lithuania for more than 600 years. According to legends, Tatar Muslims were either invited to Lithuania or, according to an alternative story, were brought back as captives by Grand Duke Vytautas at the end of the 14th century. They were settled in isolation from other ethnic groups and were autonomous subjects of the grand dukes of Lithuania. Tatars in Lithuania gradually stopped speaking Tatar, using a mixture of Polish and Belarusian instead, and became in other respects culturally similar to the surrounding communities, though they did continue to practise Islam. However, the Islam that developed among Lithuanian Tatars was a peculiar variety. Not speaking Arabic or the other languages of the broader Muslim world, they could follow the teachings of Islam only in approximation, and even after contact with the broader Muslim world became easier, they had little desire to depend on foreign teachers. Traditional Muslim practices in Lithuania included various forms of magic; they held liberal views on alcohol and entertained various superstitions[3].

[3] E. Račius, 'Musulmonai', *Religinės bendruomenės* (Vilnius, Mokslo ir enciklopedijų leidybos institutas, 2009), p. 73-90.

After the restoration of Lithuanian independence, the country's Muslim communities were invigorated by visiting Muslims from other countries and by immigrants. According to the country's 2001 census, there were 2,860 Muslims in Lithuania, 58.7% of whom were of Tatar nationality; 10% were Lithuanian, Polish, Belarusian or Russian (therefore most probably local); 24.1% were of nationalities that are traditionally associated with Islam; and 6.8% did not indicate their nationality. According to the 2011 census, the total number of Muslims decreased in the intervening decade, and the portion of the Tatar community among the total Sunni Muslim population also decreased (52.8% of Sunni Muslims were of Tatar nationality; 17.3% were Lithuanian, Polish, Belarusian or Russian; 29.2% were of nationalities that are traditionally associated with Islam; and 0.6% did not indicate their nationality). The percentage of Lithuanians among those confessing the Sunni version of Islam increased from 6.5% to 13.7%[4].

Two of the nine Muslim religious communities currently active in Lithuania were established by mostly non-Tatar Muslims. However, all the registered Muslim religious communities in Lithuania still belong to the Spiritual Centre of Lithuanian Sunni Muslims Muftiate, which manages to mitigate extremist tendencies, if any, in the Muslim community.

Table 2. Sunni Muslims by Ethnicity, Data from the 2011 Census[5]

	Sunni Muslims			
Ethnicity	***2001***	***2001 %***	***2011***	***2011 %***
Arab	10	0.3%	66	2.4%
Azeri	362	12.7%	327	12.0%
Belarusian	15	0.5%	11	0.4%
Bashkir	39	1.4%	27	1.0%
Chechen	27	0.9%	51	1.9%
Egyptian	-	0.0%	18	0.7%
Kazakh	29	1.0%	27	1.0%
Lezgin	33	1.2%	26	1.0%
Polish	13	0.5%	15	0.6%
Lithuanian	185	6.5%	374	13.7%
Pakistani	-	0.0%	15	0.6%
Russian	74	2.6%	73	2.7%
Tajik	27	0.9%	18	0.7%

[4] According to the 2011 census, there were only 11 Shia Muslims in Lithuania, which could hardly be correct, since Azeris are traditionally Shia Muslims and there were 648 Azeris living in Lithuania at the time, while, supposedly, more than half of them were Sunni Muslims. This seems to be unlikely and could be a result of a poorly constructed questionnaire.

[5] The data was provided by the Department of Statistics to the author on 15 July 2017.

Tatar	1,679	58.7%	1,441	52.8%
Turkish	26	0.9%	67	2.5%
Turkmen	-	0.0%	10	0.4%
Uzbek	48	1.7%	54	2.0%
Other	88	3.1%	91	3.3%
Did not say	183	6.4%	16	0.6%
Total	**2,860**	**100%**	2727	100%

II. Political and public debate

There is currently little political or public debate about the need to monitor religious groups for extremism. There was extensive debate on the activities of sects from approximately 1993 to 2004, but not currently. The debate about sects mainly focused on the possible harm to those involved, so it was not strictly about the extremism of the sects.

Islamic extremism is mostly perceived as a foreign phenomenon, with only minor exceptions. One story of potential Islamic extremism that has captivated Lithuanian public debate is that of Eglė Kusaitė, a young woman from the Lithuanian port city of Klaipėda. Kusaitė, a convert to Islam, was arrested in 2009 at Vilnius International Airport on her way to Russia, as she was suspected of going there to carry out a suicide attack at a Russian military base. After much publicity and lengthy court proceedings, she was sentenced in 2013 to 10 months' imprisonment[6]. She appealed her sentence and was acquitted by both the court of appeals and the Lithuanian Supreme Court (cassation court). The charges against her were based on materials provided by the State Security Department of Lithuania, and there was also information that the Russian Federal Security Service was involved, both by providing information to the Lithuanian State Security Department and by taking part in the initial questioning of Kusaitė. It was also revealed in court that the State Security Department was aware of her contacts with Chechen radicals but failed to take preventive action. As a result, the case did little to raise awareness of the potential of terrorism and hurt the image of the State Security Department.

Besides the aforementioned episode, the threat of terrorism and religious extremism, though perceived as a possibility, is overshadowed by the growing anxiety about the threat posed by Russia. The *National Security Threat Assessment of 2017*, produced jointly by the State Security Department of the Republic of Lithuania and the Second Investigation Department under the Ministry of National Defence, states that:

[6] O. Scharbrodt, S. Akgönül, A. Alibašić, J. Nielsen and E. Racius (eds), *Yearbook of Muslims in Europe,* Volume 7 (Leiden, Brill, 2015) pp. 370-376.

> '[The] terrorism threat in Europe throughout 2016 has remained high. A terrorist organization proclaiming itself the 'Islamic State' (ISIL) planned and executed attacks in Europe. The risk of ISIL terrorist attacks has also increased in Egypt and Turkey, [popular tourist] countries [for] Lithuanian citizens. It should not be [ruled out] that Lithuania, as a member of [the] EU and NATO, [could be] a target for terrorists, but [at present this] [is considered unlikely][7].
>
> Being a member state of [the] EU and NATO, Lithuania is a potential but not a priority target for Islamist terrorists. In 2016, [no activities on the part of] radical Islamist terrorist organizations [were] identified [in Lithuania], no threats to carry out a terror attack [were made], and no information [was received] about [the] departure of our citizens from Lithuania to [the conflicts in Syria] and Iraq.
>
> The [degree of radicalisation] of [the] Lithuanian Muslim community has remained low. In 2016…unsuccessful attempts [on the part] of foreign Muslims to… influence [the] Lithuanian Muslim community and change [the Islamic] traditions of [Tatars] residing in Lithuania [were observed]. The Tatars' domination in [the] Lithuanian Muslim community and [the] guidance of its religious life [have limited the spread of] Islamic radicalization in Lithuania'[8].

III. Legal and political framework

1. Definitions of Extremism, Fundamentalism and Related Concepts

There are no definitions of extremism, fundamentalism or radicalisation in any of Lithuania's legal acts. The State Security Department uses generally acceptable and academic definitions of these phenomena. As can be seen from the reports of the State Security Department, so far there has been little need to have precise definitions of these terms in legal acts.

2. Legislation *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

There has been no legislation adopted in Lithuania that specifically targets radicalisation and extremism.

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

Regarding legislation that is indirectly relevant to tackling radicalisation and extremism, Article 170 of the Criminal Code on incitement against any national, racial, ethnic, religious or other group of people should be mentioned first. It criminalises incitement of hatred on various grounds, including a person's religion:

[7] State Security Department of the Republic of Lithuania, National Security Threat Assessment of 2017, p. 34 <https://www.vsd.lt/wp-content/uploads/2017/03/AKATSKT_DRAFT-3-31-EN-HQ.pdf> (accessed 14 July 2017).

[8] Ibid, p. 35.

> '1. A person who, for the purposes of distribution, produces, acquires, sends, transports or stores…items ridiculing, expressing contempt for, urging hatred of or inciting discrimination against a group of persons or a person belonging thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or inciting violence, [the physically] violent treatment of such a group of persons or a person belonging thereto or distributes them shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to one year.
>
> 2. A person who publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of persons or a person belonging thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to two years.
>
> 3. A person who publicly incites violence or [the physically] violent treatment of a group of persons or a person belonging thereto on grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or finances or otherwise supports such activities shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to three years.
>
> 4. A legal entity shall also be held liable for the acts provided for in this [article]'[9].

Likewise, Article 170(1) criminalises the creation and activities of groups and organisations that aim to discriminate against a group of people or to incite hatred against them. Article 171 criminalises the disturbance of religious ceremonies or religious celebrations of religious communities or associations recognised by the state.

Regulations regarding the screening of individuals who need to work with classified or secret information, approved by the Government on 19 October 2016,[10] stipulate that the applicant has to declare their participation in an unregistered religious organisation, which seems to suggest that such participation can be a potential reason for the state to withhold a security clearance from a civil servant. The same question is included in the application form for candidates for the position of a prosecutor. Since it is hypothetically likely that an extremist religious organisation would be an unregistered religious organisation, this filter is potentially useful to countering extremism, although at the same time it is too broad and imprecise. It is possible that a religious community is not registered because there is no compulsory registration

[9] Criminal Code of the Republic of Lithuania, <https://www.unodc.org/cld/document/ltu/2000/criminal_code_of_lithuania.html> (accessed 14 July 2017).

[10] Decision of the Government of 19 October 2016, No. 1053 'Dėl Asmenų, pretenduojančių gauti leidimą dirbti ar susipažinti su įslaptinta informacija, tikrinimo ir teisės dirbti ar susipažinti su įslaptinta informacija, žymima slaptumo žyma "Riboto naudojimo", suteikimo tvarkos aprašo patvirtinimo' <https://www.e-tar.lt/portal/lt/legalAct/a7f921009d0811e69ad4c8713b612d0f> (accessed 14 July 2017).

of religious communities, or it may have fewer than the required minimum of 15 members, who also have to be citizens of Lithuania. It is noteworthy that a similar provision was removed from the requirements for granting security clearances in the Law of the Republic of Lithuania on State Secrets and State Service in 2016 upon the recommendation of the Office of the Equal Opportunity Ombudsmen[11].

The provisions regarding the registration of religious communities in the Law on Religious Communities and Associations[12], dating back to 1995, predate any current concerns over extremism and are mainly related to concern over the activities of sects, but they can also be seen as indirectly related to the prevention of extremism and radicalisation. First of all, the establishment of a non-traditional religious community is not possible without 15 adult members, who also have to be citizens of Lithuania. It is important to note that a non-religious association can be established by as few as three members, and there is no citizenship requirement in the case of non-religious associations. Article 11 of the Law on Religious Communities and Associations gives the Ministry of Justice an incredible six-month time frame for deliberations regarding the registration of a religious community or association. This is still the case at a time when a non-religious association, using standardised statutes and a digital procedure, can be established and registered in three days. Moreover, according to Article 12 of the law, the Ministry of Justice can refuse to approve the documents of a religious community submitted for registration if the 'activity of the religious community/ association violates human rights and freedoms or public order'. Likewise, Article 20 of the law stipulates that the Ministry of Justice can ask the courts to close down an offending religious community or association:

> 'Should a religious community, association or centre fail to act according to the registered statutes or corresponding documents thereof or should their activity violate the Constitution or this Law, the Ministry of Justice shall inform the religious community, association or centre [that] is in violation of laws and [shall indicate] the term…during which violations must be rectified. Failure to rectify said violations shall result in a court appeal by the Ministry of Justice for suspension of [the] activity of the religious community, association or centre.
>
> If the religious community fails to rectify [its] activities during the suspension term, which cannot exceed [six] months, the activities of [the] religious community or association may be ceased per court decision'.

Other types of non-profit legal persons, e.g., foundations, non-religious associations, public institutions, as well as for-profit legal persons, can be established without

[11] Lietuvos Respublikos valstybės ir tarnybos paslapčių įstatymas, <https://www.e-tar.lt/portal/lt/legalAct/ TAR.F4CA26A706AF/BUidgBGBfh> (accessed 14 July 2017).

[12] Law on Religious Communities and Associations of the Republic of Lithuania (translation), <https://e-seimas.lrs.lt/portal/legalAct/en/TAD/TAIS.27643> (accessed 14 July 2017).

such lengthy checks, but their continuing existence can be challenged by both their shareholders/members and the public prosecutor in case they violate any laws. The general procedure is established by the Civil Code. Article 2.125 of the Civil Code allows both the members or shareholders of a legal person and the public prosecutor to initiate an investigation of the legal person's activities. The prosecutor can do so in an attempt to safeguard public interests, 'including…cases where the activities of a legal person, [its] managing bodies or its members are at variance with the public interest'. An application for an investigation into the activities of a legal person should be filed with the district court in the place where the legal person's registered office is located. Although much of the regulation in the Civil Code regarding investigations into a legal person's activities reflect economic concerns, activities can be examined for signs of extremism as well. The courts can appoint experts to examine the activities of a legal person, and, after reviewing the recommendations of the experts together with the involved parties, it can apply measures regarding the legal person. The court, according to Article 2.131 of the Civil Code, can take the following measures:

1. revoke the decisions taken by the legal person's managing bodies;
2. temporarily suspend the powers of the members of legal person's managing bodies or exclude a person from the legal person's managing body;
3. appoint provisional members of the legal person's managing bodies;
4. authorise the non-implementation of certain provisions of the legal person's incorporation documents;
5. require that amendments be made to certain provisions of the legal person's incorporation documents;
6. transfer the legal person's right to vote to another person;
7. require that the legal person take or not to take certain actions;
8. liquidate the legal person and appoint a liquidator.

4. Soft Laws, Recommendations, Policies Tackling Radicalisation and Extremism

So far, government bodies have not announced any policies or recommendations regarding radicalisation or extremism. However, there is some concern related primarily to immigration. Therefore, the action plan of the National Internal Security Fund Program for the years 2014-2020 was amended on 2 May 2017 by a decree of the Minister of Interior to include, among other priorities, a project to improve the qualifications of police officers in criminal investigation divisions that have to investigate crimes in cases of terrorism and violent extremism, assigning EUR 46,667 for the project[13].

[13] Vidaus reikalų ministro įsakymas 'Dėl Lietuvos Respublikos vidaus reikalų ministro 2015 m. rugsėjo 29 d. įsakymo Nr. 1V-753 "Dėl Nacionalinės Vidaus saugumo fondo 2014-2020 m. programos

At another level, religious extremism and radicalisation are becoming a focus of a commission established by the government in 2000, which has hitherto primarily specialised in monitoring the activities of 'esoteric, spiritual and religious groups' (euphemisms for 'sects' derived from Parliamentary Assembly of the Council of Europe recommendation 1412 (1999) 'Illegal activities of sects'). Ever since the European refugee crisis started, the commission has been monitoring the data available to the institutions that comprise it as it relates to immigration, refugees and Islam. So far, the reports of the commission have had little to say about the possible dangers of Islamic radicalisation[14].

IV. Effects of the measures on religious freedom

The minimal measures that the State Security Department is taking to tackle radicalisation and extremism have so far had little impact on religious freedom, if any. The modest measures aimed at monitoring radicalisation have not influenced the religious communities themselves or their affiliated institutions (schools, publishing houses, etc.).

Individual religious liberty has not been affected in general either. However, there have been reports on individual cases where Muslims were supposedly singled out by police or security officials for checks. In one case in 2014, the documents of the visitors to a mosque in Nemėžis, a small village near Vilnius with a historical Muslim population, coming to the mosque for the traditional Ramadan dinner, were checked by officers from the State Security Department, which caused discontent among the local Muslims[15]. In another case, State Security Department officials visited a family that had recently received a guest (the boyfriend of their daughter) from Turkey, and they inquired about the purposes of his visit. Allegedly, the family was warned 'regarding the dangers of Muslims'[16].

V. Educational measures to tackle radicalisation and extremism

1. Laws, Policy and Programmes

There are no policy-related educational measures to tackle radicalisation or extremism in Lithuania, as radicalisation among students is not perceived as a current threat in educational contexts.

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veiksmų įgyvendinimo plano patvirtinimo" pakeitimo', <https://www.etar.lt/portal/lt/legalAct/11e73f-902f0111e78397ae072f58c508> (accessed 14 July 2017).

[14] Public reports of the commission are available on the website of the Ministry of Justice of the Republic of Lithuania at: <http://www.tm.lt/tm/Komis_grup_veikl/> (accessed 14 July 2017).

[15] R. Garškaitė, 'Nemėžio totoriai - tada ir šiandien', *Lietuvos žinios,* 23 March 2005, <http://lzinios.lt/lzinios/Gimtasis-krastas/nemezio-totoriai-tada-ir-siandien/198964> (accessed 14 July 2017).

[16] R. Tracevičiūtė, 'Musulmonas į svečius - saugumiečiai už durų', *Lietuvos žinios,* 8 July 2015, <http://lzinios.lt/lzinios/lietuva/musulmonas-i-svecius-saugumieciai-uz-duru/205129> (accessed 14 July 2017).

One possible point of tension would be the content of religious (Muslim) education in public schools, as the Lithuanian system allows traditional religious communities, including Muslims, to teach their own religion in public schools and to freely appoint teachers. On the other hand, pupils can choose either to take religious education classes or ethics classes. However, the Muslim minority is, in most schools, too small to form a class and thus cannot require their own separate religious lessons. So far, a Muslim educational programme has not been prepared by the religious community and therefore has not been presented to the Ministry of Education for approval.

Another possible point of tension would be radicalisation among teachers, particularly religion teachers. A recent event brought this potential problem to light, when, in spring 2017 a Catholic catechesis teacher presented in a state-run class controversial material about the supposed dangers of homosexual behaviour. The lecture was prepared using materials published by the Family Research Institute and American psychologist Paul Cameron[17]. In the lecture, the teacher claimed that there was a supposed correlation between homosexual behaviour and cannibalism and violence and made other remarks that were later found by the Equal Opportunity Ombudsman of the Lithuanian Parliament to be insulting to homosexuals and to incite discrimination against them[18].

This particular problem was dealt with on an *ad hoc* basis. The public reaction led the teacher to recognise that the material she presented was inappropriate. In response, the Ministry of Education, in cooperation with the Catholic Lithuanian Catechesis Centre and the Centre for Education Development, prepared a three-step programme:

1. The Catechesis centres, associations of teachers of ethics and philosophy were provided with instructions on the methodology of teaching on contemporary issues to help the teachers to prepare materials for classes.
2. Catechesis centres and associations of teachers of ethics and philosophy were sent a publication —a part of a dissertation— as material to help teachers improve their skills in teaching about sexuality and preparation for family life.
3. A decision was taken to prepare a methodology regarding the choice of sources for lectures[19].

[17] These materials are available online at: <http://www.familyresearchinst.org/2009/02/violence-and-homosexuality> (accessed 14 July 2017).

[18] 'Nustatyta: apie gėjų kanibalizmą vaikams pasakojusi tikybos mokytoja pažeidė įstatymą', *Delfi.lt,* 19 June 2017 <http://www.delfi.lt/news/daily/education/nustatyta-apie-geju-kanibalizma-vaikams-pasakojusi-tikybos-mokytoja-pazeide-istatyma.d?id=74979086> (accessed 14 July 2017).

[19] Minutes of a meeting of the Commission to Coordinate Activities of Governmental Institutions that Deal with Issues of Religious, Esoteric, and Spiritual Groups of 23 May 2017, archives of the Ministry of Justice of Lithuania.

2. Autonomy of Religious Schools

There are numerous schools run by the Catholic Church in Lithuania, as well as a Jewish school and two Christian schools originally established by new Protestant churches, though they later became more ecumenical in profile. Private religious schools offering state-recognised education have to follow a curriculum approved by the Ministry of Education: either the general curriculum or a confessional education curriculum (such as Jesuit education curriculum or Catholic education curriculum).

Beyond the requirement to follow a state-approved curriculum, the schools have broad autonomy.

3. Rights of Children and Parents

Children above the age of 14 and parents acting on behalf of younger children can choose between religious instruction (catechesis) classes and ethics classes in public schools. If there is no class of a particular traditional faith at a school, the parents can opt to send their children (or the children can choose for themselves if they are 14 or older) to their religious community's Saturday or Sunday school if it teaches according to a curriculum approved by the Ministry of Education. In that case, children can be exempt from religion or ethics classes at school. Private schools can in general be more flexible, although theoretically they still have to offer classes that parents might choose for their children. If a school representing a non-traditional religious community wants to offer catechesis classes of its own, they have to be offered as a supplementary subject, while ethics classes are offered as part of the main curriculum.

VI. Conclusion

Lithuania has not experienced any religiously motivated extremism, so securitisation that is evident in many aspects of social life because of ongoing political tensions has left the religious aspect untouched.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND LIMITS OF STATE CONTROL IN MALTA

Vincent A. De Gaetano [1]

I. Introduction

A leading Maltese historian, Professor Henry Frendo, in his book *The Origins of Maltese Statehood*[2], describes the 'Maltese consciousness' in the 1950s —a time when both major political parties[3] in Malta were actively clamouring, albeit on different terms, for independence from Britain— in the following words:

> 'The Maltese consciousness was emphatically Catholic by religion, largely Semitic by language, European by history in a *continuum* since the twelfth century, survivalist and economically dependent with strokes and touches of the British Empire set against Mediterranean hues, insular and cosmopolitan; but it was above all, Maltese, hence its uniqueness'[4].

In so far as that consciousness may be affected by genes, one could add that it was also genetically Sicilian!

That 'consciousness' has not suffered any appreciable change in the last sixty-odd years, notwithstanding substantial social, economic and political changes, culminating in 2004 in Malta's accession as a full member to the European Union. Malta's

[1] Chief Justice Emeritus, Malta; Judge of the European Court of Human Rights, Strasbourg. The author would like to express his gratitude to the following people for their assistance in preparing this short report: Rev Dr Joe Inguanez, formerly of the Department of Sociology, University of Malta; Professor Kevin Aquilina, Dean of the Faculty of Laws of the same university; Rev Mgr Alfred Vella, Director of the Malta Emigrants' Commission; and Ms Claire Meli, Senior Statistics Executive, National Statistics Office (Malta).

[2] H. Frendo, *The Origins of Maltese Statehood* (Malta, BDL, 2000).

[3] The Malta Labour Party (MLP, today the Labour Party) and the Nationalist Party.

[4] *Op. cit.*, p. 19.

uniqueness lies in the fact that, notwithstanding its small size[5], it has been able to assimilate and integrate migratory, cultural and legal currents into the Maltese identity, leaving virtually no traces of any ethnic minorities[6]. Ethnic origins are reflected in surnames —those that stand out most today are those of Italian/Sicilian origin (e.g. Sacco, Camilleri, Bonello, Cremona), English/Irish (Hamilton, Warrington, Myatt), with less frequent ones indicating other migratory routes, like Eminyan (Armenian), Eynaud (French) and Papagiorcopulo (Greek)[7]. Every year on 8 September (the feast of the Nativity of the B.V.M., which is celebrated in Malta as the Feast of Our Lady of Victories), Malta commemorates with a public holiday the lifting of two sieges: that of 1565, when the Ottoman Turks attempted to wrest the islands from the hands of the Order of St John, and the end of hostilities with Italy in 1943, when the bulk of Italy's *Regia Marina* surrendered at Malta. The only traces of anti-Turkish (not anti-Muslim) sentiments are to be found in monuments, most of them dating from the time of the order's rule over Malta, the most notable being an inscription over one of the gates leading to the fortified suburb of Floriana[8]: *Dum Thraces ubique pugno, in sede sic tuta consto*[9].

II. Constitutional framework

The Constitution of Malta recognises as a social fact that the 'religion of Malta is the Roman Catholic Apostolic Religion'[10]. It also contains a provision, considered by many as being unique, to the effect that 'the authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and

[5] It is, indeed, the smallest member state of the EU both in geographical size (316 square kilometres) and in population (450,000 - 2014 estimate).

[6] The government of Malta has in recent years maintained that there are no national minorities in Malta for the purposes of the 1995 Framework Convention for the Protection of National Minorities of the Council of Europe. The government's stance has put it at loggerheads with the Advisory Committee on this Convention: see the Fourth Opinion on Malta adopted on 14 Oct 2016 and published on 4 May 2017, <https://rm.coe.int/fourth-opinion-on-malta-adopted-on-14-october-2016/16807105e5> (accessed 1 Sep 2017). According to this opinion, in 2015 the number of non-EU nationals residing in Malta had risen to 42,400, constituting 9.9% of the population. The laconically telegraphic comments of the government of Malta on this opinion are found here: <https://rm.coe.int/comments-of-the-government-of-malta-on-the-fourth-opinion-of-the-advis/1680710577> (accessed 1 Sep 2017).

[7] For more details, see Godfrey Wettinger, 'The Origin of Maltese Surnames', <https://vassallo-history.wordpress.com/vassallo/the-origin-of-the-maltese-surnames/> (accessed 4 Sep 2017).

[8] Floriana is a suburb of Valletta, itself a fortified city originally built to withstand an Ottoman onslaught.

[9] 'While I fight the Turks everywhere, I am secure in my seat'.

[10] Constitution of Malta, Article 2(1).

which are wrong'[11]. The teaching of religion according to the tenets of the Catholic Church is also guaranteed in all state schools as part of compulsory education[12]. The provision of the Constitution dealing with the protection of freedom of conscience and worship[13], together with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which have been incorporated into domestic law[14], guarantee in the most ample way religious freedom. More specifically, Article 40(2) of the Constitution provides that no person is required to receive instruction in religion or to show knowledge or proficiency in religion if, being a person under the age of 16, their parents or lawful guardians object thereto or, if the person, having attained said age, objects thereto. A *proviso* to this provision, however, makes it clear that no such requirement to receive instruction in religion or to show knowledge or proficiency in religion 'shall be held to be inconsistent with [freedom of conscience and worship] to the extent that the knowledge of, or the proficiency or instruction in, religion is required for the teaching of such religion, or for admission to the priesthood or to a religious order, or for other religious purposes, and except

[11] Article 2(2). The current Article 2, introduced by Act LVIII of 1974 in the turbulent early 1970s, replaced a previous provision, also dealing with the position of the Catholic Church in Malta. A hint of the convoluted discussions and sometimes cloak-and-dagger negotiations that preceded Act LVIII is provided in the book *Eddie: My Journey* (Malta, Allied Publications, 2014), in which former Prime Minister and later President of Malta Edward Fenech Adami traces his journey from a lawyer to head of state: 'Mintoff [the then-leader of the Malta Labour Party] was keen on constitutional amendments to lower the voting age from 21 to 18, a relatively uncontroversial move, and altering the constitutional provision that entrenched Roman Catholicism as Malta's official religion. He had tried and failed to limit the importance of the Church when the 1964 constitution was being drafted (while the Church at that time actually wanted to make its constitutional position even stronger). However, now older and wiser, after 1971 he went about achieving his aims by bypassing the local Church hierarchy and dealing directly with the Vatican. [Archbishop] Gonzi was ageing by then and had softened considerably after the 1969 statement made jointly with the MLP in which the Church stressed its right to safeguard spiritual interests, but at the same time accepted that a distinction had to be drawn between itself and state. We [in the Nationalist Party] were of course aware that discussions were taking place, but not privy to them. In August 1974 Mintoff and Gonzi returned from Rome together (they had left separately) after discussing proposed changes in relation to the Church's constitutional position. In a joint statement with the government, the Vatican said it had no objections to the amendments' (p. 48).

[12] Article 2(3) of the Constitution.

[13] Article 40 of the Constitution.

[14] See the European Convention Act (Cap. 319). By virtue of this act, Articles 2-18 of the European Convention, as well as the substantive provisions of the First, Fourth, Sixth and Seventh Protocols thereto, have become part of the laws of Malta, enforceable in exactly the same manner as the human rights provisions of the Constitution, that is to say, upon application by an aggrieved party to the First Hall of the Civil Court and, by way of appeal, to the Constitutional Court. Although Malta signed and ratified the Twelfth Protocol on 8 December 2016, and this protocol came into effect as regards Malta as of 1 April 2017, up until the time of preparation of this report the substantive provision of this protocol had not yet been added to the Schedule to Cap. 319, and it is therefore technically not yet part of domestic law.

so far as that requirement is shown not to be reasonably justifiable in a democratic society'. Like Article 9 of the European Convention, Article 40 of the Constitution provides that restrictions may be imposed on the external manifestation of religion or religious belief in the interests of, among other things, public safety and the protection of public order, provided that such restrictions have the backing of a law and are necessary in a democratic society (in the words of the Constitution, are 'shown [to be] reasonably justifiable in a democratic society').

III. The influx of immigrants and asylum seekers

Like many other European countries, Malta has failed to deal with migratory flows in an effective and efficient manner, largely due to the slow response of the authorities and the failure to distinguish effectively and robustly between economic migrants obtaining entry into Malta illegally and asylum seekers, and instead lumping both categories under the general nomenclature of 'irregular immigrants'. Figures for 2016 published by the National Office of Statistics in June 2017[15] show that in 2016 no boat landings were recorded, with only 24 people[16] being airlifted from out at sea and brought to Malta. This contrasts dramatically with previous years[17]. Nevertheless, the total number of applications for asylum lodged in 2016 with the Office of the Refugee Commissioner increased by 4.6% over the previous year, to a total of 1,928. According to unconfirmed sources, this increase was due to the fact that asylum seekers are finding their way into Malta by legal means, such as regular scheduled flights from other European countries where they enjoy freedom of movement. When analysing asylum applications for the same year, that is for 2016, in the context of the European Union, one finds that Malta ranks fourth[18] after Germany, Austria and Greece as to the number of applications per million people. Almost three-fourths of the applicants were citizens of African countries, with over a third (34.5%) being Libyan citizens. A further 17.1% of the applicants were Syrian citizens. A large proportion of the applicants, 42.4%, were males aged between 18 and 34.

During the same year, 2016, the Office of the Refugee Commissioner processed a total of 1,435 applications for asylum or subsidiary protection. Of these, 83.1%

[15] News release, European Statistical System, 20 Jun 2017, <https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C5/Population_and_Migration_Statistics/Documents/2017/News2017_098.pdf> (accessed 1 Sep 2017).

[16] All from African countries: Eritrea, Ghana, Guinea, Ivory Coast, Nigeria, Senegal and Somalia.

[17] 2005: 48 boats, 1,822 people; 2006: 57 boats, 1,780 people; 2007: 68 boats, 1,702 people; 2008: 84 boats, 2,775 people; 2009: 17 boats, 1,475 people; 2010: two boats, 47 people; 2011: nine boats, 1,475 people; 2012: 27 boats, 1,890 people; 2013: 24 boats, 2,008 people; 2014: five boats, 569 people; and 2015: one boat, 106 people.

[18] Closely followed by Belgium, France, the Netherlands and Finland.

were granted a positive decision (refugee status, subsidiary status or equivalent)[19] at first instance, while the remaining applications were rejected. Nearly two-thirds (that is 64.2%) of the applicants who were granted asylum (in the form of refugee status, subsidiary status or equivalent) during 2016 were citizens of African countries, with Libya topping the list, while a further 32.7% were citizens of Asian countries[20]. Of all the applicants granted some form of international protection during 2016, 44.5% were Libyan citizens, while 30.1% were Syrians.

The resident population of open refugee centres[21] registered an increase of 11.4%. In the same year, 461 non-EU nationals were resettled in another country (a decrease of 19.1% over 2015), while another 14 people benefitted from assisted voluntary return programmes.

Neither the official statistics on refugees nor any other statistics —such as the periodic population census— indicate the religious denomination or affiliation of people resident in Malta. These denominations, however, are a reality accompanying migratory flows, and the problems that they have given rise to have at times called for some unorthodox solutions. Thus, for instance, with the rising number of asylum seekers belonging to the Coptic Orthodox (non-Uniate) faith, a place was needed where they could hold religious services on Sundays. Through the intervention of the Malta Emigrants' Commission[22], the Roman Catholic Archdiocese of Malta ceded one of its churches (St James Church, in Merchants Street, Valletta) for use by this community. By 2015, however, this small church could no longer accommodate the entire community, and, moreover there was some friction between the Eritrean and Ethiopian members of the community. The Archdiocese again stepped in, and an old church in the same street that had been deconsecrated since the middle of the 20th century and used as a warehouse, the Church of St Mary Magdalene, was blessed again by Archbishop Charles Scicluna on 25 February 2015, and the Eritrean community moved into it.

Since 1997, there has been one Islamic school in Malta, the Mariam Al-Batool School, which is attached to the only officially recognised Islamic place of worship on

[19] In actual figures, 167 applicants were granted refugee status, 1,025 were granted other forms of protection status, and 243 applications were rejected.

[20] Syria, 358 applicants in total; Iraq, 16; Iran, seven; Occupied Palestinian Territory, four; others, four. There were also 33 applicants from Ukraine and two from other (unspecified in the statistics) European countries.

[21] There are five such open reception centres on the island, and, together with 'other institutional households', a total of 673 migrants were accommodated in 2016. The total figures for the three previous years were as follows: 2013: 1,499; 2014: 764; 2015: 604. The largest of these open centres, at Ħal Far, had 905 residents in 2013 but only 209 in 2016.

[22] The Malta Emigrants' Commission is an NGO of the Catholic Church in Malta tasked primarily with seeing to the spiritual needs of the Maltese diaspora. After the arrival in Malta of the first asylum seekers from Uganda in 1972, it also took on the task of assisting immigrants and asylum seekers in Malta.

the island, bearing the same name[23] and which opened its doors to Muslim worshippers in 1982. Up until late last year, it had about 400 students, mainly Muslims, with classes from kindergarten to the fifth-year secondary level. In early 2017, however, financial difficulties forced the school to shut its secondary school and keep only its kindergarten and primary branches[24].

IV. Securitisation of sorts

Notwithstanding that the influx of immigrants and asylum seekers over the last decade has created some social tension in Malta, tension that has, at times, been exacerbated by unnecessary and undue importance given in certain sections of the press and other media to crimes committed by immigrants or asylum seekers, no need has to date been felt in Malta to enact special measures to combat extremism, fundamentalism or radicalisation associated with religious manifestation or belief.

A comprehensive law on the handling of refugees was only enacted in October 2001[25], refugees having been previously dealt with under the general immigration legislation[26], which was soon found to be inadequate notwithstanding a number of piecemeal amendments over time. The Refugees Act contains several provisions that empower the authorities to take some form of action when national security or public order is in any way threatened[27]. Thus, for instance, mirroring the 1951 Geneva Convention relating to the Status of Refugees, Article 41(1) of the act prohibits *refoulement* 'where the life or freedom of [the] person would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. Paragraph 2, also mirroring the Geneva Convention, but possibly falling short of the higher standards imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly with regard to its Articles

[23] The Mariam Al-Batool Mosque adheres to the Sunni branch of Islam.

[24] According to a report published in the *Times of Malta* on 11 Feb 2017: 'It received subsidies from the government to the tune of €300,000 a year. The government had granted the school interest free loans in 2011 and 2012, amounting to €200,000 each, without requesting any guarantees. But this was still not enough because debt kept up until the situation got out of hand, forcing the school authorities to make the drastic decision. Imam Elsadi, who presides over the board of trustees, confirmed the decision when contacted and said mass redundancy would take place. He did not mention figures. He said the school faced a severe financial crises over the last five years because funds from Libya had ceased and the number of charities the school used to depend on to cover its annual deficit kept falling'. See M. Xuereb, 'Muslim secondary school to shut down after 20 years', *Times of Malta*, 11 Feb 2017, <https://www.timesofmalta.com/articles/view/20170211/local/muslim-secondary-school-to-shut-down-after-20-years.639202> (accessed 1 Sep 2017).

[25] Refugees Act (Cap. 420).

[26] Immigration Act (Cap. 217), which came into force on 21 Sep 1970.

[27] See, for example, Articles 10(2), 11(1), 14(2), 17(1)(d), 23A(c) and paragraph j of the definition of 'manifestly unfounded application' in Article 2 of Cap. 420.

2 and 3, goes on to provide that the prohibition against *refoulement* does not apply in respect of a refugee or a person enjoying subsidiary protection 'where there are reasonable grounds for regarding him as a danger to the security of Malta, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community'.

In 2002, the substantive offence of incitement to racial and other kinds of hatred[28] was added to the Criminal Code[29] for the first time. This offence is committed, *inter alia,* by whoever 'uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting'. This can be accompanied with either the specific intent 'to stir up violence or racial or religious hatred against another person or group of persons or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion', or even with just a generic intent, since the law provides that it is sufficient that the material element is such that 'such violence or racial or religious hatred *is likely, having regard to all the circumstances, to be stirred up*' (emphasis added).

Other provisions of the Criminal Code that could be used to combat extremism, fundamentalism and radicalisation (but not specifically with reference to religion) are Article 82B (condoning, denying or trivialising genocide, crimes against humanity and war crimes) and 82C (condoning, denying or trivialising crimes against peace directed against a person or a group of persons defined by reference, among other things, to religion or belief).

As regards in particular offences committed 'by means of the publication or distribution in Malta of printed matter, from whatever place such matter may originate, or by means of any broadcast'[30], the Press Act provides for a specific offence in Article 6: 'Whosoever, by [the publication or distribution of printed matter or by means of any broadcast] shall threaten or insult or expose to hatred, persecution or contempt, a person or group of persons because of their gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion, disability [as defined in Cap. 413][31], shall be liable on conviction to imprisonment for a term not exceeding three months and to a fine *(multa)*'.

[28] Criminal Code, Article 82A. Also of 2002 vintage are the crimes of genocide: Article 54B; crimes against humanity: Article 54C; and war crimes: Article 54D, Cap. 9.

[29] Criminal Code, Cap. 9 of the Revised Edition of the Laws of Malta.

[30] Article 3 of the Press Act (Cap. 248).

[31] The Equal Opportunities (Persons with Disability) Act.

Under the Seditious Propaganda (Prohibition) Ordinance[32], seditious matter is defined[33] as any printed or written matter, sign or visible representation and 'any gramophone record or recorded tape' that 'is likely or may have a tendency directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise' to, among other things, 'promote feelings of ill will and hostility between different classes or races of [the inhabitants of Malta]'.

Finally, the Broadcasting Authority[34], acting under powers conferred by the Broadcasting Act[35], published in 2007 a set of requirements[36] to be adhered to by broadcasters and that are intended to promote racial equality. Although the term 'racial' is used in the title of this delegated legislation, the requirements go beyond merely promoting racial equality. Radical and extremist views in broadcasting can be stopped by the Broadcasting Authority if it considers them to be, for instance, in breach of the notion of multiculturalism. Of particular interest are points 8.1 and 8.3 of the requirements, dealing with the coverage of acts of violence perpetrated in the context of ethnic disputes or clashes. The first lays down that 'News, views or comments relating to local ethnic or religious disputes or clashes must only be broadcast after proper verification of facts and must be presented with due caution and restraint and in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace'. Point 8.3 further provides: 'News reports of commentaries must not be written in a manner likely to inflame the passion, aggravate the tension or accentuate strained relations between the communities concerned. Hence the use of inflammatory language and terms which put ethnic or religious groups into a negative light should also be avoided'.

V. Concluding remarks

While extremism, fundamentalism or radicalisation associated with religious manifestation or belief is not seen to be a problem in Malta, this is not to say that extremist views are not held on the island in respect of other areas of concern. This is true in particular with regard to racist and homophobic attitudes. The problem is often exacerbated when these views are circulated on social media. The step from racial to religious intolerance can be a very small one indeed. The concept of 'hate speech', inspired to a considerable degree by the Recommendation of the Committee

[32] Cap. 71. This piece of legislation was enacted in September 1932, and therefore in colonial times, but has been retained, with many modifications over the years, on the statute book.

[33] In Article 2.

[34] The Broadcasting Authority is set up under Article 118 of the Constitution.

[35] Cap. 350.

[36] The Requirements as to Standards and Practice on the Promotion of Racial Equality - *Subsidiary Legislation* 350.26.

of Ministers of the Council of Europe adopted on 30 October 1997,[37] has to date been used to deal with excesses linked to, or associated with, religion and belief. As the European Court of Human Rights said in its judgment in the case of *Gündüz v. Turkey*[38], it may at times be necessary in order to protect human dignity to curtail freedom of expression and freedom of religious manifestation and belief: '[T]he Court would emphasise … that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued'[39].

37 Recommendation No R (97) 20.
38 *Gündüz v Turkey,* App no 35071/97 (ECHR, 4 Dec 2003).
39 Ibid, [40].

SECURITISATION OF RELIGIOUS FREEDOM IN POLAND

Piotr Stanisz [1]

I. Social context

Contemporary Poland (contrary to the interwar period and earlier) is almost completely homogeneous ethnically and relatively uniform religiously. According to the 2011 national census, about 95% of the population declare an exclusively Polish national/ethnic identity. Over 99% of the permanent residents of Poland have Polish citizenship [2].

The total number of foreigners with long-term residency in Poland (at least 12 months) is just several hundred thousand, although it is difficult to estimate the number of foreigners residing in Poland illegally. In 2015, about 220,000 foreigners (including unregistered migrants) arrived in Poland with the intention of staying for a longer period of time (this number has been slowly increasing in recent years; by comparison, it was 155,000 in 2010), but only 17,000 arrived from least- or lesser-developed states. In the same year (2015), about 260,000 people left Poland with the intention of staying abroad for a longer period of time (this number was slightly lower in 2015 than in 2013 and 2014)[3]. Among the important phenomena that should be mentioned are also short-term visits by citizens of Ukraine undertaken for employment purposes. These visits last a few months and are regularly repeated. The number of Ukrainians in the Polish labour market has been on the rise since 2014. In 2015,

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[2] *Ludność. Stan i struktura demograficzno-społeczna. Narodowy Spis Powszechny Ludności i Mieszkań 2011* (Warszawa, Główny Urząd Statystyczny, 2013), pp. 81-83, 89-91.

[3] See *Rocznik demograficzny 2017. Demographic Yearbook of Poland 2017* (Warszawa, Główny Urząd Statystyczny, 2016), p. 444.

there were already about 1 million Ukrainians working in this manner in Poland (and another 30,000 were students at Polish universities)[4].

About 33 million of the 38.5 million people living in Poland belong to the Roman Catholic Church. None of the religious minorities in the country have a significant number of members. According to the 2011 national census, the Polish Autocephalous Orthodox Church has 160,000-200,000 believers (according to the church itself, it has around 500,000 members). Protestantism encompasses approximately 30 relatively small religious organisations. The most numerous is the Evangelical Church of the Augsburg Confession, which brings together more than 60,000 faithful. Jehovah's Witnesses are a relatively large religious minority in Poland. Their organisation has about 120,000 faithful (proclaimers). Characteristically, however, the number of organisational units comprising the Religious Organisation of Jehovah's Witnesses has decreased in recent years (from 1,804 in 2005 to 1,299 in 2016). Religious communities belonging to the Far Eastern tradition are very small, with the most numerous groups gathering only some 2,000 faithful each[5].

According to official data, there are approximately 7,000 Muslims in Poland (while unofficial estimates suggest that there are actually tens of thousands). These include not only recent immigrants but also a well-assimilated Tatar community that has lived in Poland for several centuries[6]. Jewish communities are also very small (8,000-12,000 members in total)[7].

According to sociological data, a significant majority of residents feel safe in Poland (in March and April 2017, as many as 89% of respondents found Poland a safe country)[8]. Analysis of terrorist risks and other risks associated with the activities of extremist organisations leads to similar conclusions. In the Ministry of the Interior and Administration's report on state security in Poland in 2015[9], the terrorist threat was assessed as low (although it was also stressed that this could rise in connection with the determination of Muslim terrorists to attack targets in EU states). In addi-

[4] See I. Chmielewska, G. Dobroczek and J. Puzynkiewicz, *Obywatele Ukrainy pracujący w Polsce - raport z badania* (Warszawa, Departament Statystyki NBP, 2016), pp. 4-30.

[5] *Rocznik Statystyczny Rzeczypospolitej Polskiej 2017. Statistical Yearbook of the Republic of Poland 2017* (Warszawa, Główny Urząd Statystyczny, 2017), pp. 194-195; *Ludność. Stan i struktura*, pp. 99-100.

[6] See P. Borecki, 'Położenie prawne wyznawców islamu w Polsce' (2008) 1 *Państwo i Prawo*, pp. 72-73.

[7] Available from the website of the Poznań branch of the Union of Jewish Religious Communities in Poland, <http://poznan.jewish.org.pl/index.php/historia-ZwPol/Po-1989.html> (accessed 30 Jan 2018).

[8] CBOS Public Opinion Research Center, 'Opinions about security and crime threat', <www.cbos.pl/EN/publications/reports/2017/048_17.pdf> (accessed 30 Jan 2018).

[9] CBOS Public Opinion Research Center, 'Raport o stanie bezpieczeństwa w Polsce w 2015 r.', <https://bip.mswia.gov.pl/bip/raport-o-stanie-bezpie/18405,Raport-o-stanie-bezpieczenstwa.html> (accessed 30 Jan 2018).

tion, the activity of extremist organisations was assessed as low. In 2015, extremist offences accounted for 0.1% of the total number of offences. These primarily included promoting a totalitarian state system (Article 256 of the Penal Code) and insulting an individual or a group of people on grounds of their national, ethnic, racial or religious affiliation or lack of religious affiliation (Article 257 of the Penal Code). According to the report, the victims of these kinds of acts included Roma (235 proceedings in 2015), Jews (208 proceedings), Muslims (192 proceedings), blacks (166 proceedings), Catholics (44 proceedings), Ukrainians (37 proceedings) and Syrians (36 proceedings)[10].

Another issue is the fact that greater emphasis has recently been placed on national and patriotic values in public life. This reflects the feelings of a large part of society and corresponds with the historical policy of the current government primarily formed by the Law and Justice party (*Prawo i Sprawiedliwość*)[11]. The official promotion of national and patriotic values has, however, been regarded by some circles as consent to disseminate racist and xenophobic ideas. One of the events that can be considered symptomatic of the present situation is the annual Independence March. As a mass manifestation (gathering several tens of thousands of participants), it has been organised by the private Independence March Association for the last few years, and it has undoubtedly enjoyed the government's moral support since 2015. The majority of participants see their participation in this event as an opportunity to manifest their sense of Polish identity on the anniversary of Poland's independence. During the march in 2017, some banners displayed unacceptable content (e.g. 'Pure blood', 'White Europe of brotherly nations')[12], which had at least tacit approval of the organisers.

II. Public debate

One of the most important subjects of the current debate concerning (indirectly) such phenomena as extremism or radicalisation has recently been the question of

[10] Ibid.

[11] According to the Law and Justice party's platform formulated before the parliamentary elections of 2015, the essential elements of this policy were documenting crimes against the Polish nation, commemorating victims of the communist security services from the years 1944-1989, promoting patriotism and strengthening national identity, as well as popularising the tradition of fighting for independence. See 'Program Prawa i Sprawiedliwości 2014', <http://pis.org.pl/dokumenty> (accessed 30 Jan 2018).

[12] See, for example, R. Roberts, 'Fascists march in Warsaw for Polish Independence Day in one of "world's biggest" far-right gatherings', *Independent*, 11 Nov 2017, <https://www.independent.co.uk/news/world/europe/poland-independence-day-march-warsaw-far-right-fascists-a8050181.html> (accessed 19 Aug 2018); 'Marsz Niepodległości. "Manifestacja patriotyzmu"', *Polskie Radio 24*, 12 Nov 2017, <https://www.polskieradio.pl/130/6388/Artykul/1919558,Marsz-Niepodleglosci-Manifestacja-patriotyzmu> (accessed 19 Aug 2018).

the reception of immigrants within the framework of relocation programmes run by the European Union. This has been part of a broader dispute stimulated mainly by politicians as an element of a political contest.

The government formed by the Law and Justice party is decidedly against accepting immigrants in Poland within the framework of European Union programmes. The argument concerning the safety of Poles plays an important role in justifying this stance. The opposing view is presented by, among others, the former ruling party, Civic Platform (*Platforma Obywatelska*), which undertook an obligation to admit immigrants in 2015. Today, the party is appealing for European solidarity, stressing that it is improper to equate immigrants with terrorists.

In the above-mentioned report on state security in Poland in 2015, illegal migration from North Africa and the Middle East was indicated as one of the factors enhancing the operational abilities of 'Muslim terrorist organisations'. 'The permanent influx of illegal immigrants' from these regions was listed as a potential threat to safety and 'the increasing influx of illegal immigrants to the European Union' was assessed as a factor that 'can lead to an increase in the popularity of extreme attitudes'.

According to a poll conducted in March-April 2017, 74% of Poles are against admitting immigrants from North Africa and the Middle East who arrive in other EU countries. The poll showed that the attitude of respondents on this issue is largely connected with their political views. Those who are most in favour of admitting immigrants to Poland support left-wing parties, but even among these people the level of acceptance only amounts to 37%. Supporters of the governing party, for their part, are decidedly against admitting such immigrants (88% of respondents). Poles seem to have a much better attitude towards admitting immigrants from the regions of Ukraine engaged in an armed conflict with Russia. Some 55% of respondents claim that Poland should admit them[13].

The participation of the Catholic Church in the debate concerning immigrants is rather cautious. Individual bishops have emphasised that everybody in need should be helped. On the other hand, they stress the importance of coming to their aid in their country of origin (church programmes have focused mainly on this form of aid, e.g. in Syria). An important role in the broader debate is played by a document approved by the Polish Bishops' Conference on 14 April 2017 titled *Chrześcijański kształt patriotyzmu* (The Christian Form of Patriotism)[14]. The document highlights the importance of 'noble patriotism' (i.e. an honest love of one's homeland connected with respect for

[13] CBOS, 'Stosunek do przyjmowania uchodźców. Komunikat z badań nr 44/2017', <www.cbos.pl/SPISKOM.POL/2017/K_044_17.PDF> (accessed 30 Jan 2018).

[14] 'Chrześcijański kształt patriotyzmu', *Konferencja Episkopatu Polski*, 27 Apr 2017, <http://episkopat.pl/chrzescijanski-ksztalt-patriotyzmu-dokument-konferencji-episkopatu-polski-przygotowany-przez-rade-ds-spolecznych/> (accessed 30 Jan 2018).

the values of other nations), which should be distinguished from 'insane nationalism' (which is characterised by an aversion to foreigners and is connected with disdain for other nations and cultures). The bishops recalled the words of John Paul II from his address to the United Nations General Assembly in 1995: 'we must ensure that extreme nationalism does not continue to give rise to new forms of aberrations of totalitarianism. This is a commitment which also holds true, obviously, in cases where religion itself is made the basis of nationalism, as unfortunately happens in certain manifestations of the so-called "fundamentalism"'[15]. The bishops also emphasised that what is necessary in Poland is the sort of patriotism that was popular in Poland's past, 'which is open to the loyal collaboration with other nations and based on respect for other cultures and other languages'. It is true that 'the history and identity of our homeland is particularly connected with the Latin tradition of the Catholic Church. However, besides Catholics, Polish Orthodox believers and Protestants also served well and still serve our common homeland, as well as Muslims, followers of Judaism and other religions and those who do not profess any religion'[16]. Keeping in mind the intense political contest that has been going on in Poland in recent years, the bishops' appeal for involvement in 'the work of social reconciliation' and express the wish that Poland should remain 'a symbol of solidarity, openness and hospitality' in contemporary Europe and in the world[17].

There is a dispute over the charge concerning the spread —with the government's consent— of intolerant and xenophobic attitudes. The mood of this dispute is reflected in the debate on the character of the Independence March of 2017. On the one hand, it has been characterised *en bloc* as 'xenophobic and fascist'[18]. On the other hand, this description is considered —not without reason— unjust to the majority of its participants. It has been claimed at the same time that some media overestimated 'the elements whose nature was purely incidental', although 'the views springing from racist, anti-Semitic or xenophobic convictions' undoubtedly deserve to be condemned[19].

[15] Address of His Holiness John Paul II to the 50th General Assembly of the United Nations, *The Holy See* website, 5 Oct 1995, <https://w2.vatican.va/content/john-paul-ii/en/speeches/1995/october/documents/hf_jp-ii_spe_05101995_address-to-uno.html> (accessed 30 Jan 2018).

[16] 'Chrześcijański kształt patriotyzmu'.

[17] Ibid.

[18] See 'European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland', 2017/2931(RSP), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0442+0+DOC+XML+V0//EN> (accessed 30 Jan 2018).

[19] 'MFA statement following comments regarding incidents during Independence March in Poland', *Ministry of Foreign Affairs, Republic of Poland*, 12 Nov 2017, <http://www.msz.gov.pl/en/news/mfa_statement_following_comments_regarding_incidents_during_independence_march_in_poland> (accessed 30 Jan 2018).

III. Legal and political framework

1. Definitions

Polish law provides no definitions of terms such as 'extremism', 'fundamentalism' and 'radicalisation'. We can in fact find these terms only in a few acts and only in the context of combating terrorism, such as in the Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency[20]. According to this act, one of the tasks of the Intelligence Agency is to identify international terrorism and extremism (Article 6.1.5), and organs of government administration are obliged to transmit all information about these phenomena to the head of the agency (Article 41.3). The terms 'international extremism', 'extremist groups', 'extreme fundamentalism' and 'terrorism' appear, without being defined, in the catalogue of incidents of a terrorist nature, which was published in a regulation of the minister of the interior and administration of 22 July 2016[21] in connection with the obligation of the head of the Internal Security Agency to coordinate analytical activities regarding events of a terrorist nature and individuals conducting such activities (see Article 5.1 of the Act of 10 June 2016 on Anti-terrorist Actions)[22]. The catalogue also uses terms such as 'Internet portal, blog or forum of an extremist nature' and 'fundamentalist slogans' (propagated by 'representatives of religious groups'), but they are, as previously indicated, not defined in any way.

The above-mentioned report on state security in Poland in 2015 says that groups that are extremist in nature 'propagate an ideology that is contrary to the law and standards of a democratic state, questioning the constitutional order and democratic procedures', whereas 'extremism can emerge as the use of violence, unlawful threats or public insults on grounds of national, ethnic, racial, political or religious affiliation. It may also take the form of public promotion of fascist or other totalitarian systems of state'.

In some theoretical analyses[23], it is assumed that the notion of extremism concerns a combination of extreme views with the extremity of utilised means and constitutes the antithesis of what is moderate and what occupies middle ground. It has been pointed out that extremist groups are characterised by self-seclusion and the inability to engage in constructive dialogue. Among groupings associated with extremism —besides terrorist groups and youth gangs— some 'religious sects' and

[20] *Dziennik Ustaw* 2017, item 1920, with subsequent amendments.

[21] *Dziennik Ustaw* 2016, item 1092.

[22] *Dziennik Ustaw* 2016, item 904, with subsequent amendments.

[23] See, for example, R. Tokarczyk, 'Rozważania nad pojęciem ekstremizmu' (2003/2004) L/LI *Annales Universitatis Mariae Curie-Skłodowska* (*sectio G*), pp. 253-280.

'cult groups' are mentioned. It has also been stressed that the differentiation between extremists, radicals and fundamentalists is rather debatable[24].

2. Legislation Adopted to Tackle Radicalisation and Extremism Directly

According to Article 13 of the Constitution of the Republic of Poland of 1997[25],

> 'Political parties and other organisations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence state policy, or provide for the secrecy of their own structure or membership, shall be prohibited'.

Some of the most important criminal actions connected with the phenomenon of extremism are punishable in accordance with the Penal Code of 6 June 1997[26]. They can be found, above all, among offences against peace, humanity and war crimes (Chapter XVI) and offences against public order (Chapter XXXII). The former group includes genocide (Article 118), assaults on the population (Article 118a) and violence or making unlawful threats (Article 119). Criminal actions consist, respectively, of: 1) cruel actions (homicide, serious bodily harm, creation of especially difficult living conditions, application of means aimed at preventing births, etc.) performed with the intention of destroying (fully or partially) any ethnic, racial, political or religious group or a group with a determined outlook on life; 2) cruel actions (not only homicide or causing serious detriment to health, but also, for example, torture, rape or deprivation of liberty with special torment performed in connection with participation in an attempt against a group of people with the aim of supporting the policy of a state or an organization; 3) violence or unlawful threats towards a person or a group of people on the grounds of their national, ethnic, political or religious affiliation or lack of religious beliefs.

Offences against public order include promotion of fascist or other totalitarian state systems or incitement to hatred based on national, ethnic, racial or religious differences or on grounds of a lack of religious affiliation (Article 256), violation of personal inviolability or insulting an individual person or a group of people because of their national, ethnic, racial or religious affiliation or their lack of religious affiliation (Article 257), and participation in an organised group or union whose purpose is to commit crimes (Article 258).

[24] Ibid.

[25] *Dziennik Ustaw* 1997, No 78, item 483, with subsequent amendments.

[26] *Dziennik Ustaw* 2017, item 2204, with subsequent amendments.

In the context of extremist activity, one could also mention some offences against the Republic of Poland (Chapter XVII), including publicly insulting the country or the Polish nation (Article 133) and publicly insulting (as well as destroying, damaging or removing) an emblem, flag or other symbol of the Republic of Poland or of any other state (if issued publicly by the representatives of that state or on orders of the Polish authorities, Article 137).

It should also be pointed out that the Penal Code provides for the category of an offence of a terrorist nature (Article 115 § 20). Every offence can have a terrorist nature if the punishment provided for amounts to at least five years of deprivation of liberty and if it is committed: 1) to seriously intimidate many people; 2) to force a Polish public authority or the authority of any other state or an international organisation to perform a certain action or refrain from doing so; or 3) to cause serious disturbances in the Polish system or economy or in the system or economy of any other state or an international organisation. A threat to commit such an act is also a terrorist offence. An offence with a terrorist nature results in an extraordinary aggravation of the penalty (Article 65)[27].

On 13 December 2016, the Polish parliament enacted an amendment to the Law on Gatherings[28]. When justifying the amendment, its drafters emphasised the necessity of ensuring that everyone is able to demonstrate in a peaceful way. The aim was to eliminate the possibility of organising two or more gatherings at the same time and in the same place if they could not be carried out without a threat to human life or health or to property to a considerable extent. In principle, the order in which the authorities are notified of the intention to organise a gathering determines the priority for choosing the place and time of the gathering. However, 'gatherings organised cyclically' are always given precedence[29].

The provisions on granting refugee status or other forms of protection to foreigners are shaped with an awareness of the activities of extremist organisations in various parts of the world. According to the Act of 13 June 2003 on Granting Protection to

[27] See K. Wiak, *Terrorism and Criminal Law* (Lublin, Wydawnictwo KUL, 2012), pp. 133-153.

[28] See *Dziennik Ustaw* 2015, item 1485, with subsequent amendments.

[29] The amendment raises serious doubts as to its conformity with the Constitution and international standards. The president of the Republic of Poland also had such doubts; therefore, before signing it, he sent it to the Constitutional Tribunal. According to the tribunal's opinion, however, the amendment does not breach constitutional norms (see the judgment of 16 March 2017, Kp 1/17, *Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy* 2017-A, item 28). To evaluate the issue properly, one should be aware that the governing party, Law and Justice, is engaged in organising some 'cyclical gatherings'. The main example are the demonstrations organised in Warsaw on the 10th day of every month to commemorate the Smoleńsk plane crash of 10 April 2010 that resulted in the death of numerous high-ranking officials, including then-President Lech Kaczyński. Their opponents would organise a counterdemonstration on the same day and in the same place. The situation caused a threat to public safety.

Foreigners on Polish Territory[30], individuals threatened with persecution or other kinds of danger in their country of origin can obtain refugee status in Poland or make use of several other forms of protection (e.g. asylum). However, this protection does not concern individuals engaged in committing crimes. According to the Act of 12 December 2013 on Foreigners[31], a visa or consent to stay in Polish territory will not be granted for reasons connected with the country's defence or protection of public order or safety.

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

Offences against the freedom of conscience and religion (regulated in Chapter XXIV of the Penal Code) can have indirect relevance to tackling radicalisation and extremism. The list of these offences includes religious discrimination (Article 194), malicious disturbance of the performance of a religious act (Article 195 § 1), malicious disturbance of a funeral ceremony or funeral rites (Article 195 § 2) and offending religious feelings (Article 196). The last listed offence has the greatest practical significance. In accordance with Article 196 of the Penal Code, 'whoever offends the religious feelings of other people by insulting in public an object of religious worship or a place dedicated to the public celebration of religious rites' is liable to punishment[32]. It should be noted that the Constitutional Tribunal, in its judgment of 6 October 2015 (SK 54/13), stated that Article 196 of the Penal Code did not constitute a disproportionate limitation on the freedom of expression[33].

Civil-law protection of personal interests also seems to be important. If the personal interests of any individual (including freedom of conscience or religious feelings) are under threat due to some action, then this action, if it is unlawful, may be required to be ceased. If someone's personal interests (including freedom of conscience or religious feelings) have already been offended, the suffering party may demand a remedy, such as an apology by the offending party. It is also possible to claim monetary compensation or payment of a specific amount of money for a designated social purpose (see Articles 23-24 of the Civil Code of 23 April 1964)[34]. A journalist's

[30] *Dziennik Ustaw* 2018, item 51, with subsequent amendments.

[31] *Dziennik Ustaw* 2017, item 2206, with subsequent amendments.

[32] See P. Stanisz, *Law and Religion in Poland* (Alphen aan den Rijn, Kluwer Law International, 2017), pp. 114-116.

[33] In *Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy* 2015-A, No 9, item 142. See M. Skwarzyński, 'Blasphemy in Poland and the Standards of Protection of Human Rights: The Perspective of a Central-European Country' in E. Krzysztofik and E. Tuora-Schwierskott (eds), *EU Migration Policy and the Internal Security of the Member States* (Berlin, De-iure-pl, 2016), pp. 211-233.

[34] *Dziennik Ustaw* 2017, item 459, with subsequent amendments.

duties include the obligation to protect personal interests in press publications (see Article 12 of the Press law of 26 of January 1984)[35].

4. Policies Tackling Radicalisation and Extremism

In 2014, the Council of Ministers approved the National Anti-terrorism Programme for the Years 2015-2019[36]. Its aim is to help identify and assess potential dangers so as to prevent them or remove their consequences. One of the programme's principles is ensuring guarantees of the full protection of human rights and other democratic values in accordance with the Constitution and international standards.

It is assumed that radicalisation is often caused by feelings of marginalisation; therefore, different programmes for the integration of national minorities are carried out. One of them is the Programme for the Integration of the Roma Community in Poland for the Period 2014-2020[37], which constitutes a continuation of initiatives carried out previously.

IV. Relevance of the measures for religious freedom

1. Institutional Religious Freedom

Provisions intended to tackle radicalisation and extremism have no serious impact on the religious freedom of religious communities or their affiliated institutions in Poland. One might note only that regulations on the limits of freedom of speech (especially concerning hate speech) can be used to limit the right of religious organisations to manifest religion in teaching. A few years ago, a judgment by the Court of Appeal in Katowice of 5 May 2010 (I ACa 790/09)[38] was assessed in this way in ecclesiastical circles. The judgment was made in a case initiated by Alicja Tysiąc (the applicant in a case decided by the European Court of Human Rights in 2007)[39] against the publisher and the editor-in-chief of the Catholic weekly magazine *Gość Niedzielny* (Sunday Guest). According to the court, the plaintiff's personal interests were violated by a series of articles written to comment on her publicised difficulties in terminating a pregnancy and the related judgment of the Strasbourg Court. The publisher (the Archdiocese of Katowice) and the editor-in-chief were initially required

[35] *Dziennik Ustaw* 1984, No 5, item 24, with subsequent amendments.

[36] See *Monitor Polski* 2014, item 1218.

[37] 'Programme for the integration of the Roma community in Poland for the period 2014-2020', *Ministry of the Interior and Administration, <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol/8675,Programme-for-the-integration-of-the-Roma-community-in-Poland-for-the-period-201.html>* (accessed 30 Jan 2018).

[38] For the full text of the judgment, see: <https://www.saos.org.pl/judgments/2987> (accessed 30 Jan 2018).

[39] *Tysiąc v Poland*, App no. 5410/03 (ECHR, 20 Mar 2007).

by the Court of Appeal to 'express their regret that by the unlawful violation of the personal interests of Ms. Alicja T. and the use of the language of hatred they caused her pain and did her harm'[40]. The Presidium of the Polish Bishops' Conference, in a statement of 24 September 2009, expressed 'solidarity with the magazine *Gość Niedzielny* and its chief editor'. Talking about the judgment of the court of first instance (the judgment of the District Court in Katowice of 23 September 2009), which was in essence analogous to the subsequent judgment of the Court of Appeal, they called it 'an attempt to limit the freedom of speech and the right of the Church to the moral evaluation of human behaviour'[41].

Some years later, lawsuits brought against Archbishop Józef Michalik were assessed in a similar way. The reason for the lawsuits was a passage from a homily given by the archbishop in the autumn of 2013. Referring to the phenomenon of paedophilia, Michalik called for a search for its root causes and in this context pointed out the harmful effects of divorces, pornography and gender ideology promoted by 'aggressive feminists'. The initiator of the lawsuits was an activist in a Polish feminist group and a single mother who claimed that her personal interests were breached. However, the District Court in Przemyśl in its judgment of 9 April 2015 (I C 767/14) rightly did not share that opinion, as the statements of the archbishop did not refer to any individual person and had a general character[42].

It should also be noted that civil-law provisions concerning personal interests have been used effectively for the protection of the religious feelings of believers in the past[43].

The amendment to the Law on Gatherings mentioned above should not have any negative impact on the freedom of religious communities, since gatherings organised

[40] According to the Court of Appeal, the plaintiff's personal interests were violated 'by drawing a comparison which is the most insulting for any person who knows the history of the 20th century', as the case of Alicja Tysiąc was analysed in the context of the Nazi crimes in the Auschwitz-Birkenau camp and the martyrdom of Jews in ghettos. The court stated that the articles in question overstepped the boundaries indicated in the regulations of the Press Law, as they constituted 'an expression of extremely negative emotions towards the plaintiff, contempt, reluctance and virulence'. The defendants (the publisher and the editor-in-chief) appealed the decision to the Supreme Court. The case finished with an agreement according to which the defendants withdrew their appeal, and the plaintiff gave up her demand for the publication of an apology.

[41] 'Oświadczenie Prezydium Konferencji Episkopatu Polski', *gość.pl*, 2 Oct 2009, <https://www.gosc.pl/doc/770461.Oswiadczenie-Prezydium-Konferencji-Episkopatu-Polski> (accessed 19 Aug 2018).

[42] For the full text of the judgment, see: <http://orzeczenia.ms.gov.pl/content/$N/154020000000503_I_C_000767_2014_Uz_2015-04-28_001> (accessed 30 Jan 2018).

[43] For example, in the judgment of 6 Apr 2004 (I CK 484/03), the Supreme Court assumed that the personal interests of one Polish priest (Rev Zdzisław Peszkowski) were violated by an article titled 'Johannes Paulus dixit' that insulted Pope John Paul II. See *Orzecznictwo Sądu Najwyższego. Izba Cywilna* 2005, No 4, item 69.

in the framework of the activity of religious organisations are not subject to the Law on Gatherings of 24 July 2015 (see Article 2.2).

2. Individual Religious Freedom

In the course of the proceedings pertaining to granting refugee status or any other kind of protection on the territory of the Republic of Poland, and in the registers that are maintained in connection with such proceedings, data concerning religious convictions or religious affiliation may be processed. This is undoubtedly a kind of interference in the sphere of religious freedom, especially since, according to the Polish Constitution of 1997, 'no one may be compelled by organs of public authority to disclose [their] philosophy of life, religious convictions or belief'. In the context of the conditions of granting refugee status (which includes threat of being persecuted on grounds of religion), it should generally be considered justified.

Information concerning religious convictions or religious affiliation is not processed in typical situations when foreigners apply for entry into Poland (e.g. in visa proceedings). These issues are regulated by the Act of 12 December 2013 on Foreigners, according to which photographs attached to visa applications or applications for a permit to stay in Poland can, on an exceptional basis, show the applicant in headwear according to the principles of their faith, provided that the person's face is fully visible. In such cases, it is required, however, that the foreigner attach a declaration concerning their religious affiliation. The same applies to ID cards (see Article 29.3 of the Act of 6 August 2010 on ID Cards)[44] and to passports (see § 3.3 of the Regulation of the Minister of the Interior and Administration of 16 August 2010 concerning Passport Documents)[45].

In terms of security checks performed especially at airports, one should mention the case of Shaminder Puri, a practising Sikh who was forced to remove his turban during a check at Warsaw Chopin Airport. The case ended up in court, as Puri felt that his personal interests were infringed. The courts of various instances (including the Supreme Court; see its judgment of 18 September 2014) stated, however, that the actions taken by airport personnel were justified. Their actions infringed the personal interests of the plaintiff (the freedom of conscience), but they were not unlawful and therefore there was no legal responsibility for these actions[46].

[44] *Dziennik Ustaw* 2017, item 1464.

[45] *Dziennik Ustaw* 2010, No 152, item 1026.

[46] See A. Kosińska, 'Wolność myśli, sumienia i religii migrantów w prawie Unii Europejskiej i prawie krajowym - wybrane problemy' in P. Stanisz, A. Abramowicz, M. Czelny, M. Ordon and M. Zawiślak (eds), *Aktualne problemy wolności myśli, sumienia i religii* (Lublin, Wydawnictwo KUL, 2015), pp. 140-141.

V. Educational measures to tackle radicalisation and extremism

1. Law Enforcement Officer Programme on Combatting Hate Crime

As is indicated in the above-mentioned report on state of security in Poland in 2015, one important initiative undertaken with a view to counteracting extremist threats is the Law Enforcement Officer Programme on Combating Hate Crime[47]. Part of the programme includes courses aimed at improving the qualifications of police officers as far as the issues discussed are concerned, and these courses are conducted with the participation of non-governmental organisations that are active in the area of combating racism and neofascism and representatives of various minority groups, including immigrant communities. By the end of 2015, almost 90,000 police officers had received training within the programme[48].

2. Autonomy of Religious Schools

A great majority of religious schools in Poland are managed by organisational units of the Catholic Church. These schools do not conduct any special educational programmes aimed at tackling extremism, radicalisation or fundamentalism. They have the right to promote their religious identity and religious educational profile. If they have the rights of public schools (and this is always the case in practice), they are, however, obliged to teach generally applicable curricula.

Religious instruction at schools always has a confessional nature and is conducted on the basis of curricula and coursebooks prepared by individual religious organisations and approved by the competent religious authorities. The minister of national education is only notified about these curricula and coursebooks. To this point, no public authorities have objected to the content of any of these coursebooks or curricula.

Ecclesiastical universities and other institutions offering post-secondary education enjoy a relatively significant amount of autonomy (although it tends to vary depending on the status). They are managed not only by the Catholic Church but also by several other Christian churches. Thus, a number of them serve to educate clergy, without any oversight by public authorities (which is at present not an especially controversial issue and does not involve any practical problems). As for the right of ecclesiastical universities and institutions to grant professional and academic degrees and titles, it depends on whether the conditions specified by Polish law are fulfilled[49].

[47] 'Law Enforcement Officer Programme on Combating Hate Crime', *Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights*, <http://www.osce.org/pl/odihr/20701> (accessed 30 Jan 2018).

[48] 'Raport o stanie bezpieczeństwa w Polsce w 2015 r.'.

[49] See Stanisz, *Religion and Law*, pp. 314-316.

3. Rights of Children and Parents

No major educational programmes are implemented in Poland in order to strengthen the rights of children or parents in the context of tackling extremism, radicalisation or fundamentalism, as no bigger problems have been identified in this respect. It should be noted, however, that in the Act of 17 May 1989 on Guarantees of the Freedom of Conscience and Religion[50], parental authority is listed among the fundamental values that determine the limits of the free operation of religious organisations (the minister of the interior and administration is obliged to refuse to enter a religious organisation in the register of churches and other religious organisations if the content of the application is inconsistent with the provisions of the law on the protection of, for example, parental authority). On the other hand, parents have the right to make decisions about the upbringing and moral or religious education of their children, taking into consideration the child's maturity and their freedom of conscience, as well as their beliefs. In cases when parental authority is overused, however, parents can be deprived of it (Article 111 of the Family and Guardianship Code of 25 February 1964)[51].

VI. Conclusion

Extremism and fundamentalism do not constitute a serious social problem in contemporary Poland. Accordingly, the measures to tackle these phenomena are not too radical and do not pose a major threat to religious freedom. In addition, xenophobic and racist acts are of an incidental character. Moreover, they are inspired by nationalist convictions (sometimes artificially associated with Catholicism as the religion of the majority of Poles). Although opposing such acts in public life is an urgent challenge for public authorities (as well as for society in general), this should not result in limitations on the freedom to manifest one's religion.

[50] *Dziennik Ustaw* 2017, item 1153.
[51] *Dziennik Ustaw* 2017, item 682.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL - THE CASE OF PORTUGAL

Jónatas E.M. Machado [1]

I. Introduction

Religious freedom has developed amid security concerns. The concept of human dignity and freedom of conscience was already developing when the *Res publica Christiana* sought to protect itself against the rise and advance of Islam, in particular from the eighth century onwards. The need to repel this external enemy has often been invoked to justify the sometimes violent repression of internal dissent and to quash discussion and debate. After the Protestant Reformation, divisions and rivalries between European nations and between them and the pope and the emperor intensified. In this context, the defence of different religious perspectives was often associated with the intervention of foreign powers and their destabilising purposes. In the violent tensions between the Bourbons and the Habsburgs in their dispute over power over the Holy Roman Empire, dissensions involving Catholics, Protestants, Huguenots, Jansenists and others were often politicised. The realpolitik of Cardinal Richelieu is a case in point. It is no wonder that even John Locke, one of the most eloquent advocates of religious tolerance and separation of religious confessions from the state, limited the scope of the former in a way that left out Catholics, who were generally associated with French power or the authority of Rome.

Religious freedom has developed to become not just a human rights issue, to be dealt with through constitutional norms and international conventions enforced by national and international human rights courts, but a very complex geopolitical question, involving international relations, diplomacy and in some cases secret-police surveillance and the use of military force. In order to ground a consistent position on this complex issue, states and peoples have had to delve deep not just into their own history, culture and tradition, but also into the larger framework of world history.

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The relevant time frame is not just the two centuries since the rise of modern liberal constitutionalism. The current geopolitical and geo-religious challenges have forced countries to look back at the trends that have been developing in the last 1,600 years or so, if not more. The *presence of history*, with its full force, seems to be a characterising feature of our times.

II. Social context

Since Portugal's inception in 1143, its history has been inseparable from religion. Portugal was born from the Iberian Christian reconquest that started with the battle of Covadonga in 718. The first Portuguese kings fought alongside the Crusaders against the Muslim occupiers. In the siege of Lisbon, in 1147, the first Portuguese king, Afonso Henriques, fought side by side with English, Scottish, Flemish, Norman and German Crusaders who were on their way to the Holy Lands during the Second Crusade[2]. Ever since then, Portugal has understood its place in the world as part of the *Res publica Christiana*. Its engagement in discoveries and in the quest for a maritime route to India was part of a larger effort, directed by the pope, to expand Christendom throughout the world and to weaken Muslim economic power that came from its control of trade routes in the Middle East. The symbol of the Christian crucifix, ever-present on knights' white robes and caravels' white sails, was deeply enshrined in the dominant culture.

The consolidation of state and colonial power in the 16th and 17th centuries was eventually constrained by external pressures, such as the Reformation, liberal revolutions, the Enlightenment and Napoleonic wars, which would shake the absolutist views of the divine right of the king and the theological political status quo, opening the door to the slow and gradual progress of freedom of conscience, religious freedom, individual rights of due process, rule of law, democracy, separation of powers and decolonisation in subsequent centuries. In Portugal, this process started with the liberal revolution of 1821 and culminated after the Carnation Revolution of 1974, with the development of freedom of conscience, freedom of religion and the separation of church and state in Article 42 of the Portuguese Constitution of 1976, as well as the enactment of the Religious Freedom Act (RFA) of 2001[3].

This framework of religious freedom was instrumental in shaping the current religious situation. Portugal signed a new international agreement with the Holy See, the Concordat 2004. Some years later, it signed an international agreement with the Ismaili Muslim community. The last three decades have seen interesting develop-

[2] 'Medieval Sourcebook: Osbernus: De expugnatione Lyxbonensi, 1147 *[The Capture of Lisbon]*', Fordham University website, <https://sourcebooks.fordham.edu/source/cap-lisbon.asp> (accessed 31 May 2017).

[3] Law No 16/2001 of 22 Jun 2001.

ments in religious expression. There is an increasing interest in non-Catholic lines of Christianity and in some Eastern religions. Still, according to the last census of 2011, 81% of Portugal's population above the age of 15 still describe themselves as Catholic. The percentage of non-Catholic Christians was just 3%. Muslims accounted for 0.2% of the population, while there were barely 3,000 Jews in the country, as culturally influential as they are[4]. These two traditional communities are very well integrated in the framework of equal religious liberty, albeit within a dominant Judeo-Christian culture.

The developments that took shape after 11 September 2001, however, which initiated a chain reaction that eventually led to the resurgence of radical Islamic terrorism, the genocide of the Yazidis, Christians and Shia Muslims in the Middle East and renewed threats to the Iberian Peninsula made by ISIS, have sparked a renewed interest in Portuguese history, including its religious connections with the rest of Europe. Along with their European counterparts, the Portuguese authorities are well aware of the current threats and are paying close attention to developments in the Middle East (e.g. Syria, Yemen) and North Africa (e.g. Libya). The challenge is to take the existing security situation seriously without jeopardising the framework of religious freedom that has allowed the religious majority and religious minorities to coexist freely in an atmosphere of equal citizenship and mutual respect. One thing is clear: the debates about religious freedom have taken on a distinct geopolitical flavour.

III. Public debate

In the last few years, Portugal has observed the intensification of security concerns in the domain of religion. Like many other countries, and following policy guidelines from the European Union, Portugal has stepped up its secret-service and police activity concerning terrorist threats, including the alleged proliferation of secret mosques[5]. Internally, however, the climate between Christians, Jews, Muslims, members of other religious communities and secularists has been remarkably cordial, probably due to the climate of equal dignity and liberty that was generated by the RFA of 2001.

Of course, the complex international security environment, where radical Islamic terrorist attacks are global media events, along with the pervasive conflict between

[4] População residente com 15 e mais anos de idade (N.º) por Local de residência (à data dos Censos 2011) e Religião; Decenal, Religião, 2011 (last updated in 2012), Statistics Portugal website, <https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&indOcorrCod=0006396&contexto=bd&selTab=tab2> (accessed 31 May 2017).

[5] 'Mesquitas secretas crescem em Portugal: CM foi conhecer a face oculta do Islão e conta o que viu', *Correio da Manhã*, 28 Apr 2012, <http://www.cmjornal.pt/exclusivos/detalhe/mesquitas-secretas-crescem-em-portugal> (accessed 31 May 2017).

Sunnis and Shiites, led by Saudi Arabia and Iran, respectively, has been generating a sense of unease in some segments of Portugal's population.

One recent example concerns the possible construction of a new mosque in Lisbon in an area known as Martim Moniz Square (named after a Christian soldier who died as a hero during the siege of Lisbon in 1147). This new mosque would be financed by the left-leaning Lisbon City Council. The project has generated a fierce debate. On the one hand, the City Council argues that there is already a mosque in the neighbourhood of Mouraria[6], located in an apartment building zoned for residential purposes. According to the City Council, a new space is needed in a building devoted exclusively to religious worship.

The City Council says that it is only trying to reasonably accommodate the rights of the residents of the apartment building, where the current mosque is seen as a nuisance, with the religious rights of the Muslims who attend the existing mosque. The City Council, with the support of the police, wants to send a message of positive religious freedom, equality and inclusion. Public financing of the new mosque is also seen by some as a way of avoiding financing by Islamic countries, some of which are thought to have dubious ties to radical Islamist groups[7].

On the other hand, significant sectors of the population are opposed to the City Council's proposal, arguing that, in a secular state, public funds should not be used to pay for a house of worship, and certainly not for a mosque. They also claim that a new mosque would require the demolition of some buildings and the eviction of some homeowners and shopkeepers. A public petition against the new mosque was recently begun according to which the principle of separation of church and state and claims made by the Islamic State against the Iberian Peninsula are invoked as arguments against the construction of a mosque. Most of the arguments directed against the building of the new mosque would also be made in the case of any other religious community. This is not an isolated case, but current geopolitical and geo-religious tensions are increasing the tension in the debate.

Another important issue, albeit less salient, concerns the official surveillance of mosques and madrasas. Several years ago, some newspapers reported a supposed increase in secret mosques and madrasas in Portugal, which could become fertile soil for radicalisation. If that is really the case, it is not at all clear if they have been successful because of the scarcity of news generated about them. That being said, it is difficult to make a factual, rigorous and reasoned assessment of the issue. The

[6] The name Mouraria comes from the word 'Moors' and bears witness to the historical presence of a Muslim community in Lisbon.

[7] N. Ribiero, 'Polícias creem que dinheiro público para as mesquitas ajuda à integração', *Publico*, 5 Jun 2016, <https://www.publico.pt/2016/06/05/sociedade/noticia/forcas-de-seguranca-acreditam-que-dinheiro-publico-para-as-mesquitas-ajuda-a-integracao-1734016> (accessed 29 Jun 2017).

problem of secret mosques and madrasas, if such a problem really exists, is best dealt with by the secret services, preferably in cooperation with the secret services of other European Union member states. The pope's recent visit to the Catholic shrine of Fatima, in May 2017, highlighted the heightened security concerns that surround the exercise of freedom of religion.

The challenge facing Portuguese constitutional and human rights law is to maximise religious freedom for all communities, while at the same time confronting the real dangers of radical Islamic terrorism.

IV. Legal and political framework

Portugal's legal framework for religious freedom is covered by Article 41 of the Portuguese Constitution, which reads:

> '1. The freedom of conscience, of religion and of form of worship is inviolable.
> 2. No one may be persecuted, deprived of rights or exempted from civic obligations or duties because of [their] convictions or religious observance.
> 3. No authority may question anyone in relation to [their] convictions or religious observance, save in order to gather statistical data that cannot be individually identified, nor may anyone be prejudiced in any way for refusing to answer.
> 4. Churches and other religious communities are separate from the state and are free to organise themselves and to exercise their functions and form of worship.
> 5. The freedom to teach any religion within the ambit of the religious belief in question and to use the religion's own media for the pursuit of its activities is guaranteed.
> 6. The right to be a conscientious objector, as laid down by law, is guaranteed'.

This constitutional provision has to be interpreted and applied in accordance with Article 18 of the Universal Declaration of Human Rights as well as Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in Strasbourg. The right of freedom of religion has an individual and a collective dimension, and it is inseparable from other fundamental rights, such as the freedoms of thought, speech, assembly and association. These rights are aimed at creating an environment where individuals and groups are free to develop, promote, discuss and change their own religious convictions and doctrines. This is done, to a significant extent, in the sphere of public discourse, where all ideas can be vigorously debated and critically assessed. Religious communities are free to engage in this debate, questioning other religious doctrines and having their own doctrines questioned by others within a framework of freedom, equality, reciprocity and mutual respect.

V. Combating extremism through criminal law

Portugal is considered one of the safest countries in the world, but its Criminal Code is hardly one of the toughest. Portugal has learned that peace and security rely

on different political, cultural and social variables other than criminal law. However, Portuguese law makes it clear that it intends to protect ordinary religious activity from extremist acts, isolated acts of aggression and organised populism. Excesses that may occur are covered in the Penal Code. Article 132(2)(f)(l) of the Penal Code stipulates that the crime of homicide is an aggravated offence when it is motivated by religious hatred or when the victim is a member of the clergy. These provisions can be relevant in cases of inter- and intra-religious conflict. The theft or destruction of objects linked to religious worship is a crime according to Articles 204 and 213 of the Criminal Code. Religious hatred of a violent sort is thus repressed and prevented. Mocking or making fun of religious ceremonies is considered a crime by Article 252 of the Penal Code.

The right of religious privacy is protected from private intrusion by Article 193 of the Criminal Code, according to which the private collection and storage of data concerning religious convictions is a crime. Although the public collection of religious data on personal religious convictions is forbidden by Article 41(3) of the Constitution, national and public security concerns can justify a restriction of this right, as is the case when identifying and monitoring actual and potential radicals. The Portuguese Constitution allows for restrictions immanent to the Constitution, i.e. based on constitutional grounds even when not expressly provided for.

Religious equality is protected by Article 240 of the Penal Code, which criminalises the organised or isolated advocacy of religious discrimination and defamation. It is important to ensure that legitimate criticism of religious and non-religious tenets and conduct, of both majority and minority communities, are not overinterpreted as hate speech. This vague, highly manipulable and restrictive concept (hate speech) should be interpreted restrictively in order to ensure the robust cross-examination of all ideas and conduct. This must take into account the fact that, in ideologically and culturally divided societies, even the concepts of freedom, rights, equality, discrimination and defamation are subject to intense controversy. This cross-examination is an essential feature of the sphere of public discourse in a free, plural, open and democratic society. In the long run, this has proven to be the best defence against political, ideological or religious tyranny.

VI. Effects of the measures on religious freedom

The RFA of 2001, in Articles 1 to 7, develops the constitutional and human rights framework that guarantees equal religious freedom. It develops the principles of freedom of conscience, religion and worship, equality, separation of religious institutions and the state, cooperation and tolerance. These principles have created an inclusive atmosphere. Religious communities are well aware that they may strongly disagree on religious, theological, political, ideological and ethical issues, while at the same time seeing themselves and their individual members as recipients and promoters of the benefits of equal dignity and citizenship.

Due to the pervasive cultural and religious influence of the Catholic Church, a new Concordat was signed in 2004, responding to some specific regulatory questions (e.g. education, social assistance, historical and cultural heritage) and containing specific rules concerning cooperation between the Catholic Church and the state. These rules are subject to constitutional and human rights principles of equal dignity and freedom, which allow for some measure of legal differentiation, as long as it is proportionate to the institutional, social and cultural differences between the various religious groups that are present in the country. The same is true with the agreement between the Republic of Portugal and the Ismaili Imamat (2010)[8], which was followed by the signing of a headquarters agreement in 2015 for the establishment of a formal seat of the Imamat in Portugal[9]. The global framework for religious freedom recognises the historical, cultural and social importance of religion and religious diversity.

Although the cultural dominance of the Catholic tradition in Portugal is without question, minority religious communities still enjoy a wide range of legal prerogatives in fields such as media, religious education in public and private schools and spiritual assistance in hospitals, prison or in police and military forces, without fear of abuse of the dominant position by the majority religious community. On the other hand, the Catholic Church is able to develop its numerous religious, social and cultural activities without being constantly harassed, opposed or blocked by disgruntled and disaffected minority religious groups. Thanks to the RFA of 2001, religious freedom is not understood as a zero-sum game but is instead viewed as a positive-sum game.

Members of the different religious communities meet regularly and interact with each other in the Religious Freedom Commission (RFC), a body that was established by the RFA of 2001[10]. The RFC performs various functions, such as issuing advisory opinions on different matters (e.g. on draft agreements between churches or religious communities and the state, on the establishment and registration of churches or religious communities, on the composition of the Commission for the Allocation of Time in the Media or on the registration of religious entities). It also studies the evolution of religious movements in Portugal and gathers information on new religious movements to provide the necessary scientific and statistical information to the services, institutions and individuals concerned and to publish an annual report on the subject. It prepares studies, information, opinions and proposals that are required by law, by the parliament, by the government or at its own initiative. The RFC functions as

[8] Resolução da Assembleia da República No 109/2010, Diário da República No 187/2010, Série I, 24 Sep 2010.

[9] Resolução da Assembleia da República No 135/2015 Diário da República No 210/2015, Série I, 27 Oct 2015.

[10] Articles 52 to 57 of the RFA.

a locus of *integrative bargaining* where different religious issues can be assessed, debated and decided so as to prevent and resolve potential or actual difficulties and to try to meet every party's needs and expectations.

The RFC is currently chaired by José Vera Jardim, who was the justice minister of the Socialist government that, almost two decades ago, proposed and promoted the enactment of the RFA of 2001. On the occasion of his inauguration on 5 September 2016, a solemn ceremony took place in which 21 churches and religious communities read and signed a declaration for peace and dialogue, an unprecedented initiative that gained special relevance in the complex security context in which issues related to religious tolerance are currently being addressed.

VII. Educational framework

It is perfectly clear, nowadays, that there is no such thing as religiously or ideologically neutral education. All teaching is embedded in a particular worldview. For members of different religious communities, it is self-evident that not speaking about God in History, Philosophy, Literature or Science classes is a particular way of speaking about God. It is a way of saying that religion is absolutely irrelevant in those and other fields of human endeavour. This promotes the philosophy and ideology of atheistic naturalism as if it were the only valid worldview that can be used to interpret human experience. That is why allowing the teaching of religion in public and private schools works as an important antidote to the transformation of the official worldview of the education system into philosophical naturalism and ideological naturalism. That is why the existing legal framework of religious teaching is so important.

According to Article 25 of the RFA of 2001, churches and other religious communities or organisations representing believers residing in Portugal may request that the government provide religious instruction in public schools offering primary and secondary education. Moral and religious education is optional and is not an alternative to any area or curricular discipline. In order for any religious community to offer its own religion classes, they need to have a certain minimum number of students who positively expressed the desire to attend the discipline. That decision must be made by their parents if the students are under 16 years old, but it can be made by the students themselves if they are over 16. Teachers who are responsible for teaching religion classes may not teach in other fields, except in duly recognised situations where there is a clear difficulty in applying this principle, and they are appointed, transferred and removed by the state in accordance with the wishes of churches, communities or representative organisations. In no case are such courses taught by individuals who are not considered suitable by the respective church representatives. It is incumbent upon churches and other religious communities to train teachers, prepare programmes and approve teaching materials in harmony with the general guidelines of the educational system.

For the religious communities in Portugal, these regulations provide a defence against the philosophical worldview of naturalist secularism. In a sustainable, free, open and democratic society, it is important to guarantee the permanent critical engagement of individuals and communities in the search for knowledge and truth. This can only be done by preventing the capture of the education system by a single ideology or worldview, be it religious or secular. The robust presence of different religious communities in the education system helps promote debate and discussion concerning the origin, meaning and destiny of human life, with important externalities in the fields of politics, law, philosophy, economics, science, literature, visual arts and music.

VIII. Conclusion

Religious freedom currently faces a challenging geopolitical environment. So far, Portugal has been able to remain faithful to the ideals of individual and collective religious freedom, while at the same time being realistic in the domain of international relations and remaining vigilant about developments that are taking place around the world. Portugal has been able to create an inclusive framework for the free exercise of individual and collective religious freedom. It has been able to do so without denying its own history or the dominant role of the Catholic Church in Portuguese culture. The religious freedom of minority groups has made significant progress in an atmosphere devoid of cultural strife. Extreme radical Islamic movements are seen as fringe movements that are alien to the peaceful, law-abiding and cooperative Islamic community in Portugal. If and to what extent Portugal, as a member state of the European Union, will be able to sustain this reality remains to be seen.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN ROMANIA

Emanuel Tăvală [1]

I. Social context

Romania is a country in South-eastern Europe that belongs to the Orthodox countries from the point of view of religious orientation. Since 1989, Romania has faced international emigration, which has led to a decrease in the resident population. Since 1989, around 2.3 million Romanians, more than 100,000 every year, have chosen to emigrate, according to the Institute of National Statistics (INS). Thus, the country's population fell in 2014 to the same level that it was in 1969, about 20 million, and it fell further to 19.5 million inhabitants by 2017[2]. The most significant wave of emigration occurred in 2007, when Romania joined the European Union. Emigration reached its peak that year, with outgoing migration amounting to approximately 458,000 people in a single year, the main destination being Spain at that time. The preferred destination currently is Italy or the United Kingdom. From 1989 to 2012, Romania's population decreased by over 3.1 million inhabitants. Seventy-seven per cent of this decrease was a result of emigration. In 2012, a relative balance was achieved between in- and outgoing migration, with emigration exceeding immigration by only 3,000 people.

If, in 2007, most Romanian emigrants were leaving for Spain, four years later, the most popular destination among Romanians choosing to leave the country was Italy (46% of the total). At the same time, the number of Romanians migrating to Germany increased in the period 2008-2012 from 5% of the total number of emigrants to 7%.

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[2] See <http://www.insse.ro/cms/ro/content/popula%C5%A3ia-rezident%C4%83-la-1-ianuarie-2017-%C5%9Fi-migra%C5%A3ia-interna%C5%A3ional%C4%83-%C3%AEn-anul-2016> (accessed 10 Apr 2018).

In 2012, the United Kingdom became one of the countries favoured by Romanian emigrants, with 4% of all emigrants from Romania moving there[3].

From the point of view of religion, Romania is a majority Orthodox country, which is also home to a well-integrated minority Muslim population, which has been living in the region since Ottoman rule was established in Dobrogea (south-eastern Romania). This region was under Ottoman rule from 1418 to 1878, and the Muslim population has lived in the region for more than 700 years. They represent 0.3% of Romania's population today and belong to the Sunni branch of Islam[4].

Romania has been primarily a country of outgoing migration, with Romanians seeking a better life or work abroad. The ongoing European immigration crisis has turned the tables, however, as the numbers of new arrivals in Romania have been increasing. From 2013 to 2015, about 500 migrants reached Romania. In 2016, there were 1,624 new arrivals (Romania was ready to receive only 1,330). In 2017, 2,800 people tried to cross the Romanian border illegally, coming from conflict zones. According to the EU Agency for Border Protection, 475 non-EU migrants entered Romania during the period of August-September 2017. Immigrants have arrived in Romania via both land and sea. In 2017, however, most immigrants arrived via the Black Sea.

On 2 July 2015, the Romanian government approved a memorandum on the implementation of the European Council conclusions of 25-26 June 2015[5] regarding migration. According to this memorandum, Romania was to take in 1,705 people under an EU mechanism for internal resettlement and 80 people who clearly needed international protection through an EU programme for extra-EU relocation[6].

One can identify two types of illegal immigration to Romania. The first type involves illegal immigration by non-EU nationals who arrive in Romania mainly from Moldova, Turkey and China. Individuals from these countries tend to arrive in the country legally on the basis of a visa or residence permit and then stay illegally after that document expires. The second type of illegal immigration involves temporary flows caused by socio-economic events in countries of origin. In the 1990s, for example, the main sources of illegal immigrants were Bangladesh and Pakistan. These individuals would travel to the EU via Russia, Moldova and Ukraine and from there enter Romania and continue to Hungary.

[3] Ibid.

[4] See Emanuel Tăvală, 'Romania, between Tradition and Transition' in Stefan Mueckl (ed), *Kirche und Staat in Mittel- und Osteuropa* (Berlin, Dunker&Humblot Verlag, 2017), pp. 189-216.

[5] European Council meeting (25 and 26 June 2015) - Conclusions, https://www.consilium.europa.eu/media/21717/euco-conclusions-25-26-june-2015.pdf (accessed 1 Jul 2019).

[6] See National Institute of Statistics, http://www.insse.ro (accessed 1 Jul 2019).

All in all, Romania is a country of transit for illegal immigrants and asylum seekers. Data analysis shows that Romania has been used as a transit area for illegal immigration to more developed western EU states. The illegal migration flow in Romania is represented by citizens coming from countries affected by conflict (Syria, Afghanistan, Iran, Iraq, etc.

II. Political and public dabate

The public debate in Romania has been influenced by the migration crisis and has focused on the EU-imposed number of migrants who should be accepted by each EU country and on the fact that Romania does not have the capacity to accept more than a few hundred. Most migrants are not Christians, and some in society think that Muslims should not be allowed to settle in Romania.

There has been a discussion in the country's newspapers about the construction of a mosque in Bucharest on an area of 11,000 square metres, while the Muslim population already has another 17 mosques in the country. These mosques were built in Dobrogea for the Muslim communities there, but the papers have been arguing that a huge mosque with an academy for imams is too much for the country. Additionally, some claim that the planned mosque is going to be a centre for promoting Islamic fundamentalism. This debate was also sparked due to the country's past. During the period when Romania (except Transylvania) was under Ottoman rule, treaties concluded between the two countries stipulated that no mosques could be built in the country. Its common in Romania to rely on the past, even bringing up documents and treaties that were signed 500 years ago.

III. Legal and political framework

1. Definition (or Non-definition) of Extremism, Fundamentalism and Radicalisation

Romanian legislation does not contain any definition of terms such as 'extremism', 'fundamentalism' or 'radicalisation'.

2. Legislation *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

In accordance with the Law on National Security of Romania (Law 51/1991), identifying totalitarian or extremist actions falls within the remit of the Romanian Intelligence Service (SRI). '[I]nitiating, organising, committing or supporting in any way totalitarian or extremist actions coming from the communist, fascist, Iron Guard [ideology] or of any other racist, anti-Semitic nature' constitute threats to national security. The SRI presents annual reports to the Romanian parliament that include a list of extremist movements in the country. The first such report was published in October 1994, covering the results of the SRI's operations for the period from October

1993 to September 1994. In this report, the SRI indicated that 'right-wing extremism' existed in the country.

In March 2002, the Romanian government adopted Emergency Ordinance No 31 prohibiting organisations and symbols of a fascist, racist or xenophobic nature and upholding the memory and personality of people guilty of crimes against peace and humanity.

The Romanian parliament turned this ordinance into Law 217/2015, Article 5 of which stipulates 'that any action of an individual to promote, in public, the memory of people guilty of genocide, crimes against humanity or war crimes, as well as the crime of promoting, in public, fascist, Iron Guard, racist or xenophobic ideas, concepts or doctrines is punishable by imprisonment of three months to three years and the interdiction of certain rights'.

The punishment for the distribution, sale or manufacturing of fascist, racist or xenophobic symbols is imprisonment from six months to five years and the interdiction of certain rights. The same punishment applies to individuals who promote a cult of such a personality. Fines of ROL 25 million to 250 million (EUR 500 to 5,000) also apply for legal entities that distribute, sell or manufacture fascist, racist o xenophobic symbols for the purposes of dissemination. Holocaust denial is punishable by imprisonment for a period from six months to five years and the loss of certain rights.

There is no real problem with extremism in Romania, however, which is why there are no special laws aimed at tackling radicalisation or extremism[7].

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

The only anti-discrimination provision in Romanian legislation is Article 297(2) of the Penal Code, which stipulates: 'Limitation by a public official to use or exercise [the] rights of any citizen, or the creation of situations of inferiority based on nationality, race, sex or religion, shall be punished by imprisonment from two to seven years'.

The current legislation regulating non-EU nationals in Romania, citizens of EU member states and of the European Economic Area as well as the rules governing asylum in Romania are found mainly in Government Emergency Ordinance No 194/2002 on foreigners in Romania; Government Ordinance No 25/2014 on the employment and deployment of foreigners in Romania and amending some laws on foreigners in Romania; Government Emergency Ordinance No 102/2005 on the free movement of citizens of EU member states on Romanian territory, citizens of the EEA and the Swiss Confederation; Law No 122/2006 on asylum in Romania; and Government Ordinance No 44/2004 on the social integration of foreigners who were granted a form of protection or a right to stay in Romania and citizens of the member states of the European Union and the European Economic Area, approved with amendments by

[7] G. Andreescu, *Extremismul de dreapta în România* (Cluj, Napoca, 2003), p. 93.

Law No 185/2004. Accession to the EU triggered a process of comprehensive regulatory harmonisation to ensure compliance with EU legislation and other international legal instruments to which the Romanian is a party.

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

Romania has not passed any legislative measures to tackle radicalisation or extremism.

Romania signed the Declaration of the Copenhagen Meeting in 1990. It joined the Council of Europe in 1993, gaining full rights after ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1994. Opinion 176 of the Parliamentary Assembly on Romania's application for membership in the Council of Europe urged the country to: 'change … Article 19 of the Law on [the] judiciary … Article 200 of the Penal Code will no longer consider private homosexual acts between consenting adults as offences … [to take] measures to improve prison conditions … [to] use all means available to a constitutional state to combat racism and anti-Semitism, and all forms of nationalist and religious discrimination and incitement to discrimination … [and to] sign the European Charter for Regional or Minority Languages'. Since 1994, appointments of judges have been for life.

IV. Effects of the measures on religious freedom

1. Effects of the Legislative Framework Tackling Radicalisation and Extremism on Religious Freedom of Religious Communities and their Affiliated Institutions

Romania provides broad legislative protection for minorities based on Article 6 of the Constitution, which states: 'The state recognises and guarantees national minorities the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity'. A number of sectoral laws, including Law No 1/2011 on education, stipulate substantive rights enjoyed by individuals belonging to national minorities.

The Ombudsman Institution, established in March 1997, has a mandate to protect the rights and freedoms of citizens against violation by the authorities.

2. Effects of the Legislative Framework on Individual Religious Liberty

There has been no impact on individual religious liberty since no legislative measures have been undertaken to tackle radicalisation and extremism.

3. Effects of Policies on the Religious Freedom of Religious Communities and their Affiliated Institutions and on Individual Believers

Policies aimed at tackling extremism have had no impact on religious freedom or religious communities or their affiliated institutions or on individual believers.

V. Educational measures to tackle redicalisation and extremism

1. Laws, Policy and Programmes

Article 5(e) of the Law on Public Education (No 1/2011) provides that education should be carried out in the spirit of dignity, tolerance and respect for human rights.

2. Autonomy of Religious Schools

Religious schools are part of the public school system and they are thus required to obey laws on public education.

3. Rights of Children and Parents

The freedom of religious instruction is guaranteed according to the specific needs of each religious community. Additionally, parents and legal guardians have the right to 'determine the education of minors for whom they are responsible according to their own convictions'. Conflicts between parents' convictions and different forms of religious instruction should be avoided.

Law 1/2011 on Public Education is one of the most important laws enacted in Romania after 1990. According to this law, education is a national priority in Romania. Universal compulsory education exists for the first eight years of schooling. Education offered by general schools is free of charge, but schools can levy fees for some activities as specified by law.

According to Article 9(1) of the law, religious instruction is an optional subject in primary, secondary and grammar schools and is part of the general curriculum. In 2014, the Romanian Constitutional Court, following a complaint by the Romanian Secular-Humanist Association, decided that this article was not in accordance with the constitution. This meant that the freedom of conscience should be positively interpreted and that all pupils had to decide for themselves (or their parents for those under 16) whether or not to take part in religious education classes in the middle of the winter semester in 2015. The court's decision provided the basis for numerous discussions, talk shows and the common position adopted by all legally recognised religious organisations in Romania. Input from civil society resulted in the creation of an association called Parents for Religious Education Classes, which quickly created a network throughout the country, with the help of the Romanian Orthodox Church and religious organisations. The decision to take part in religion classes or not had to be taken within one week at the beginning of the school year, and 88% of pupils decided to take these classes.

A 'silent revolution'[8] took place in Romania in 2015 that ended on 6 March. Almost 90% of parents agreed in writing that their children should take part in religious

[8] R. Carp, 'Cerere pentru ora de religie - o revolutie tacuta si apolitica', in *Dilema veche,* nr. 579, 19-25 martie 2015, p. 5.

education classes after Decision 669/2014 of the Romanian Constitutional Court. The court was asked to again make a decision on Law 1/2011 on Public Education even though it had already made a ruling on this law in 2012 through Decision 306. In 2014, the court did not simply mention its own decision from 2012 where the Law on Public Education (especially the article regarding religious education) was found to be constitutional, but it offered a new judgment with bizarre arguments. First, the court decided that religious education classes could not made compulsory for pupils, but that the state had an obligation to provide such classes. The court did not understand that the compulsory nature of religious education means the possibility of opting out because the religious education is not 100% compulsory if individuals have the right to opt for this discipline, nor is it 100% optional if it is part of the common curriculum.

The court considered, at the same time, that the right to provide an education is not the exclusive right of parents but also the right of the state, which runs the entire school system. It should be noted that the state administers public funds paid into the education system by parents in the form of taxes. Statements to the effect that the state has the duty to educate pupils has a totalitarian connotation. The state has no obligation to educate, but it has to make sure that public schools meet certain standards.

VI. Conclusion

There have been manifestations of extremism in Romania, but they are not based on religion, nor have they been a threat to public safety. National legislation does, however, provide for the prevention of manifestations of extremism, and it is up to citizens to respect these laws.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN THE SLOVAK REPUBLIC

Michaela Moravčíková [1]

I. Social context

The census of 21 May 2011 shows that 75.97% of Slovak citizens belong to a church or religious community. The most numerous groups are Roman Catholics at 62.02%, followed by the Evangelical Church at 5.86% and the Greek Catholic Church at 3.83%. The Reformed Christian Church represents 1.83% of the population. Some 13.44% of the population do not belong to any religious confession. For comparison, we present some data from the census of 1 March 1950: at that time, the percentage of believers was 99.72%. Roman Catholics represented 76.2%, the Evangelical Church 12.88%, Greek Catholics 6.55% and Reformed Christians 3.25% of the population, while only 0.28% of the population had no confession. A comparison of censuses in Slovakia's modern history, e.g. in 1991, 2001 and 2011, suggests only a slight re-grouping of believers within traditional churches, i.e. a slight decrease in the number of believers of all churches[2]. Newly registered churches and religious communities include Jehovah's Witnesses (1993), the New Apostolic Church (2001), Mormons (2006) and the Baha'i Community (2007). Furthermore, there are dozens or even hundreds of entities[3] that have been set up and registered based on Act 83/1990 Zb[4] on Civic Associations. This law's first provisions (Section 1) state that the act does not mean associations of citizens in churches or religious communities. Instead, civic associations are used mainly by religious communities with only a small number of

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[2] 'TAB. 14 Obyvateľstvo SR podľa náboženského vyznania', <https://census2011.statistics.sk/tabulky.html> (accessed 10 Nov 2018).

[3] Based on a my unpublished survey of the statutes of civil associations (40,000 records), direct or indirect reference to religious activity has been found in more than 200 associations.

[4] Zb stands for 'Collection of Acts of the Slovak Republic'.

members. Act 308/1991 Zb on the Freedom of Belief and the Position of Churches and Religious Communities, based on which a church or a religious community can be registered, requires a high number of church members for registration (adult citizens of Slovakia permanently residing in the country), which is an insurmountable obstacle for smaller communities.

Experience shows that once a violation of the Act on Civic Associations is reported, these associations would rather change their statutes to avoid the cancellation of registration of the given entity by the Ministry of Interior of the Slovak Republic.

Within the context of migration and immigration and religion itself, the issue of Islam and non-Muslim migrants has been raised. Slovakia has not traditionally been a desired final destination for migrants. It is a rather homogeneous country in terms of culture and religion, and was not affected by the dramatic increase in migration during the 20th century. Until recently, Slovakia was almost exclusively a country of origin of migrants. More significant changes were brought about by Slovakia's accession to the European Union and the Schengen Area. Today, there are some 97,934 foreigners in Slovakia, representing 1.8% of the population, and the number of foreigners in the country has been slowly but continually growing: in 2017, there were 9,968 more foreigners than in the previous year, which was an 11% increase[5]. Some 41% of these foreigners are citizens of neighbouring countries. Another significant group of migrants are citizens of Bulgaria, Romania, Russia and Serbia, who represent 22.4% of all foreigners in Slovakia. Migrants from Asian countries (China, South Korea, Thailand and Vietnam) account for 7.5% of all foreigners (7,353) in Slovakia. Citizens of EU countries account for more than half of all foreigners in Slovakia (54.3%)[6]. In recent years, the number of applications for asylum has stabilised at several hundred per year[7]. In 2017, Slovakia granted asylum to 29 people, while 77 applications were rejected. Most applications for asylum are made by citizens of Afghanistan, Iraq, Syria and Vietnam. From the overall number of 58,559 applications since 1993, asylum has been granted to 838 people, whereas 702 people were provided subsidiary protection as another form of international protection.

Out of the total number of foreigners living in the country, almost 43,000 are economically productive. Currently, there is one foreign worker for every 60 national employees. In 2017, foreigners from more than 130 countries were employed in Slovakia, coming mostly from Serbia (8,808), Romania (8,621), the Czech Republic

[5] 'Statistical overview of the Migration Office of the Ministry of Interior of the Slovak Republic', 7 May 2018, <http://www.minv.sk/?statistiky-20> (accessed 23 Oct 2018).

[6] Apart from nationals of Hungary (8%) and Poland (5.8%), citizens of Germany (4.6%), Italy (3%) and Austria (2.4%) are also numerous in terms of citizens of EU countries living in Slovakia.

[7] 'Statistical overview of the Migration Office of the Ministry of Interior of the Slovak Republic'.

(4,492), Hungary (4,309) and Ukraine (3,045). Among foreign workers, men constitute a substantial majority, accounting for 73% of all employed foreigners[8].

II. Political and public debate

Slovakia is one of the countries that refused to accept the quota system for migrant distribution proposed by the European Commission. In doing so, Slovakia reflected the xenophobic mood of its citizens, which has been emphasised by the participation of an extreme far-right political party in the Slovak parliament since 2016, the first time such a party has been in the parliament since Slovakia gained its independence in 1993[9]. On the other hand, it should be clear that, in terms of economic and other prospects, Slovakia is not an attractive country for migrants as a place for permanent settlement. Therefore, politicians have been asking a legitimate question: How can we convince migrants to stay in Slovakia when they themselves see their stay as only temporary? In addition to economic conditions, culture and religion obviously play a role in this issue. To make matters even more complex, the prime minister has stated that Islam has no place in the country and that Christian asylum seekers should be given preferential treatment.

In 2015, the Pace et Bene institution and the Catholic Church arranged a relocation and integration programme for 25 families from Iraq who were members of the Assyrian Church of the East. Two years later, only 87 of the 149 Assyrian Christians remained in Slovakia. Especially the older members of these families were unable to get used to the social environment and climate and decided to return home. Even some younger members, who could probably have integrated within Slovak society and could have made it a priority to keep their families together, also returned home. Their decision might have been influenced by the fact that the Iraqi government had launched an offensive on Mosul at the time, and the liberation of their native region started. The Assyrians who left Slovakia to return home have been living in refugee

[8] 'Central Office of Labour, Social Affairs and Family, Employment of Foreigners in the Slovak Republic in 2017', <http://www.upsvar.sk/buxus/docs/statistic/cudzinci/2017/cudzinci_1706.xlsx>, (accesed 8 May 2018).

[9] Kotleba - People's Party Our Slovakia won 8.04% of the vote in the 2016 parliamentary elections and currently holds several seats in parliament. On 25 May 2017, Slovakia's prosecutor-general submitted a proposal for dissolution of the party to the Supreme Court 'due to its extremist political views, fascist tendencies and activities leading to the violation of the Constitution of the Slovak Republic, laws and removal of the current democratic system in the Slovak Republic. A review of extensive documentation showed that the political party Kotleba - People's Party Our Slovakia, as an extremist political party with fascist tendencies, violates, by its programme and activities, the Constitution of the Slovak Republic, laws and international treaties'. The prosecutor-general thus completed his review, answering more than 170 filings submitted to him in relation to the application to the Supreme Court to dissolve this political party. Prior to this, the Supreme Court had already dissolved Kotleba's Slovak Brotherhood.

camps in Iraqi Kurdistan because the infrastructure has been destroyed to such a degree that life elsewhere within the region is nearly impossible. Some of them would like to come back to Slovakia[10]. Slovakia's neighbour, the Czech Republic, has had a similar experience with its relocation programme. There, only 40 relocated Christians out of 89 stayed in their host country.

In December 2017, the Sociological Institute of the Slovak Academy of Sciences published the results of a joint European Values Study, a survey focused on the values of Europeans. In addition to a widespread crisis of trust in institutions, including churches and religious communities, the survey revealed increased hostility against Muslims. Between 2001 and 2008, the willingness of Slovaks to have Muslims as neighbours decreased from 26% to 20%, whereas in 2017 Muslims were undesirable neighbours for 54.4% of the Slovaks surveyed[11].

III. Legal and political framework

On 1 January 2017, amendment No 316/2016 Z z to the Criminal Code entered into force. Its declared aim is to strengthen the fight against extremism. Prior to this amendment, the Criminal Code did not contain any criminal offences of extremism. While the amendment does not offer a definition of extremism, radicalism or fundamentalism, it does define criminal offences of extremism, which are divided into nine sections: the offence of establishing, supporting and promoting any movement leading to the suppression of fundamental rights and freedoms; expressing support for a movement leading to the suppression of fundamental rights and freedoms; the production of extremist material; the dissemination of extremist material; possession of extremist material; denial or approval of the Holocaust, political crimes and crimes against humanity; defamation of a nation, race or belief; incitement to national, racial and ethical hatred; apartheid or discrimination against a group of people; and offences committed on the basis of a special motive (with the intention of committing an offence of terrorism and some forms of participation in terrorism). According to the amendment, an extremist group is an association of at least three people for the purpose of committing an extremist offence (Section 421). Extremist material means written, visual, audio or film material that shows texts or symbols of movements leading to the suppression of fundamental rights or inciting others to hatred or discrimination or to deny the Holocaust or other crimes whose denial is prohibited. To be considered extremist, material must be produced, disseminated, published or possessed with the intention of inciting others to hatred or discrimination.

[10] Ž. Janečková, 'Iračania si pri Nitre zvykajú, ďalší sa vrátili', *Pravda*, 30 Jan 2017 <https://spravy.pravda.sk/domace/clanok/418276-iracania-si-pri-nitre-zvykaju-dalsi-sa-vratili/> (accessed 1 Oct 2018).

[11] 'Naše európske hodnoty', Sociologický ústav SAV, 18 Dec 2017, <http://www.sociologia.sav.sk/podujatia.php?id=2786&r=1> (accessed 1 Oct 2018).

The amendment specifies two special motives for crimes: (1) the intention to incite others to violence or hatred for national and racial reasons; and (2) the motive of national, racial, ethnic or religious hatred or hatred based on sexual orientation[12]. If someone commits a crime based on any of these motives, they will face harsher punishment and, at the same time, the offence will be considered an act of terrorism. As mentioned, the term 'extremism' itself is not defined in the amendment or anywhere else in the Criminal Code. The first legal regulation on extremism was adopted in 2009, as recommended by European legislation. Until then, the word 'extremism' was not included in the Criminal Code at all. The legal regulation of 2009 focused on adding certain merits of extremist offences, especially the production, dissemination and possession of extremist material.

The recent amendment did not change the overall concept of Slovakia's current anti-extremism regulation. It did, however, introduce several strict rules. For example, all offences of extremism will be dealt with by a special criminal court. The burden of proof also changed in the case of extremist material: according to the new amendment, it will have to be *proven* that certain material serves for educational or research purposes or for the purposes of a personal collection for it *not* to be considered extremist material. A new offence was also added: apartheid and racial segregation. According to Section 424a, anyone who uses apartheid or racial, ethnic, national or religious segregation or any other extensive or systematic discrimination of a group of people will face imprisonment of four to ten years. Promoting, supporting and expressing affection for movements that lead to the suppression of fundamental rights and freedoms is also a crime. Until the above-mentioned amendment of the Criminal Code entered into force, it was also a criminal offence but only when a movement used violence, a threat of violence or a threat of great harm. The definition of extremist material was also broadened. Denial of genocide and war crimes whose perpetrators have been condemned by a Slovak court is also an offence.

Freedom of expression is one of the political rights enshrined in the Constitution of the Slovak Republic (Article 26). The meaning of freedom of expression and its characteristics were set out by the Constitutional Court in its ruling of 12 May 1997: 'Freedom of expression enables a [person] to express or not to express [their] feelings, thoughts or views'[13]. Although this is a fundamental human right, it can be restricted by a law if said law concerns measures in a democratic state required for the

[12] 'Zákon o uznávaní a výkone majetkového rozhodnutia vydaného v trestnom konaní v Európskej únii a o zmene a doplnení niektorých zákonov', *Slov-lex. Právny a informačný portál*, 1 January 2017 <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2016/316/20170101.html> (accessed 10 Nov 2018).

[13] 'Rozhodnutie Ústavného súdu slovenskej republiky', Sp. zn. II. ÚS 28/1996, *Ústavný súd Slovenskej republiky*, 12 May 1997 <https://www.ustavnysud.sk/zbierka-nalezov-a-uzneseni#!znauView>(accessed 10 Nov 2018).

protection of the rights and freedoms of others, national security, public order, or the protection of public health and morality. Two sections of Criminal Act No 300/2005 Z z deal with hateful expressions: Section 423 (Defamation of a nation, race or belief) reads that: '(1) Any person who publicly defames a) any nation, its language, any race or ethnic group, or b) any individual or a group of people because of their affiliation with any race, nation, nationality, skin colour, ethnic group, family origin, religion or because they have no religion shall be liable to a term of imprisonment of one to three years'. Section 424 (Incitement to national, racial or ethnic hatred) reads that:

> '(1) Any person who publicly threatens an individual or a group of people because of their affiliation with any race, nation, nationality, skin colour, ethnic group, family origin or religion, if they constitute a pretext for making threats on the aforementioned grounds, by committing a felony, restricting their rights or freedoms or whoever imposes such restriction or incites [others] to the restriction of the rights or freedoms of any nation, nationality, race or ethnic group, shall be liable to a term of imprisonment of up to three years. (2) The perpetrator shall be liable to a term of imprisonment of two to six years if [they] commit the offence of defamation of a nation, race and belief (a) in association with another power or other agent, (b) publicly, (c) for a special reason, (d) as a public official, e) as a member of an extremist group or f) in a crisis situation'.

In recent decades, the police and other authorities have dealt with extremism mainly in relation to violence on the part of spectators (fans). Currently, the issue of extremism and spectator violence falls, at the national level, within the competence of the Section for Extremism and Spectator Violence of the Criminal Police Office of the Police Corps Presidium, which ensures methodological, international and interdepartmental cooperation and provides practical assistance to individual units of the police corps. The basic document in the fight against extremism used to be the Counter-Extremism Concept 2011-2014, which was adopted on 8 July 2011 by a resolution of the government of Slovakia[14]. It was replaced by Counter-Extremism Concept 2015-2019[15], which describes the situation related to radicalisation and extremism in Slovakia as stable with no major incidents threatening national stability. Nevertheless, it approaches this issue '[with foresight] and especially with respect to neighbouring countries and the overall security situation in Europe'[16]. In terms of content, the concept focuses on current issues, which are prevention, raising awareness within society, efficient training of the police corps and cooperation with neighbouring countries. The document contains a definition, according to which: 'extremism means actions and expressions resulting from an extreme ideology hostile to

[14] Resolution of the Government of the Slovak Republic No 379/2011.
[15] Resolution of the Government of the Slovak Republic No 129/2015.
[16] Counter-Extremism Concept 2015-2019, p. 2.

a democratic system, which has, either directly or indirectly or within a certain time period, a destructive impact on the existing democratic system and its fundamental attributes. Another typical feature of extremism and related activities is that they attack the system of fundamental rights and freedoms guaranteed by the Constitution and international human rights documents or they seek to aggravate or thwart the application of these rights by their activities'[17]. The document divides extremism into: right-wing, left-wing, religious and extremism focused on one issue (the environment, separatism, etc.). It also includes a definition of radicalisation, according to which it is 'a process in which individuals or groups abandon, under the influence of radical political or religious ideology, the value system of a given country and adopt a new system of values that contradict elementary principles of a democratic society such as rule of law, innate human dignity, equality before the law or the universal system of fundamental rights and freedoms'[18]. As far as the issue of hate crimes is concerned, the document refers to the Criminal Code.

The focus of the concept is expressed in four strategic objectives: (1) strengthening the resilience of communities and individuals to non-democratic ideologies and extremism; (2) raising awareness about the seriousness of extremism for society and the consequences of radicalisation; (3) efficiently monitoring and uncovering offences of extremism and prosecuting their perpetrators; and (4) building institutional and personnel capacities for state bodies fulfilling tasks related to the protection of constitutional principles and the internal order and security of the state. The document contains specific tasks for individual ministries and other state institutions operating in various areas of public life. Churches and religious communities have two tasks: Task No 2.7 includes updating the 'spiritual scene in the Slovak Republic, focusing on religious communities that demonstrate attributes of religious extremism'. And Task No 2.8 includes performing educational activities for vocational groups, registered churches and religious communities in the area of preventing extremism and radicalisation'[19]. Since radicalisation and extremism can be encouraged by inactivity and indifference in society, the concept sets an ambitious aim: to prevent radicalisation by training and raising awareness within society. A summary of the fulfilment of these tasks is presented in an interdepartmental report.

IV. Effects of the measures on religious freedom

The changes to the Criminal Code that entered into force in January 2017 did not have an immediate impact on the legal framework in terms of relations between

[17] Ibid, p. 3.
[18] Ibid.
[19] Ibid, p. 12.

the state and churches or the exercise of the right to religious freedom on the part of both adults and children. Concerns over Islam and immigrants that have been verbalised by various political elites had an immediate impact on the legal framework even before the adoption of the legal regulation on extremism. In 2016, a group of parliamentarians submitted to the parliament a draft amendment to Act No 308/1991 Zb on the Freedom of Belief and the Position of Churches and Religious Communities. The essence of the draft amendment was an increase in the required number of members of a newly established church from 20,000 to 50,000 adult citizens of the state. Slovakia has been criticised for this change, as small churches in particular do not have a realistic chance to achieve this legal status. Changes to the conditions for registration have also been under consideration, with the idea of introducing a two-tier model for the registration of churches, like the system that exists in the Czech Republic. As the main reason for the proposed change, the explanatory memorandum to the parliamentary draft amendment of 2016 stated that 'the aim of the submitted draft is to eliminate fraudulent registrations of alleged churches and religious societies seeing the main aim of registration as getting funds from the state'[20]. Those who proposed the draft also presented an extensive portfolio of benefits that, in addition to funds from the national budget, churches and religious communities become eligible for upon registration, including access for registered churches' clerics to public facilities, especially schools and the right to teach religion in public schools and to carry out pastoral activities in healthcare, social and other facilities. Beyond the explanatory memorandum, the real motives that were discussed within the parliamentary debate focused on Islam and migration. Another group of parliamentarians submitted a draft amendment requiring an increase in the number of members necessary for registration up to 250,000. This proposal was not accepted.

The draft amendment was approved by the National Council of the Slovak Republic (parliament) on 30 November 2016, with entry into force planned for 1 January 2017. The president used his right to return the act for further discussion. He justified his decision on the basis of concerns about the possibility of diminishing the right to religious freedom in the country. The parliament did not accept the president's arguments and approved the act again on 31 January 2017. Act No 39/2017 Z z amending Act No 308/1991 Zb on the Freedom of Belief and the Position of Churches and Religious Communities as amended entered into force on 1 March 2018. Section 23 of the act contains a transitional provision to the effect that proceedings concerning the registration of churches or religious communities started before 28 February 2017 would be completed according to laws in force prior to that date. In fact, this transitional provision concerns only the registration of Church Christian Communities of

[20] Explanatory Memorandum to the draft act amending Act No 308/1991 on the Freedom of Belief and the Position of Churches and Religious Communities No CRD -1747/2016, p. 1.

Slovakia, which has been seeking the status of the registered church and religious society since 2007. The relevant national authority, the Ministry of Culture, rejected this entity's application on two occasions, and its organisational committee lodged an appeal with the Supreme Court.

The impact of the amendment is broader: it significantly toughens the criteria for registration. Considering the number of citizens in the country, another application for registration of a new church or religious community does not seem likely unless it was a branch of an existing traditional church that separated from that church. Bearing in mind the statements of political representatives and deputies from political parties that submitted and supported the amendment, concerns about religious extremism and terrorism played a significant role in its drafting. The new confessional regulation *de facto* does not enable the formation of new churches and religious communities recognised by the state; however, in no way does it limit the religious freedom of individuals, the autonomy and activities of existing churches and religious communities or any exercise of the right to freedom of belief, especially pastoral care. It has provoked a debate on the right to autonomy of churches that are active within society but are not registered under Act No 308/1991, i.e., they do not have legal personality, as churches and religious communities do. They function as civil associations or foundations and do not enjoy the rights of registered religious communities.

V. Educational measures to tackle radicalisation and extremism

Legislation passed in 2016 and 2017 has had no impact on religious education in schools in any way (state, private or church schools). It did not affect the right of parents to take decisions regarding the religious education of their children or children entrusted to them by law as long as said children are under 15 years of age. Educational activities focusing on the prevention of extremism were significantly affected by the adopted counter-extremism concepts, especially the one for 2015-2019. This is a Slovak government policy that, through ministries and other state institutions, develops activities focused on preventing and combating extremism. The policy specifies the strategic priorities of the state in the field of preventing and eliminating radicalisation, extremism and related anti-social activity endangering fundamental rights and freedoms of individuals and the foundations of a democratic state and the rule of law. The second strategic priority is to 'raise awareness about the social seriousness of extremism and the consequences of radicalisation'. It calls for training in the area of radicalisation, extremism and the expression thereof, with the aim of publicising the danger thereof through the mass media and training target groups. Strategic priority No 4, 'building institutional and personnel capacities for state bodies fulfilling tasks related to the protection of the constitutional foundation, internal order and security of the state', includes the design and development of efficient instruments in terms of organisation, designating experts and providing training for individuals to improve

the functioning of security forces. In addition to specific tasks, the strategy also tasks ministries with the organisation of training and education at all school levels. It includes education in the environment of churches and religious communities, as has been already stated. An extensive programme of training and seminars is already in progress. Finally, there are ongoing dialogues, including one called 'A rabbi, a priest and an imam speak with students', organised by the Islamonline organisation and the Forum of the World's Religions Slovakia.

VI. Conclusion

In principle, the Slovak government has stated in several documents that the situation regarding expressions of extremism is stable, and at a press conference on 1 February 2017, the prime minister said that: 'Slovakia has underestimated the new wave of fascism and extremism [in Europe]. Social networks have no rules or responsibility and often present information incompatible with the essence of the state'[21]. *At the same time, he presented a new National Counter-Terrorism and Extremism Unit*, operating under the aegis of the National Crime Agency. Although the Counter-Extremism Concept uses the term 'religious extremism', it is limited to an explanation of key terms.

In the context of the above-mentioned amendment to the Criminal Code and the application of anti-terrorism and anti-extremism measures, no need to limit external expressions of religion has arisen. A specific case is the change of the basic confessional regulation, i.e. Act No 308/1991 on the Freedom of Belief and the Position of Churches and Religious Communities, which introduces stricter conditions for the registration of churches and religious communities. Although its declared justification is to prevent fraudulent registration of religious entities, it is assumed that one of the motives is fear of extreme, religiously motivated acts and terrorism.

In general, we may say that believers, registered churches and religious communities have not suffered any harm in relation to the application of anti-extremism and anti-terrorism measures. What might be expected is a discussion about the autonomy of churches in relation to the possibility of acquiring legal personality as regards the exercise of the right to religious freedom in the future.

[21] 'Vznikla Národná jednotka boja proti terorizmu a extrémizmu, je súčasťou NAKA' (Press conference of the Presidium of Police Corps of the Slovak Republic', Ministerstvo vnútra Slovenskej republiky), 1 Feb 2017, <http://www.minv.sk/?tlacove-spravy&sprava=vznikla-narodna-jednotka-boja-proti-terorizmu-a-extremizmu-je-sucastou-naka> (accessed 1 Oct 2018).

SECURITISATION OF RELIGIOUS FREEDOM: THE CASE OF SLOVENIA

Blaž Ivanc[1]

I. Social context

It is a central task of modern and democratic states to provide for personal and public security. At the same time, the state also has to provide for conditions that enable the smooth exercise of religious freedom. Radicalisation and extremism are directed against both the above-mentioned (constitutionally and legally) protected goods. On the one hand, the misuse of religious freedom might endanger personal and/or common security. On the other hand, a lack of security may hinder the enjoyment of religious freedom. Thus, the role and performance of states and their international and supranational associations have to be strengthened.

Slovenia's 1991 census and 2002 census provide some basic data on religious affiliation in the country[2]:

Year	**1991**		**2002**	
Total population	**1,913,355**	**100%**	**1,964,036**	**100%**
Religion	**Persons**	**%**	**Persons**	**%**
Catholic	1,369,873	71.6	1,135,626	57.8
Evangelical	14,101	0.7	14,736	0.8
Other Protestant	1,890	0.1	1,399	0.1
Orthodox	46,320	2.4	45,908	2.3
Other Christian	2,410	0.1	1,877	0.1
Muslim	29,361	1.5	47,488	2.4

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[2] M. Šircelj, *Verska, jezikovna in narodna sestava prebivalstva Slovenije : popisi 1991-2002* (Ljubljana, Statistični urad, 2003), p. 169, <https://www.stat.si/popis2002/gradivo/2-169.pdf> (accessed 23 Oct 2018).

Jewish	199	0.0	99	0.0
Eastern religions	478	0.0	1,026	0.1
Other religions	269	0.0	558	0.0
Agnostic	…	…	271	0.0
Believer but belongs to no religion	3,929	0.2	68,714	3.5
Unbeliever, atheist	84,656	4.4	199,264	10.1
Did not want to reply	81,302	4.2	307,973	15.7
Unknown	278,567	14.6	139,097	7.1

Previously, the Republic of Slovenia has not been affected by any major expressions of religiously motivated extremism or fundamentalism (including terrorist attacks). Being a part of the European Union, however, Slovenia considers such acts common and crucial problems.

The Resolution on the Migration Policy of the Republic of Slovenia (2002) pointed out security concerns and risks in relation to migration and called for better management of border control, enhanced cooperation between internal and international bodies in the sphere of public security and coordination of migration policy with security, foreign, educational and other policies[3]. Since 21 December 2007, Slovenia has been a member of the Schengen Area.

In 2015, the government decided to raise a wire fence on its southern border with Croatia because of numerous illegal entries by migrants. During the peak of the migrant wave in 2015 and 2016, most migrants only transited through Slovenia to other EU countries.

The Slovenian Government Office for the Support and Integration of Migrants (GOSIM) performs different tasks as specified by statutes that regulate aliens, international protection, and the temporary protection of displaced people. GOSIM also provides current statistical data about migration.

As of 18 April 2017, 256 refugees and migrants were residing in Slovenia.

The number of refugees and migrants at the Centre for Foreigners and at the Asylum Centre (AC) and their branch facilities[4]:

Location	Number of people
Asylum Centre (AC) in Ljubljana	134
AC branch facility at Kotnikova in Ljubljana	49
AC branch facility in Logatec	32

[3] Resolucija o migracijski politiki Republike Slovenije, Uradni list RS No. 106/02.

[4] 'Police Activities in Connection with Current Migration Flows', Ministry of the Interior website, 18 Apr 2017 <https://www.policija.si/eng/index.php/component/content/article/13-news/1729-a-new-web-page-on-police-activities-re-current-migration-flows-set-up-available-informations> (accessed 18 Apr 2017).

Outside the Asylum Centre in Ljubljana	11
Displaced	22
Centre for Foreigners in Postojna	8
Total	256

On 18 July 2017, 292 people were residing in Slovenia who had lodged an application for international protection, and there 488 more people residing there who were already receiving approved international protection.

The number of applicants for international protection in Slovenia from 2010 until July 2017[5]:

Before 2010	2011	2012	2013	2014	2015	2016	2017
246	357	304	272	385	277	1308	646

The data show that most applicants for international protection come from Afghanistan and Syria.

An applicant's country of origin (from January 2017 until July 2017):

Afghanistan	Syria	Pakistan	Algeria	Turkey	Iran
178	59	53	32	23	10

Integration of individuals granted international protection:

from 1995 until 2010	2011	2012	2013	2014	2015	2016	2017 (until July)
209	24	34	37	44	45	170	100

Applications for international protection in Slovenia[6]:

[5] 'Aktualni podatki', Government Office for the Support and Integration of Migrants website, , 1 Aug 2017 <http://www.uoim.gov.si/si/statistika/aktualni_podatki/> (accessed 1 Aug 2017).

[6] Ministrstvo za notranje zadeve RS, 'Prošnje za mednarodno zaščito v Republiki Sloveniji', *Ministrstvo za notranje zadeve RS*, 1 Aug 2017 <http://www.mnz.gov.si/fileadmin/mnz.gov.si/pageuploads/DUNZMN_2013/DUNZMN_2014/DUNZMN_2015/DUNZMN_2016/DUNZMN_2017/odlocitve_julij_2017.xls> (accessed 1 Aug 2017).

Applications for international protection in Slovenia									
Year									
	Number of applications								
		Claims for repeated procedure							
			Number of repeated procedures						
				Number of resolved issues					
					Status approved				
						Application denied			
							Procedure suspended		
								Application repudiated (procedural reasons)	
									Safe third country
									Migrant crisis
1995	6	-	-	17	2	4	10	1	-	
1996	35	-	-	26	0	0	5	21	-	
1997	72	-	-	51	0	8	15	28	-	
1998	337	-	-	82	1	27	13	41	-	
1999	744	-	-	441	0	87	237	117	-	
2000	9,244	-	-	969	11	46	831	0	81	
2001	1,511*	-	-	1,0042	25	97	9,911	9	0	
2002	640	-	60	739	3	105	619	12	0	
2003	1,101	35	45	1,166	37	123	964	17	25	
2004	1,208	35	70	1,125	39	317	737	20	12	
2005	1,674	77	160	1,848	26	661	1,120	38	3	
2006	579	61	339	901	9	561	228	43	0	
2007	434	39	56	576	9	276	238	53	0	
2008	260	18	52	325	4	145	164	12	0	
2009	202	15	22	228	20	89	96	23	0	
2010	246	35	31	239	23	55	120	27	14	
2011	358	51	19	392	24	78	177	40	73	
2012	304	43	21	328	34	75	110	57	52	
2013	272	31	23	374	37	82	177	59	19	
2014	385	27	23	360	44	51	216	49	0	
2015	277	18	22	265	46	87	89	44	0	141
2016	1,308	7	44	1,136	170	96	621	249	0	1,184
2017	723	13	30	744	104	65	352	223	0	0

II. Political and public debate

The public and political debate has focused on several issues. The first topic was the location of a future mosque as part of the Islamic cultural centre, which is situated in the centre of Ljubljana and is in the final stage of completion. The main financing

for the erection of the Islamic cultural centre was provided by Qatar, which has raised public concerns due to possible radicalisation. It is worth mentioning that the majority of Muslims living in Slovenia immigrated from Bosnia and Herzegovina and from other republics of the former Socialist Federative Republic of Yugoslavia after World War II.

After the Paris attacks on 13 November 2015, the largest opposition political party (Slovenian Democratic Party, SDS) proposed an amendment to the Protection of Public Order Act that would have prohibited the wearing of a burka or niqab in public. The ruling coalition rejected the draft bill. Debates on this topic were discontinued. A short public debate took place on an alleged terrorist training meeting (in April 2014) at a location near Ljubljana. The main concern of the public and the core of the public debate were focused on the effects of uncontrolled waves of migrants in 2015 and 2016. Spontaneous public gatherings occurred in several towns and villages in border areas. In October 2015, some migrants set 27 tents on fire at the Brežice Migrant Accommodation Centre, which raised serious concerns about public safety.

III. Legal and political framework

1. Definitions

Terms such as 'extremism', 'fundamentalism', 'religious radicalisation', 'extremist behaviour' and 'extremist literature' are not well-defined in Slovenian legislation. The social phenomena described by the above-mentioned terms are, from the legal perspective, first addressed by a special constitutional prohibition of incitement to discrimination and intolerance and prohibition of incitement to violence and war.

Article 63 of the Constitution of the Republic of Slovenia (1991)[7] declares:

> 'Any incitement to national, racial, religious or other discrimination, and the inflaming of national, racial, religious or other hatred and intolerance are unconstitutional.
> 'Any incitement to violence and war is unconstitutional'.

This constitutional provision, which regulates —although not *expressis verbis*— hate speech does not explicitly enumerate all social phenomena or acts that fall under the provision of Article 63 of the Constitution and should be considered as a breach of a constitutional norm. However, it does impose a prohibition on the following three forms of freedom of expression: 1. incitement to national, racial, religious or other discrimination; 2. inflaming of national, racial, religious or other hatred; and 3. incitement to violence and war. These three forms of public expression are considered morally unacceptable[8]. Accordingly, Article 3 of the Religious Freedom Act 2007

[7] The Constitution of the Republic of Slovenia - 1991 [Ustava Republike Slovenije], Uradni list RS Nos. 33/91-I, 42/97, 66/00, 24/03, 69/04, 69/04, 69/04, 68/06, 47/13 and 47/13.

[8] See J. Letnar Černič, 'Dopolnitev komentarja 63. člena Ustave RS (prepoved spodbujanja k neenakopravnosti in nestrpnosti ter prepoved spodbujanja k nasilju in vojni)' in L. Šturm (ed), *Komentar*

(RF Act)[9] explicitly prohibits any incitement to religious discrimination, inflaming of religious hatred and intolerance (para 1) and any direct or indirect discrimination on the basis of religious belief, expression or exercise of such belief (para 2).[10]

2. Legislation

The state has a general duty to guarantee religious freedom in private and public life and to prevent violations thereof (Article 3 RF Act). Freedom of church activities is one of the basic principles of the RF Act, which in Article 6 guarantees free activities of churches and other religious communities regardless of whether they are registered or not. However, there are some important legal requirements. Their activities must be in accordance with the legal order and known to the public and must not be in conflict with public order or morals. For major violations of these requirements, the RF Act introduced a rapid administrative procedure, initiated by the state prosecutor, that enables judicial prohibition of the activities of a church or a religious community (Article 12). Such judicial prohibition is possible if a church or a religious community commits a serious violation of the Constitution: incites people to national, racial, religious or other inequality, to violence or war; or inflames national, racial, religious or other hatred or intolerance or persecution (para 1); or if its purpose, objectives or the manner in which it carries out religious instructions, its religious mission, religious rites or some other activity is based on violence or uses violent forms, threatens the life or health or other rights and freedoms of church members or members of another religious community or other people in a manner that seriously violates human dignity (para 2).

In 2016, Slovenia's parliament passed the Protection Against Discrimination Act, which, in a more detailed manner, regulates direct, indirect and other forms of discrimination (Articles 6 and 7) and established an independent institution called the Advocate for the Principle of Equal Treatment[11].

The most violent acts of extremism, fundamentalism, religious radicalisation, extremist behaviour, extremist literature etc. are subject to incrimination by criminal

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Ustave Republike Slovenije; Dopolnitev-A (Commentary on the Constitution of the Republic of Slovenia - Supplement-A). (Ljubljana, Fakulteta za podiplomske državne in evropske študije, 2011), pp. 951 -957.

[9] Religious Freedom Act [Zakon o verski svobodi], Uradni list RS No. 14/2007 - No. 40/2010 (most recent amendment).

[10] Exceptionally, a difference of treatment on the basis of religious belief in employment and work of religious and other employees of churches and other religious communities does not constitute discrimination if, due to the nature of a professional activity in churches and other religious communities or due to the context in which it is carried out, religious belief constitutes a major legitimate and justifiable professional requirement in respect to the ethics of churches and other religious communities (Article 3(3) RF Act).

[11] Protection Against Discrimination Act [Zakon o varstvu pred diskriminacijo], Uradni list RS No. 33/16.

law. In the new Criminal Code, which was enacted in 2008, the legislature introduced the criminal offence of public incitement to hatred, violence or intolerance, which is enshrined in the provisions of Article 297 that read as follows:

> '(1) Whoever publicly provokes or stirs up ethnic, racial, religious or other hatred, strife or intolerance, or provokes any other inequality on the basis of physical or mental deficiencies or sexual orientation, shall be punished by imprisonment of up to two years.
>
> (2) The same sentence shall be imposed on a person who publicly disseminates ideas of the supremacy of one race over another or provides aid in any manner for racist activity or denies or diminishes the significance of, approves, disregards, makes fun of, or advocates genocide, the Holocaust, crimes against humanity, war crime, aggression, or other criminal offences against humanity.
>
> (3) If an offence under the preceding paragraphs is committed by publication in the mass media, the editor or the person acting as the editor shall be sentenced by imposing the punishment referred to in paragraphs 1 or 2 of this article unless it was a live broadcast and they were not able to prevent the actions referred to in the preceding paragraphs.
>
> (4) If an offence under paragraphs 1 or 2 of this article is committed by coercion; mistreatment; endangering security; desecration of national, ethnic or religious symbols; damaging the movable property of another person; desecration of monuments or memorial stones or graves, the perpetrator shall be punished by imprisonment of up to three years.
>
> (5) If the acts under paragraphs 1 or 2 of this article are committed by an official by abusing their official position or rights, they shall be punished by imprisonment of up to five years.
>
> (6) Material and objects bearing messages from paragraph 1 of this article, and all devices intended for their manufacture, multiplication and distribution, shall be confiscated or their use disabled in an appropriate manner'.

In July 2017, a new crime of travelling abroad for the purpose of terrorism was added to the Criminal Code (Article 108.a). The Slovenian authorities have arrested one Slovenian national who was radicalised and involved in terrorist activities abroad.

Other acts that are inspired by religious extremism, fundamentalism and radicalisation might constitute a minor offence, which is governed by the Protection of Public Order Act[12].

According to Article 31 of the International Protection Act,[13] one of the reasons for not approving an individual's status as a refugee is the existence of justified reasons that indicate that the applicant presents a danger to the safety of the Republic of Slovenia (para 1). Concerning an application for subsidiary protection, the statute in a similar way determines that an application will be denied if the applicant has committed major crimes (Article 31).

[12] Protection of Public Order Act [Zakon o varstvu javnega reda in miru], Uradni list RS No. 70/06.

[13] Article 31 of the International Protection Act [Zakon o mednarodni zaščiti], Uradni list RS No. 16/17 - officially consolidated text.

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

The regulation of the mass media is of great importance for assuring the use of freedom of expression within the framework of the Constitution. Article 6 of the Media Act 2006[14] provides basic rules for all activities by the mass media: they have to be based on freedom of expression, the inviolability and protection of human personality and dignity; the free flow of information; openness to different opinions and beliefs and to diverse content; the autonomy of editorial personnel, journalists and other authors/creators in creating programmes in accordance with programme concepts and professional codes of behaviour; and the personal responsibility of journalists, other authors/creators of content and editorial personnel for the consequences of their work. However, the Media Act also introduced some important limitations on the freedom of expression by prohibiting the dissemination of programme content that encourages ethnic, racial, religious, sexual or other discrimination, violence and war, or that incites racial, sexual, religious or other hatred and intolerance (see Article 8). Article 9 of the Audiovisual Media Services Act[15] similarly prohibits any incitement to national, racial, religious, gender or other discrimination; incitement to national, racial, religious or other hatred; incitement to violence and war and acts that would violate human dignity. According to Article 47(3) of the Media Act, advertising in public media may not encourage religious discrimination or religious intolerance or offend religious beliefs. The Ministry of Culture (the Culture and Media Inspectorate of the Republic of Slovenia) and the Agency for Communication Networks and Services of the Republic of Slovenia[16] are the oversight bodies that bear responsibility for the implementation of media legislation.

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

In 2012, the Slovenian parliament adopted the Resolution on a National Plan on Preventing and Combating Crime for the period between 2012 and 2016, which has not been renewed or replaced by a new resolution.

Slovenia takes an active part in the operations of the Radicalisation Awareness Network (RAN) and has established a Slovenian RAN platform. Within the Brdo process initiative (in June 2014), Slovenia launched a project called 'FIRST LINE Practitioners Dealing with Radicalisation Issues - Awareness Raising and Encourag-

[14] Media Act 2006 [Zakon o medijih]; Uradni list RS No. 110/06, 36/08 - ZPOmK-1, 77/10 - ZSFCJA, 90/10 - odl. US, 87/11 - ZAvMS, 47/12, 47/15 - ZZSDT, 22/16 and 39/16.

[15] Audiovisual Media Services Act [Zakon o avdiovizualnih medijskih storitvah -ZAvMS], Uradni list RS No. 87/11 and 84/15.

[16] 'About AKOS', Agencija za komunikacijska omrežja in storitve Republike Slovenije, 1 October 2017 <https://www.akos-rs.si/about-akos> (accessed 1 Oct 2017).

ing Capacity Building in the Western Balkan Region' (the project covered the period from 15 January 2016 until 14 January 2018) and also organised several events (conferences, expert meetings, etc.). The aim of the project, which involved several EU member states and Western Balkan states, was to boost EU security by managing various threats stemming from the Western Balkan region.

Otherwise, there are no specific state recommendations or policies that tackle radicalisation and extremism with the exception of a programme that provides a wide range of information to all foreigners who wish to enter Slovenia[17].

One should mention that the Interior Ministry co-funded an integration project (prepared by Ljubljana University's Faculty of Arts, Faculty of Medicine and Faculty of Health Sciences), the Public Health Institute and the Medical Chamber, which produced a manual for health workers that consists of Slovenian-English-French, Slovenian-Russian-Chinese, Slovenian-Arabic-Farsi and Slovenian-Albanian versions[18].

IV. Effects of the measures on religious freedom

It is very difficult to provide information about the effects of the legislative framework and policies tackling radicalisation and extremism on individual religious freedom and on the religious freedom of religious communities and their affiliated institutions without specific empirical research.

In Slovenia, the legislative framework will gradually become more restrictive and will increase the amount of state power and control. This effect can be expected in the implementation of the Schengen acquis.

In the future, some provisions of the Slovenian Education Law could be challenged (see Sections 5.2 and 5.3 below). Slovenian policies tackling radicalisation and extremism will first have to be well developed before they can be evaluated.

V. Educational measures to tackle radicalisation and extremism

1. Laws, Policy and Programmes

The Slovenian Law on Education consists of several statutes, but the most interesting provision that is related to the freedom of education and freedom of religion is Article 72 of the Education Act, which prohibits any denominational activity in public schools and preschools. In this way, school autonomy is determined more by

[17] See 'Informacije za tujce', Ministrstvo za notranje zadeve Republike Slovenije, 1 Jul 2017 <Http://www.infotujci.si/index.php?setLang=EN> (accessed 1 Jul 2017).

[18] See U. Lipevec Čebron (ed), N. Hirci … [et al.], 'Multilingual health - Večjezični priročnik za lažje sporazumevanje v zdravstvu', *Ministrstvo za notranje zadeve, Filozofska fakulteta, Medicinska fakulteta, Zdravstvena fakulteta Univerze v Ljubljani ter Nacionalni inštitut za javno zdravje and Zdravniška zbornica Slovenije*, 1 Jul 2017 <http://multilingualhealth.ff.uni-lj.si/> (accessed 1 Jul 2017).

the exclusion of religion from the domain of public education than by other principles[19]. The 'Declaration on promoting citizenship and the common values of freedom, tolerance and non-discrimination through education'[20], adopted in Paris on 17 March 2015, is an important initiative for combating radicalisation and extremism within the EU. Analysis by the Education, Audiovisual and Culture Executive Agency, which has tried to provide an overview of education policy developments in EU countries following the adoption of the Paris Declaration, did not include Slovenia. However, it does mention that Slovenia, on the one hand, introduced important measures in the years just before the adoption of the Paris Declaration, but, on the other hand, did not develop a new education policy afterwards[21]. Since the measures are mainly part of the school curriculum (e.g. the class subject Civic and Homeland Education and Ethics)[22], one might claim that Slovenia does not have a fully developed education policy agenda that could implement the main goals of the Paris Declaration[23]. One should stress that the subject Civic and Homeland Education and Ethics does provide

[19] See more in B. Ivanc, Blaž, 'Religion and Law in Slovenia' in R. Torfs (ed), *International Encyclopaedia of Laws, Religion* (Alphen aan den Rijn, Kluwer Law International, 2015), p. 147.

[20] European Union Council of Ministers for Education, 'Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education', Informal Meeting of European Union Education Ministers, 17 Mar 2015, <http://euroclio.eu/wp-content/uploads/2016/04/citizenship-education-declaration_en.pdf> (accessed 3 Jul 2017).

[21] See European Commission/EACEA/Eurydice, Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education: Overview of education policy developments in Europe following the Paris Declaration of 17 March 2015 (Luxembourg, Publications Office of the European Union, 2016), p. 4, <https://publications.europa.eu/en/publication-detail/-/publication/ebbab0bb-ef2f-11e5-8529-01aa75ed71a1> (accessed 15 Jul 2017).

[22] See A. Štrukelj (ed), P. Karba … [et al.], Učni načrt. Program osnovna šola. Državljanska in domovinska vzgoja ter etika. (Ljubljana: Ministrstvo za šolstvo in šport : Zavod RS za šolstvo, 2011), p. 22. <http://www.mizs.gov.si/fileadmin/mizs.gov.si/pageuploads/podrocje/os/prenovljeni_UN/UN_DDE__OS.pdf > (accessed 15 Jul 2017).

[23] The main goals of the Paris Declaration are the following: '1. Strengthening the key contribution which education makes to personal development, social inclusion and participation, by imparting the fundamental values and principles which constitute the foundation of our societies; 2. Ensuring inclusive education for all children and young people which combats racism and discrimination on any ground, promotes citizenship and teaches them to understand and to accept differences of opinion, of conviction, of belief and of lifestyle, while respecting the rule of law, diversity and gender equality; 3. Strengthening children's and young people's ability to think critically and exercise judgement …; 4. Combating geographical, social and educational inequalities, as well as other factors which can lead to despair and create a fertile ground for extremism, …; 5. Encouraging dialogue and cooperation among all the education stakeholders …; 6. Empowering teachers so that they are able to take an active stand against all forms of discrimination and racism …' See European Union Educational Ministers, 'Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education', European Council, 17 Mar 2015 <http://cache.media.education.gouv.fr/file/01_-_janvier/79/4/declaration_on_promoting_citizenship_527794.pdf> (accessed 24 Oct 2018).

appropriate information and instructions about the role and importance of human rights and freedoms in a free, democratic and pluralistic society.

There are no special state educational programmes in place to tackle radicalisation and extremism, but one should mention that the Institute of Criminology at the Faculty of Law in Ljubljana runs a project called 'NasVIZ systematic approach to peer violence in educational institutions' that tackles violence among adolescents.[24]

2. **Autonomy of Religious Schools**

The autonomy of religious schools is related to a set of constitutional provisions: the general right to religious freedom (Article 41), the principle of state-church separation and autonomy of churches and religious communities (Article 7), the right to conscientious objection (Article 46) and assurance of the freedom of education (Article 57). Thus, the state bears important positive obligations and is obliged to refrain from undue interference with the freedom of education and to observe its neutrality. In relation to religious schools, the state also has a duty to create the necessary legal framework for their establishment, and it must enable their free operation and must recognise the public validity of an education obtained from private schools if they have been registered and their educational programme has been publicly recognised by the Ministry of Education. The state has no supervisory role over non-registered private religious schools.

In 2017, only six of 452 primary schools (not including their branches) were private schools with a publicly acknowledged programme and six of 132 upper secondary schools were private secondary schools[25]. In general, Slovenia has a very small number of private primary and secondary schools in comparison with the number of public schools.

One should mention the intentions or attempts to establish two Muslim primary schools in Slovenia. One school is planned to be established by the Islamic Commu-

[24] The institute published three very useful manuals on peer violence. See M. Muršič et al, *Osnove sistemskega pristopa k medvrstniškemu nasilju in evalvacija projekta NasViz - Priročnik št. 1* (Ljubljana, Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani, 2016), p. 58, <http://nenasilje.inst-krim.si/images/prirocnik_1.pdf > (accessed 2 Jul 2017); M. Muršič, I. Klemenčič and K. Filipčič (eds), I. Klemenčič, A. Jerina, E. Karajić, A. Kuhar and A. Molan, *Preventivne dejavnosti sistemskega pristopa k medvrstniškemu nasilju v VIZ* - Priročnik št. 2 (Ljubljana, Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani, 2016), p. 108. <http://nenasilje.inst-krim.si/images/prirocnik_2.pdf > (accessed 2 Jul 2017); and M. Muršič, I. Klemenčič, K. Filipčič (eds), I. Klemenčič, E. Karajić and S. Sitar, *Obravnavanje medvrstniškega nasilja v VIZ - Priročnik št. 3* (Ljubljana, Inštitut za kriminologijo pri Pravni fakulteti v Ljubljani, 2016), p. 56. <http://nenasilje.inst-krim.si/images/prirocnik_3.pdf > (accessed 2 Jul 2017).

[25] 'Evidenca zavodov in programov', Ministrstvo za izobraževanje, znanost in šport, <https://paka3.mss.edus.si/registriweb/ZavodiPodrobno.aspx> (accessed 1 Aug 2017).

nity in Slovenia and would operate as part of the Islamic cultural centre in Ljubljana (which is still under construction).

In 2017, the Adriatik Muslim primary school and kindergarten (Vrtec Pikica), established by the Adriatik private educational centre, and the Ambra language school failed to obtain public registration of their programmes[26].

3. Rights of Children and Parents

Article 41(3) of the Constitution states that 'parents have the right to provide their children with a religious and moral upbringing in accordance with their beliefs', and determines that 'the religious and moral guidance given to children must be appropriate to their age and maturity, and be consistent with their free conscience and religious and other beliefs or convictions'. However, the legislation on education lacks provisions that would exhaustively regulate the way this constitutional freedom is assured in the schooling system. The fact that the Slovenian Law on Education does not regulate special educational measures that are aimed at tackling radicalisation or extremism may also partially be related to the strict exclusion of religion from the sphere of public education. This approach makes the school space non-transparent and does not enable efficient measures or policies that could combat radicalisation and extremism. Religious instruction may not take place in public schools.

VI. Conclusion

One could claim that Slovenia is a small EU country that has not been directly affected by radicalisation or extremism. This might be one of the reasons for the rather slow changes in its legislation, policies and recommendations that tackle radicalisation and extremism. Existing laws need to be supplemented not just in order to better define the above-mentioned violent phenomena, but also to promote religious tolerance and to enhance various instruments for the prevention of radicalisation and violent extremism. The Education Act should be supplemented in order to better protect and promote religious freedom.

[26] See T. Anžlovar, 'Turški zavod ne more odpreti vrtca in osnovne šole', *MMC RTV SLO, Televizija Slovenija*, 24 May 2017 <https://www.rtvslo.si/slovenija/turski-zavod-ne-more-odpreti-vrtca-in-osnovne-sole/423213> (accessed 1 Aug 2017).

THE INFLUENCE OF PUBLIC SECURITY CONCERNS ON THE FREE EXERCISE OF RELIGION: THE LIMITS OF STATE CONTROL IN THE SPANISH EXPERIENCE

Santiago Cañamares[1]

I. Introduction

According to the Institute for National Statistics, there are more than 46.4 million people living in Spain, approximately 10% of whom are immigrants[2]. The largest immigrant communities come from Eastern Europe (Romania) and the Maghreb (Morocco).

There are no official statistics about religion in Spain, mainly because Article 16.2 of the Spanish Constitution states that 'no one may be compelled to make statements regarding his religion, beliefs or ideologies'. However, the Centre for Sociological Research, which is a public national agency, regularly publishes the results of surveys that include questions about religion or belief. According to one of the latest (February 2017), almost 70% of the Spanish population declare themselves to be Roman Catholics. Because of this, Spain is considered, in many respects, a Catholic country from a sociological point of view. In fact, many Catholic religious traditions and festivities can be identified in different aspects of public and political life.

In contrast, the percentage of people belonging to other religious denominations is quite low, only 2.3% of the population. For the most part, they are Muslim, followed by Protestants and adherents of the Orthodox Church. It is undisputed that immigration has played an important role in increasing the number of people identifying with religions other than Catholicism. This phenomenon is particularly clear when it comes to the Islamic faith and other Christian denominations like Orthodox and

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[2] These data, which were made public in December 2016, are accessible on the Institute's website: <http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176951&menu=ultiDatos&idp=1254735572981> (accessed 1 Oct 2018).

Protestant churches. Finally, it is also important to highlight that 15% of the Spanish population describe themselves as non-believers and 9% as atheist[3].

Setting aside the sociological background of religion and before focusing on how the protection of public security may be interfering with the free exercise of religion, it should be highlighted that in the terrorist attacks that, since 2001, have been hitting different Western countries there is a clear connection between religion and violence insofar as they are claimed by terrorist groups seeking to impose Islamic law on the West. In Spain, the first attack of this type took place in Madrid in 2004, when the terrorist organisation Al-Qaeda exploded bombs on several commuter trains. This attack made the Spanish authorities aware of a new kind of terrorism that was spreading very rapidly across Europe and other Western countries. Nowadays, these actions are being claimed by another terrorist organisation known as the Islamic State.

At the same time, it is undeniable that there is a trend in Western societies of seeing Islam as violent despite the fact that all religions are susceptible to fundamentalist visions that can degenerate into violence because some adherents of them all religions still consider it legitimate to kill in the name of God[4].

In any event, the fight against jihadist terrorism is what has led Western countries to amend their criminal legislation in order to combat this global phenomenon more effectively. In the Spanish case, this new type of terrorism has very different characteristics and aims than the terrorism perpetrated during a period of more than 40 years by the terrorist organisation ETA, whose goal was the independence of a part of the national territory (and of part of France as well). Consequently, there was a need to fit the profiles of global terrorism into those existing legal remedies that had proved effective over many decades in combating domestic terrorism. Following recommendations adopted by international organisations, various amendments were introduced to the Criminal Code to adequately punish certain new behaviours like self-indoctrination or the recruitment of new terrorist fighters through the media and social networks.

In certain cases, these laws have given rise to some concerns (even in those institutions fostering them) about their negative impact on the exercise of some fundamental rights, including religious freedom. This chapter will analyse the extent to which the Spain's new legislation and policies aimed at combating terrorism and Islamic-based extremism are affecting the constitutional balance between public security and the free exercise of religion.

[3] Centro de Investigaciones Sociológicas, 'Barómetro de Febrero 2017', p. 21: <http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/3160_3179/3168/es3168mar.pdf> (accessed 1 Oct 2018).

[4] S. Ferrari, 'Individual Religious Freedom and National Security in Europe after September 11', (2004) *Brigham Young University Law Review*, p. 360.

II. Constitutional framework

Article 16 of the Spanish Constitution (1978) enshrines freedom of religion of individuals and communities with no other restrictions in their external manifestations than those required for the protection of public order[5]. At the same time, Article 14 guarantees religious equality by stating that Spaniards are equal before the law and that no one can be discriminated against on grounds of religion or other protected characteristics such as age, race, sex, etc.

Regarding the free exercise of religion, the Spanish Constitutional Court has drawn a distinction between the internal and external dimension of this right by saying that the former 'guarantees the existence of an intimate cloister of beliefs and, therefore, a space of intellectual self-determination before the religious phenomenon, linked to one's personality and individual dignity'. On the contrary, the latter dimension allows individuals and groups to behave in accordance with their own convictions with full immunity from coercion by the State or any social groups and to act in accordance with their own convictions'[6].

When analysing the interaction between equality and the free exercise of religion, the Spanish Constitutional Court stated in its Judgment 22/1981 of 2 June 1981 that no kind of discrimination or differing legal treatment of individuals and groups is permissible on the basis of their ideology or belief[7]. Consequently, there should be an equal enjoyment of religious freedom for all, meaning that religious attitudes cannot justify any different legal treatment.

However, equality does not mean uniformity. As this court specified in its Judgment 34/1981 of 10 November 1981, the application of equality as a principle does not prevent public authorities from considering the distinct facts of every situation, which may necessitate divergent legal outcomes. Stated differently, 'equality is breached only when the different treatment lacks an objective and reasonable justification'. The existence of such justification must be assessed in light of the purpose and effects of the challenged disposition, by applying a proportionality test in relation to the means employed and the aim pursued.

[5] For a more detailed description of the Spanish legal sources on matters of law and religion, see I. C. Ibán, 'Spain' in G. Robbers and W.C. Durham (eds), *Encyclopedia of Law and Religion* (Leiden, Brill, 2016), pp. 391-396; and J. Martínez-Torrón, 'Religion and Law in Spain' in *International Encyclopedia of Laws: Religion* (The Netherlands, Kluwer Law Intl, 2013), pp. 33-45.

[6] See, generally, Constitutional Court Judgment 24/1982, 13 May 1982. Also see the Strasbourg doctrine drawn on this distinction. See *Kokkinakis v Greece* (1993) 17 EHRR 397, [33]; *Saniewski v Poland*, App no 40319/98 (ECHR, 26 Jun 2001).

[7] Constitutional Court Judgment 22/1981, 2 Jun 1981, at Fundamento jurídico 1 (hereinafter 'legal reasoning'). On this topic, see S. Cañamares, 'Religious Freedom and Religious Discrimination in Spain. Some Discussed Cases' (2011) *Religion - Staat - Gesellschaft* 12, pp. 193-208.

The content of Article 16 of the Spanish Constitution was developed by the Organic Law on Religious Freedom[8], which enumerates, in a non-exhaustive way, certain inherent faculties of the individual and collective dimensions of religious freedom. One remarkable aspect of this framework is that it harmonises the constitutional reference to public order as the only permissible limitation on the free exercise of religion, with the other possible limitations referred to in international texts on human rights. More precisely, Article 3 states that the public freedoms and fundamental rights of others, public safety, health and morality are elements that constitute the public order ensured by law in democratic societies[9].

It is important to note that the Constitutional Court contended in its Judgment 41/2001 of 15 February 2001 that public order cannot be interpreted as a preventive clause to avoid all possible risks deriving from the free exercise of religion, because this approach would become in itself a serious danger to the exercise of religious freedom. Thus, interpreting this limitation in light of the general principle of liberty, which inspires the entire constitutional system, leads to the conclusion that any risk to public security, health and morals has to be proved to judicial satisfaction before the free exercise of religion can be restricted[10].

Focusing on public security as a limitation on the free exercise of religion, it is worth clarifying that, according to Spanish jurisprudence, this concept refers to any activity aimed at the protection of individuals and goods and at the maintenance of peace and civic order[11]. Thus, it is closely linked to the action of the state security forces. In this field, the relevant regulation is Organic Law 4/2015 of 30 March 2015

[8] Law 7/1980 on Religious Freedom, 5 July 19980. The text of this organic law was published in Spain's official gazette (*BOE*) on 24 July 1980, <http://www.boe.es/boe/dias/1980/07/24/pdfs/A16804-16805.pdf> (accessed 1 Oct 2018). According to Article 81 of the Spanish Constitution, organic laws are those relating to the development of fundamental rights and public liberties, those approving the statutes of autonomy and the general electoral system and other laws provided for in the Constitution. The approval, amendment or repeal of organic laws requires the overall majority of the members of congress in a final vote on a bill as a whole.

[9] Article 3.2 of the Organic Law on Religious Freedom reads as follows: 'the rights [deriving] from the freedom of worship and religion cannot be exercised to the detriment of the rights of others to [practise] their fundamental rights and freedoms or of public security, health and morals, elements which constitute the public order protected by [law] in democratic societies'.

[10] However, the court allowed the preventive use of the public order exception with regard to regulating the action of sects where the dignity of individuals, their fundamental rights and the free development of their personality may be seriously impaired. In these cases, religious freedom can be limited directly by the administration, provided that the measure is aimed at safeguarding one of the compelling interests contained within the concept of public order, provided that the elements of the risk are duly assessed and that the restriction is proportionate and adequate to the goals pursued.

[11] According to the Constitutional Court's doctrine, the notion of public security refers to the protection of individuals and goods and to the maintenance of peace and public order, encompassing a number of activities —different in nature and content— on behalf of public bodies that are not limited to

on the security of citizens[12], which states in Article 4.3 that when public security is involved, the intervention of security forces is only justified in case of a specific threat or action likely to cause a real prejudice to individual and collective rights or that may alter the normal operation of public institutions.

Lastly, a brief reference should be made to freedom of expression, enshrined in Article 20 of the Constitution, as it is considered one of the fundamental rights that can be most deeply interfered with by the measures adopted to combat violent extremism and terrorism.

Freedom of expression is widely recognised in the Spanish legal system. In fact, the Constitutional Court has affirmed that this freedom cannot be restricted when used to disseminate ideas or opinions that are contrary to the very essence of the Constitution unless such ideas or opinions effectively damage rights or interests of constitutional relevance. In the court's view —unlike what happens in other Western legal systems— the Spanish Constitution has not established a model of 'militant democracy' that requires not only respect but also positive adherence to the Constitution's values and principles[13].

At this point, it is important to bring up the Constitutional Court judgment 235/2007 of 7 November 2007, warning that the constitutional system does not criminalise the mere transmission of ideas, even when they are truly execrable or contrary to human dignity, unless they effectively impair rights of constitutional relevance[14]. Because freedom of expression is not absolute, the constitutional recognition of human dignity in Article 10 of the Constitution provides the framework for this fundamental right to be exercised. More precisely, according to Article 20.4 of the Constitution, freedom of speech is limited by the protection of fundamental rights, especially the rights to honour, to privacy, and to one's own image and the protection of youth and childhood. Therefore, freedom of expression cannot provide protection for 'hate speech', i.e. for any discourse that involves incitement to violence against individuals or groups because of some characteristics that they share.

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those assumed by the police but covering others of an administrative range. See, generally, Constitutional Court Judgment 235/2001, 13 Dec 2001, at Fundamento jurídico sexto (legal reasoning) 6.

12 See *BOE*, 31 March 2015, <https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3442.pdf> (accessed 1 Oct 2018).

13 See Constitutional Court Judgment 48/2003, 13 March 2003.

14 See Constitutional Court Judgment 235/2007, 7 November 2007, legal reasoning 4.

III. Religious freedom and public safety

1. Legislation *Expressis Verbis* Adopted to Tackle Radicalisation and Extremism

United Nations Security Council Resolution 2178 (2014)[15] expressed concern about the intensification of terrorist activity and urged member states to counteract violent extremism (including radicalisation and recruitment and mobilisation of individuals into terrorist groups or becoming foreign terrorist fighters) since it can be conducive to terrorism.

Following this and other international resolutions[16], the Spanish National Parliament passed the Organic Law 2/2015 of 30 March 2015, amending the Criminal Code to combat new forms of terrorism. Its explanatory memorandum reflects on the profiles of jihadist terrorism, which operate through charismatic leaders who spread their messages and slogans online, particularly on social networks, with the intention of provoking terror among the population and calling on its adherents to carry out attacks.

The criminal law does not provide definitions of 'radicalisation', 'extremism', or 'fundamentalism'. As the jurisprudence has not provided any guidance on these concepts, they must be understood according to their commonly accepted definitions. The Criminal Code provides a rather broad definition of terrorism in Article 573, as it declares that numerous offences become terrorist crimes when committed with the intention of subverting the constitutional order, destabilising the state's institutions, compelling the public authorities to perform or refrain from performing a particular act, altering the public peace, destabilising the normal operation of an international organisation or provoking terror among the population or a part thereof.

Beyond this new definition of terrorism, Organic Law 2/2015 amended Article 575 of the Criminal Code, creating the new offences of self-indoctrination and military or combat training. This provision holds criminally liable those who participate in the process of being indoctrinated into terrorism with the intention of committing terrorist attacks. This can include receiving information from others or acting independently, in particular by accessing, on a regular basis, any material available online or other accessible communication services that is deemed adequate to incite recipients to join a terrorist organisation or to collaborate with it in order to achieve its ends[17]. The same penalties apply to those who acquire or possess any documents or

[15] Text available at: <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29> (accessed 1 Oct 2018).

[16] See Framework Decision 2002/475/JHA, as amended by Framework Decision 2008/919/JHA.

[17] Article 571 of the Criminal Code defines a terrorist organisation as any group of a stable or indefinite nature consisting of more than two people who, in a coordinated fashion, carry out various actions aimed at the commission of any terrorist offence. It also defines a terrorist group as the union of two or more people in order to commit terrorist crimes.

materials whose content is aimed at promoting integration into terrorist organisations or collaboration with their ends.

Using the same wording as the European Directive 2015/849, which was passed a few days after Organic Law 2/2015 entered into force[18], Article 576 criminalises the financing of terrorism, punishing those who by any means, directly or indirectly, collect, acquire, possess, use, convert, transmit or carry out any activity with goods or values of any kind with the intention of being used, or knowing that they will be used, in whole or in part, to commit any terrorist action.

Similarly, Article 577 criminalises any form of collaboration with terrorist organisations or groups in order to commit these kinds of actions, in particular through the provision of technological services and the organisation of military training. As a specific form of collaboration with these organisations, this article also punishes the indoctrination of others, imposing liability on anyone who, not being a member of a terrorist group, carries out any activity for the recruitment, indoctrination or training of those who are willing to join a terrorist organisation or to take part in terrorist actions.

Finally, Article 578 outlaws publicly praising or justifying terrorist crimes or of those individuals who participate in their commission, as well as the performance of acts that discredit, show contempt for, or humiliate the victims of terrorism or their relatives. It is worth mentioning that penalties become more severe when these actions are carried out via the media, online or through other channels of electronic communications, and when they are sufficiently robust as to seriously disturb the public peace or to create a serious feeling of insecurity or fear within society or a part thereof.

2. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

A. *At the National Level*

Framework Decision of the Council of the European Union 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[19] urged member states to take the necessary measures to adequately punish the incitement of violence or hatred against individuals or groups based on race, religion, national or ethnic origin and other characteristics like sex, sexual orientation, etc. On the basis of this document, the Spanish Parliament passed Organic

[18] EU Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. Official Journal of the European Union of 5 June 2015, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=EN> (accessed 1 Oct 2018).

[19] Official Journal of the European Union of 6 December 2008. Text available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF> (accessed 1 Oct 2018).

Law 1/2015 of 30 March 2015, amending the regulation of hate speech and incitement to violence embedded in the Criminal Code.

This Organic Law broadened the scope of this crime by giving a new wording to Article 510 of the Criminal Code. In fact, the former regulation contained in this Article was more limited in its scope than the one enforced by Organic Law 1/2015 for a number of reasons: first, because it only identified criminal action with a provocation to discrimination, hatred or violence; second, it did not make an explicit reference to the indirect nature of the action of provocation. As a consequence, the judiciary, based on Article 18 of the Criminal Code, which defines 'provocation' as direct incitement to commit crimes[20], often decided that only direct provocation could amount to this crime. Lastly, the only possible victims of this offence were 'groups or associations', meaning individuals could not be considered as victims under the previous regulation.

In contrast, the new regulation no longer uses the term 'provocation' and instead criminalises any action directly or indirectly aimed at inciting hatred, hostility, discrimination or violence against not only groups or associations but also individuals on the basis of their race, ideology or religion, sexual orientation, etc. It also considers liable for this crime anyone who produces or possesses materials of any kind with the intention of distributing them to incite hatred against individuals or groups. In addition, it imposes criminal liability on those who harm the dignity of individuals by carrying out acts of humiliation or who justify crimes committed against them with a discriminatory action. Interestingly, in both cases, harsher penalties apply when these actions are committed online or through other social media platforms.

Setting aside the changes introduced in hate-speech crimes, it is worth mentioning that this Organic Law also amended Article 515 of the Criminal Code, which proscribes illegal associations. This regulation considers three types of illegal association: first, those whose purpose is to commit an offence or, once constituted, to promote the commission thereof; second, the so-called sects that, although pursuing legitimate ends (religious, spiritual, etc.), employ violent means or brainwash their members for the fulfilment thereof; finally, those associations that promote or incite, directly or indirectly, hatred, hostility, discrimination or violence against individuals, groups or associations by reason of their particular characteristics, such as ideology, religion or beliefs, etc.[21]

[20] See, generally, Supreme Court Judgment of 12 April 2011.

[21] See Judgment of the Trial Court of Palma de Mallorca of 10 December 2012, where a clear distinction is drawn between a political party's official discourse and statements made by certain members who decided to publish on the party's website a document inciting others to hatred against women. In the end, the party was not declared illegal since it was established to defend and foster political ideas that had nothing to do with incitement to hatred or with discrimination against certain groups.

B. *At the Local Level*

Some municipalities (most of which are in Catalonia) passed ordinances prohibiting the wearing of a full-face veil in order to protect public security and other compelling interests[22]. However, their existence proved short-lived since judicial rulings declared them illegal because, according to the Constitution, local entities have no competence to regulate the exercise of fundamental rights.

One of the best-known cases took place in the city of Lleida, which amended its local regulations to ban the wearing of such attire in public premises. It is interesting to note that these amendments were published in the province's official gazette under the heading of 'people's security'[23].

More precisely, this ordinance stipulated that the norms governing services and the use of buildings and municipal facilities may prohibit access to those wearing full-face veils, balaclavas, helmets or other clothing or accessories that prevent or make difficult the identification of, and visual communication with, people[24]. Such prohibitions were applicable to both service providers and users, although some exceptions were included for professional reasons connected with workplace health and safety and for traditional festivities or other good causes[25]. Additionally, it amended Article 21 of the Regulations on Passenger Transportation Service, stipulating that those wanting to use a transportation card to travel at a reduced price must identify themselves when so ordered by the staff of the transportation company. In other words, those who refuse to show their face to transportation officers cannot use these discount cards.

Initially, the Superior Court of Justice of Catalonia upheld the prohibition[26] when deciding an appeal filed by an association of Muslim women who argued that the general burqa ban breached their free exercise of religion. The court ruled that local entities are competent to rule on this issue and that the restriction of religious freedom was justified by the protection of public security and sex equality.

[22] Other local municipalities from Catalonia that passed similar ordinances include Tarragona, Lleida, Reus, El Vendrell, Manresa, L'Hospitalet de Llobregat, Mollet del Vallès and Martorell. In addition to this, other general bans have been approved in other Spanish regions, like Galapagar in the Community of Madrid and Coín in the province of Málaga.

[23] The text of the amended ordinance can be found in *Boletín Oficial de la Provincia de Lérida*, 13 November 2010, <https://www.paeria.es/arxius/ordenances/Document_476.pdf> (accessed 1 Oct 2018).

[24] See Article 57 of the Regulations of the Municipal Archive; Article 37 of the Regulations of Local Premises.

[25] In case of contravention, the ordinance set a number of penalties that included fines ranging from EUR 30 to EUR 600.

[26] Superior Court of Justice of Catalonia, Judgment of 7 June 2011.

Text available at: http://www.poderjudicial.es/search/indexAN.jsp (ROJ Number: STSJ CAT 5980/2011).

However, the Supreme Court, in its decision of 14 of February 2013[27], ruled that the local norm infringed the constitutional provision of Article 53, which states that the exercise of fundamental rights can only be regulated by law. Therefore, as the prohibition was considered a form of regulation, the local ordinance amounted to a violation of the free exercise of religion on the part of Muslim women[28]. Interestingly, the court considered valid the amendment of the Transportation System Regulation, as it was not, strictly speaking, a prohibition of, but rather a limitation on, the enjoyment of certain benefits for the legitimate purpose of preventing identity fraud. Put simply, this norm was considered constitutionally adequate, as it did not entail a regulation of the free exercise of religion.

Elaborating on the constitutionality of a national ban on full-face veil[29], the Supreme Court claimed that it would not be necessary to protect neither public safety nor public order since no risk associated with the use of this garment had ever previously been proven[30]. At this point, the judgment recalled the Constitutional Court doctrine according to which public order, as the only limit on religious freedom established in the Constitution, cannot be interpreted as a preventive clause against mere potential risks, because, in such circumstances, it becomes an inevitable risk to the exercise of this freedom.

In the court's view, social harmony does not constitute a legitimate interest to limit religious freedom. This claim was considered exclusively to rest on subjective perception or personal prejudices without any proven basis. Additionally, the court

[27] Text available at: http://www.poderjudicial.es/search/indexAN.jsp (ROJ Number: STS 693/2013). On this decision, see M. T. Areces, 'La prohibición del velo integral islámico, a propósito de la sentencia del tribunal supremo' (2013); V. Camarero, 'Análisis de la primera decisión del Tribunal Supremo respecto del velo integral: Sentencia 693/2013 , de 6 de febrero de 2013', *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* (2013); A. López-Sidro, 'Restricciones al velo integral en Europa y en España: la pugna legislativa para prohibir un símbolo'; C. Arenas, Corramos un tupido velo. A propósito de la sentencia del Tribunal Supremo de 14 de febrero de 2013 sobre el uso del burka', *Anuario de Derecho Eclesiástico del Estado*, (2014), pp. 101-146.

[28] The court also clarified that requiring a law passed by parliament to restrict the exercise of fundamental rights is not inconsistent with the doctrine of Strasbourg, as doing so allows infra-legislative norms to limit religious freedom as long as they are both accessible and foreseeable. This is because Article 53 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not diminish the guarantees established by domestic law for the protection of fundamental rights.

[29] Not only is there no rule in the Spanish legal system that prohibits the wearing of a full-face veil in public, but, conversely, there is a general provision in Organic Law 15/2015, on the security of citizens, that implicitly permits the wearing of such garments in the public arena.

[30] The European Court of Human Rights expressed the same reasoning in *SAS v France*, declaring that except in the context of a general threat, a blanket prohibition on wearing a full-face veil in public places to protect public security was a disproportionate measure that violated the right of religious freedom of the Muslim women. See ECtHR judgment in *SAS v France* App no 43835/11 (ECHR, GC, 1 Jul 2014). Also see the judgment in *Dakir v Belgium*, App no 4619/12 (ECHR, 11 Jul 2017).

warned that if public peace were ever really affected by the presence of the burqa, the role of public authorities in guaranteeing public order, peace and tolerance in a democratic society would not be to remove all elements of social tension but, as the European Court of Human Rights contended in *Sahin v Turkey*[31], to encourage competing groups to tolerate one another and to foster social cohesion[32].

3. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

A. *Alliance for Civilisations*

In 2005, Spain's Prime Minister, José Luis Rodriguez Zapatero, proposed before the General Assembly of the United Nations an initiative called the 'Alliance of Civilizations', which was based on the need to bridge the gap between Western societies and the Arab and Muslim world. It was aimed at preventing conflicts and promoting social cohesion by fostering international actions against extremism through intercultural and interreligious dialogue and cooperation[33].

A few years later, in 2008, the Spanish Government approved the National Plan for the Alliance of Civilizations, which was aimed at implementing various projects encouraging mutual understanding and respect for cultural diversity and the transmission of civic values and a culture of peace[34]. Considering that violent groups quite often use poverty and social inequalities to justify civilisational clashes, one of its main objectives was to fight against poverty, as it can lead to a feeling of hopelessness

[31] See *Leyla Sahin v Turkey*, App no 44774/98 (ECHR, GC, 10 Nov 2005), [107].

[32] The Supreme Court also rejected the argument that a blanket prohibition on full-face veils was required to protect the fundamental rights of others, as it was only intended to protect the rights of the Muslim women who wear these garments. Likewise, the prohibition was not necessary to guarantee equality of the sexes since women are free to choose their own attire according to their own culture, religion, worldviews, etc., and they have the necessary legal resources to respond to those who try to force them to wear a burqa when they do not agree to do so. See legal reasoning, 10.

[33] The United Nations Alliance of Civilizations was established in 2005, as the political initiative of former UN Secretary General Kofi Annan, and co-sponsored by the governments of Spain and Turkey. A High-level Group of experts was formed to explore the roots of polarisation between societies and cultures today and to recommend a practical programme of action to address this issue.

According to its report of 13 Nov 2006: 'the Alliance seeks to address widening rifts between societies by reaffirming a paradigm of mutual respect among peoples of different cultural and religious traditions and by helping to mobilize concerted action toward this end. This effort reflects the will of the vast majority of peoples to reject extremism in any society and support respect for religious and cultural diversity'.

See United Nations Alliance of Civilizations, *Report of High-level Group*, (13 November 2006), <https://www.unaoc.org/docs/AoC_HLG_REPORT_EN.pdfhttps://www.unaoc.org/docs/AoC_HLG_REPORT_EN.pdf> (accessed 11 Jul 2017).

[34] Ministerial Order, 21 Jan 2008, *BOE*, 23 Jan 2008.

or a sense of injustice and alienation, which, combined with certain political demands, can fuel extremism.

In 2010, the government approved a second national plan that had the same objectives as the former plan but paid more attention to security and terrorism concerns[35]. This second edition focused on the links between peace, security, socio-economic development, social integration and respect for human rights. Because of this, one of the objectives of the plan was to strengthen the free exercise of religion and the peaceful coexistence of different religious denominations, arguing that religions teach fundamental ethical principles in favour of peace, justice, equality of human beings and the defence of nature.

The approval of these plans was highly controversial because their goals and actions were considered quite insubstantial from the very beginning[36]. In fact, no relevant normative or political actions were taken at all to implement their objectives. Only a few administrative resolutions were passed regulating some requirements for the recruitment of certain military personnel and the funding of certain institutions to promote the principles and values of the Alliance of Civilizations[37].

B. *National Plan to Combat Violent Radicalisation*

In compliance with EU directives to combat radicalisation and violent extremism[38], the Spanish Government approved, in 2015, its National Strategic Plan to Combat Violent Radicalisation[39], creating a framework that engages different public administrations to uncover and respond to potential cases of radicalisation in a timely and coordinated fashion. It assumes that radicalisation is one of the main risks to national security, so it aims to bring together all the necessary resources to combat violent extremism by creating new instruments of early detection. The plan focuses action on those communities, groups or individuals who are at risk of being radicalised.

The plan distinguishes three areas of action: internal, external and cyberspace. In the area of internal action, the government seeks the social integration of groups

[35] Ministerial Order, 20 May 2010, *BOE*, 22 May 2010.

[36] A. López-Sidro, 'El papel del Estado en el diálogo interreligioso: alianza de civilizaciones y libertad religiosa, Ius et Iura. Escritos de Derecho Eclesiástico y de Derecho Canónico en honor del Profesor Juan Fornés (Granada, Editorial Comares, 2010), pp. 626-629.

[37] Royal Decree 1551/2005, 23 Dec 2005.

[38] The European Union Counter-Terrorism Strategy, 30 Nov 2005, <http://register.consilium.europa.eu/doc/srv?f=ST+14469+2005+REV+4&l=en> (accessed 1 Oct 2018).

Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism, <http://data.consilium.europa.eu/doc/document/ST-9956-2014-INIT/en/pdf> (accessed 1 Oct 2018).

[39] See Plan Estratégico Nacional de Lucha Contra La Radicalización Violenta, <http://www.interior.gob.es/documents/642012/5179146/PLAN+ESTRAT%C3%89GICO+NACIONAL.pdf > (accessed 1 Oct 2018).

at risk by instilling respect for diversity and non-discrimination and by fostering knowledge of the identity, tradition and culture of each social group. At the same time, one of the aims of the plan is to disseminate across these groups the values, rights and duties enshrined in the Constitution, in particular those related to the protection of ideological and political pluralism and democratic diversity, in order to build up a framework of respect for diversity and for freedom of thought, belief, worship and expression.

The area of external action is aimed at combating terrorism through international cooperation, since it is considered the only way to tackle this new threat effectively.

Finally, the area of cyberspace action is aimed at providing a counter-narrative to those radical messages that are conveyed online to foster violence and terrorism. This area of action is based on the fact that 80% of radicalisation processes take place online and through social networks.

C. *Educational Measures to Tackle Radicalisation/Extremism*

The Council of Europe Action Plan to combat extremism and radicalisation leading to terrorism (2014-2017)[40] proposed different actions in education to prevent violent radicalisation and to increase the capacity of our societies to reject all forms of extremism. One of these actions focused on providing a counter-narrative to the misuse of religion, mainly by giving voice to religious leaders and academics to explain how the activities of terrorist organisations are in conflict with religion. These recommendations have been implemented in Spain's education system, in particular by teaching Islam in public schools.

At this point, it is important to highlight that Article 27.3 of the Spanish Constitution makes possible the inclusion of religious education in the academic curriculum at all compulsory levels of education[41]. More precisely, the cooperation agreements signed by the state with some religious denominations guarantee the right of parents and pupils to receive religious teaching in public and private state-funded schools, provided, in the case of the latter, that the exercise of this right does not conflict with the school's religious ethos[42].

Under this legal framework, the Ministry of Education adopted a resolution on 14 March 2016 approving the content of the elective subject Islamic Religion for

[40] CM (2015)74-addfinal,19 May 2015.

[41] Article 27.3 of the Spanish Constitution reads as follows: 'Public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions'.

[42] See, generally, Article 10 of Law 26/1992, 10 Nov 1992, approving the cooperation agreement between Spain and the Spanish Islamic Commission. Also see the third Additional Disposition to Organic Law 2/2006 on Education.

secondary education and high school[43]. This is seen not only as a purely religious subject but also as a means of preventing violent radicalisation, since it is aimed at detecting and reducing the risk of misconceptions about Islam. Specifically, Annex I of the resolution, which covers the content of this subject for secondary education, affirms that its aim is to develop in pupils social attitudes that reject violence, respect religious freedom and, ultimately, defend the culture of peace by avoiding situations of discrimination based on religion and other characteristics. Similarly, its Annex II, which contains a basic overview of this subject for high school, considers of utmost importance that students demonstrate their rejection of fundamentalism.

It is worth mentioning that, according to this resolution this subject is intended to perform a double function: on the one hand, a preventive function, by reducing the risk of misconceptions about Islam; and, on the other, a compensatory function, by contributing, along with other teaching, to reducing social disadvantages as it broadens relationships with more diverse groups and favours participation and solidarity between equals.

4. Effects of the Legislative Framework Concerning Terrorism and Violent Radicalisation on the Free Exercise of Religion

A. *Legislation Concerning Terrorist Crimes*

As previously mentioned, some legislative dispositions that were adopted to protect public security might well have an adverse effect on the free exercise of religion. Needless to say, this is the case of the prohibitions of the full-face veil adopted by some municipalities that were declared unconstitutional by the Supreme Court for breaching the religious freedom of Muslim women.

Regarding the amendment of the Criminal Code to combat new forms of terrorism, some legal scholars have warned that new crimes are described very broadly, which can lead to unnecessary restrictions on the exercise of some fundamental rights[44]. This is particularly concerning in relation to the free exercise of religion because a religious background is easily identifiable in these new forms of terrorism. The Spanish Supreme Court recognised in its Judgment 503/2008 of 17 July 2008 —the so-called 11M case— that radical Islamist terrorism poses serious difficulties for investigation, as its ultimate underpinning is based on a conception of Islam that is used to justify violent actions and as a means of terrorist recruitment[45].

[43] Approved by Resolution of the Ministry of Education of 14 Mar 2016, *BOE*, 18 Mar 2016.

[44] See F. Muñoz Conde, *Derecho Penal. Parte Especial* (Valencia, Tirant lo Blanch, 2015), pp. 756 ff.

[45] ROJ No 4587/2008, <http://www.poderjudicial.es/search/indexAN.jsp> (accessed 1 Oct 2018).

In any case, it does not seem that the basic type of crime of terrorism described in Article 573 of the Criminal Code could constitute interference with the free exercise of religion since this disposition only describes as such the commission of certain serious offences when carried out with a certain intention.

Quite differently, the regulation of the crime of self-indoctrination may have a negative impact on one of the essential faculties of the free exercise of religion, which is the freedom to disseminate and receive religious information or doctrines. Considering that the right to freedom of religion excludes any assessment by the state of the legitimacy of religious beliefs or the means of their expression, the spreading or reception of religious messages of radical content should be considered a legitimate exercise of this freedom. Likewise, a Muslim believer can lawfully access, acquire or possess religious material of radical content for merely religious purposes. However, this behaviour can amount to the terrorist crime of self-indoctrination if the believer ends up taking part in a terrorist action. Consequently, legal scholars have warned that this provision raises legal uncertainty because the use of indeterminate legal concepts leaves a wide margin of discretion to the judiciary to assess whether or not there is criminal liability in cases like this[46].

At the same time, it cannot be obviated that, as the Supreme Court affirmed in its Judgment 119/2007 of 16 February 2007[47], the online dissemination of radical and fundamentalist religious extremism serves to attract Muslims from all over the world to terrorist organisations, providing an ideological-religious basis for carrying out attacks. In other words, recruitment to, indoctrination in and affiliation with terrorist groups are very often initiated through the transmission of radical conceptions of Islamic religious doctrine. The transcendence of these messages in relation to subsequent violent actions is undeniable, since the 'religious foundation can justify violent actions and inhibits the moral restraints of the author of such action'.

As contended by the Supreme Court in its judgment of 17 July 2008, it is necessary to separate terrorist actions from the free expression of ideas. In this regard, it should be borne in mind that the mere expression of violent ideas —unless they amount to an apology for terrorism or incitement to crime— is legally admissible. However, its violent content may justify some restrictions on the exercise of some fundamental rights —mainly the freedom of expression of religious beliefs— to protect public safety. In the court's view, such a form of expression represents a reasonable indication of the existence of a danger, as it is highly likely that some of those who participate in one way or another in the expression or dissemination of such ideas may advance towards the direct execution of terrorist acts.

[46] M. A. Cano Paños, 'Reforma de los delitos de terrorismo' in L. Morillas (ed) *Estudios sobre el Código Penal reformado* (Madrid, Dykinson, 2015), pp. 926-929.

[47] Available at http://www.poderjudicial.es/search/indexAN.jsp (ROJ Number 2251/2007).

Regarding the financing of terrorism, which is covered in Article 576 of the Criminal Code, it is important to highlight that this crime is determined by the intent to support the commission of terrorist attacks and not by the mere fact of financing an organisation or group that might eventually be considered as a terrorist organisation by the administration. Consequently, there is little chance for this regulation to interfere with the free exercise of religion because no one who gives financial support to a (religious) group that happens to be involved in terrorist actions can be considered criminally liable for financing terrorism unless a clear intention is proved.

By the same token, in the crime of cooperation with terrorism, no one can be considered liable for supporting the activities of a given (religious) organisation that turned out to take part in actions of a terrorist nature since the intention to cooperate with a terrorist organisation is an essential element of this crime. Nevertheless, it is true that terrorist actions often take place within communities characterised by the presence of a strong religious bond, which makes it difficult to distinguish between those who engage in terrorist actions and those who simply take part in the communities' religious activities.

B. *Legislation Concerning Hate Speech*

The Constitutional Court affirmed in its Judgment 112/2016 of 20 June 2016 that the criminal prosecution of some expressions that amount to hate speech is a legitimate interference in the freedom of expression, as it directly or indirectly endangers individuals or even the political system of liberties.

The regulation of so-called hate-speech crimes introduced by Organic Law 1/2015 has also received criticism among legal scholars, as it was designed in quite a broad fashion that it could lead to unnecessary restrictions on the right to disseminate religious doctrines, in particular those that clash with values that are overwhelmingly accepted by society. As previously stated, the new regulation widens the field of action of these crimes by punishing both direct and indirect incitement to hatred and protecting not only groups but also individuals against such actions[48].

In order to discuss what impact this new regulation may have on the free exercise of religion, it is interesting to make a brief reference to a very well-known case decided under the former regulation in which a Catholic religious authority was brought

[48] When amending the Criminal Code, the Spanish legislator understood that the Constitutional Court held in its Judgment 235/2007 that the provocation described in Article 510 could be both direct or indirect. However, the version of Article 510 currently in force does not employ the term 'provocation' but 'promotion' and 'incitement' instead.

before the courts by a civil association that accused him of hate speech against women, gays and transgender people[49].

More precisely, a civil association went before the criminal court accusing the bishop of a Catholic diocese in the region of Madrid of committing hate speech because, in his homily at a Good Friday Mass (broadcast on Spanish public television), he allegedly incited hatred against homosexuals[50]. On that occasion, the bishop referred to the suffering many homosexuals experience when, in order to, in his words, decide their sexual orientation, they go to men's clubs and prostitute themselves. 'I can assure you that they found themselves in hell', the bishop said.

In its auto of 10 July 2012, the trial court held that the expression 'find themselves in hell' could not be considered hate speech because, strictly speaking, it did not condemn those who engage in homosexual practices but only made reference to the suffering some homosexuals endure, in particular during their childhood when they begin engaging in such behaviour. The court ruled that, although the bishop's words revealed a critical position towards homosexuality, they did not amount to an incitement to hatred against homosexuals.

On appeal, the Provincial Audience of Madrid, in its auto of 30 April 2014, upheld the lower court's decision. The audience affirmed that, although some people might disagree with the bishop's words, there was no direct incitement to hatred against gay people but a legitimate exercise of his religious freedom. Finally, it is important to underscore that the court understood that the bishop's discourse was not directed at the gay community (as the offence requires) but at individuals who 'sometimes' engage in behaviour that is considered reprehensible from a religious viewpoint.

According to some legal scholars, if the current legislation were applied in this case, the courts would have decided differently, because the expressions of Catholic authorities might be considered indirect incitement to hatred[51]. In my opinion, however, these crimes cannot be used to impede the dissemination of ideas that are contrary to those shared by the vast majority of society. Since criminal law has to

[49] See, generally, A. López-Sidro, 'La libertad de expresión de la jerarquía eclesiástica y el discurso del odio' (2016) 42 *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*.

[50] An earlier version of the article on hate speech provided punishment for those who provoke discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other reasons related to ideology, religion or belief, family situation, belonging to an ethnic group or race, national origin, their sex, sexual orientation, illness or handicap.

[51] See A. Castro Jover, 'La libertad de enseñanza de las confesiones religiosas entre libertad de expresión y discurso del odio' (2017) *Stato, Chiese e pluralismo confessionale*, <http://www.statoechiese.it/images/uploads/articoli_pdf/Castro.M_Libertad.pdf> (accessed 1 Oct 2018). According to this opinion, the manifestation of religious authorities against homosexuality and transsexuality went beyond the position held by the Catholic Church in its official documents.

be interpreted restrictively, in particular when it clashes with the exercise of certain fundamental rights, religious discourse can only be considered a crime when it is objectively aimed, directly or indirectly, at inciting some form of violence against certain individuals or groups in light of their inherent characteristics.

Finally, the new criminal regulation on illegal associations may have a negative impact on the collective dimension of religious freedom. In particular, as Article 515 considers as criminal those associations that directly or indirectly promote hatred, hostility or discrimination, some religious denominations may feel obliged to silence certain parts of their doctrine in order to avoid accusations of discrimination or incitement to hatred against certain individuals or groups. The first type of illegal association is less troublesome from a religious-freedom perspective given that the offence is qualified by the intention of the association's founders or members to commit any crime, including terrorism. In other words, the organisation's main aim must be to commit certain offences. Because of this, it is difficult for a religious organisation to be declared criminal because of the actions of some members who may use its structure to commit terrorist attacks or other offences[52].

IV. Conclusions

The Spanish Supreme Court has affirmed that the exercise of religious freedom is unrelated to terrorism and other threats to public security. As it has been observed, however, there is an ongoing discussion among scholars on whether religion motivates terrorism or if it is being used as a means for recruiting followers and amplifying the impact of terrorist actions[53]. In this line of reasoning, it has been considered inappropriate 'to dismiss the actions of the 9/11 terrorists as completely isolated from religion because the religious diversity that exists amongst those who profess Islam includes the existence of some religious groups that, although divergent from the mainstream, accept beliefs that allow or lead to violence'[54].

[52] See Supreme Court Judgment 789/2014, 2 Dec 2014, legal reasoning 4, where a distinction is drawn between the crime of illegal association, characterised by the stability and some initial imprecision on its members about the crime to be committed, and the commission of offences by members of a given organisation when developing its ends, which is normally based on a timely agreement for committing one or more specific crimes.

[53] Ferrari, 'Individual Religious Freedom', p. 358.

[54] According to this opinion, dissociating terrorism from religion could be aimed at assuming that the state's reaction to terrorism cannot affect the free exercise of religion. However, even assuming the absence of such a connection, this conclusion is considered short-sighted, as the response of the state might be overly broad, having an impact not only on terrorists but also on other individuals who would like to practise their religion in a legitimate way. See W. C. Durham and B. D. Liggett, 'The Reaction to Islamic Terrorism and the Implications for Religious Freedom After September 11: A United States Perspective' (2006) *Derecho y Religión*, vol. 1, p. 49.

At the same time, it is true that there is a broad consensus among the international community that radicalisation does not equate to terrorism, although it can be a step in the process. Therefore, radical discourse is not *per se* forbidden unless it is intended to engage others in terrorism or to incite to violence.

The point is how to distinguish between one and the other. It is true that in some cases the distinction is not easy, as religious discourse might be very subtly intertwined with messages that can lead to hatred or violent radicalisation. In the Spanish experience, there are cases in which criminal courts have distinguished between what is religious discourse and what is not, taking into consideration the source of inspiration of a given religious discourse and the opinion of religious authorities.

A good example of this distinction was drawn in a judgment of the Criminal Court of Barcelona of 12 January 2004[55] that declared the imam of Fuengirola (Málaga) responsible for the crime of incitement to hatred against women based on the content of a book he authored called *Women in Islam*. In the book, he offered some advice to husbands on how to physically punish their wives without leaving marks. As all the topics in the book were presented from a religious perspective, with textual quotations from the Quran and references to the Sunna, the court considered its publication an exercise of religious freedom by a religious leader. In sharp contrast with the author's view, however, the part dealing with the punishment of women was not considered an exegesis of the Quran and the Sunna but the result of his personal reflections as long as no references to the sacred texts or to religious leaders' opinions were identified as a source of inspiration for his ideas.

Although the author claimed that it is not possible to contradict the text of the Quran without committing heresy, the court concluded that an alternative interpretation of the sacred text was possible according to the position of Muslim experts who concluded that physical or moral mistreatment is absolutely proscribed in the sacred text.

In this case, it cannot be concluded that the court interfered in a purely religious matter by taking sides on one possible interpretation of the Quran. On the contrary, it simply showed that not every religious discourse can be considered acceptable from a legal point of view despite the fact that it can be endorsed by a part of the religious community. Neither religious freedom nor freedom of expression is an unlimited right. Consequently, they can be prohibited by law —and even by criminal law— as long as they affect the fundamental rights of others, public safety or other relevant public interests.

It is undeniable that the new phenomenon of global terrorism has given rise to many concerns about how to balance the free exercise of religion and the protection

[55] RJA-ARP 2004/1.

of public security. In this context, states have passed legislation to strengthen national security that can interfere with the exercise of certain fundamental rights, affecting (indirectly in most cases) different aspects of the free exercise of religion. I agree with those who hold that religious denominations are called on to play a key role in providing a message of tolerance and reconciliation to guarantee social peace and the full enjoyment of religious freedom by individuals and groups[56].

[56] See, for example, FERRARI, 'Individual Religious Freedom', p. 361.

SECURITISATION OF RELIGIOUS FREEDOM: SWEDEN

Lars Friedner

I. Social context

When Swedish society deals with extremism, the focus is naturally on violent extremism. Since inhabitants of Sweden are entitled to the freedom of thought, anyone may hold extremist opinions, as long as they do not act on those opinions.

Violent extremism as a social phenomenon has been discussed in Swedish society since the beginning of the 20th century[1]. Initially, the focus was on political extremism, first left-wing violent extremism and later also right-wing violent extremism. The German Baader-Meinhof Group came to have links to Sweden when the West German Embassy in Stockholm was attacked in 1975.

In recent years, religious violent extremism has become an issue in Sweden. While it is only seen as a question of Islam, there are also, of course, manifestations of Christianity and of other religions that could be regarded as extreme. To this point, however, there have been no cases of violent religious extremism associated with other religious communities, nor has there been any public fear about such a possibility.

Especially after the war in the former Yugoslavia in the 1990s, a large number of refugees of Muslim origin came to Sweden. This, together with an earlier influx of Turks as migrant workers, created, for the first time, a sizeable Muslim population in Sweden. In addition, there have also been asylum seekers from Afghanistan and the Middle East[2].

As Sweden does not include information about religion in its national registers, the question of the number of Muslims in the country is up for debate. The Swedish Agency for Support to Faith Communities has estimated the number of religiously

[1] State Public Reports, 2013:81, p. 44 ff.

[2] Swedish Migration Agency, 'History', <www.migrationsverket.se/English/About-the-Migration-Agency/Migration-to-Sweden/History> (accessed 1 Oct 2018).

active Muslims in Sweden at 140,000,[3] but other sources put the number at 400,000[4]. It also depends on whether you count people who regard themselves as Muslims or if you count people coming from predominantly Muslim countries or areas. In addition, it depends on whether you also count people who are not registered as resident in Sweden but who are, for example, asylum seekers. Whatever definition you use, the number of Muslims in Sweden is probably higher than the above-mentioned figure of 400,000 but not as high as 1 million. Sweden has 10 million inhabitants in total.

II. Public debate

Compared to other European countries, Sweden has been relatively spared from terror attacks. In 2010, an alleged terrorist blew himself up —probably by mistake— before entering the main pedestrian area in Stockholm's city centre. No one but the perpetrator was killed or injured. In April 2017, a more successful attack, from the point of view of terrorism, occurred in the same part of Stockholm, when a terrorist stole a lorry and ran over people walking in the street. Five people died, and 15 were injured, some of them severely.

The above-mentioned Swedish experiences, combined with knowledge about terror attacks in other European countries and worldwide, have led to an intense public debate regarding violent extremism and how to protect the public from attacks. The debate has focused not only on Muslim violent extremism, although the fact that the two recent terror attacks in Sweden were carried by Muslim terrorists has had an impact on shaping the debate.

This serious public debate has been careful not to regard every Muslim as a terrorist, although some individuals have argued that the risk of terrorist attacks should put a stop to immigration.

III. Definition of extremism, fundamentalism or radicalisation

In a report to parliament, the government defined *violent extremism* as 'ideologies affirming and legitimising violence as a way to realise extreme ideological opinions and ideas'[5]. In the same report, *radicalisation* is defined as 'a process where those who commit ideologically motivated actions of violence due to political or religious reasons gradually have accepted acts of violence as a legitimate method within the framework of a political or religious ideology'[6].

[3] Swedish Agency for Support for Faith Communities, <www.myndighetensst.se/kunskap/statistik-om-trossamfund> (accessed 1 Oct 2018).

[4] State Public Reports 2009:52, p. 26.

[5] Government Letter to Parliament 2014/15:144, p. 9.

[6] Ibid, p. 16.

There is no official Swedish definition of fundamentalism. This is probably because it is difficult to offer such a definition and also due to the fact that freedom of speech (and, thus, thought) is guaranteed by the constitution.[7]

IV. Legislation adopted to tackle extremism and radicalisation

Sweden has not adopted any legislation aimed directly at tackling extremism or radicalisation. On the other hand, there is quite a lot of legislation that has in fact had an impact on extremism and radicalisation or at least it has hopefully had such an impact.

The crime of *inciting hatred against a group of people*[8] is used in cases where an extremist incites hatred against a minority group in society. A problem with this provision in the situation today is, however, that it probably does not protect the majority group, as the initial intention was aimed at protecting the Jewish minority in Sweden[9]. An extremist who incites hatred against Swedish (or Western) society as a whole would accordingly not be convicted of this crime.

If a crime is committed with the aim of inciting hatred against a group of people, the crime can be regarded as aggravated[10], which means that the punishment will be more severe.

Crimes of terrorism —regarded as the worst form of violent extremism— are punishable in Sweden according to provisions emanating from the European Union. According to the Act on Punishment for Crimes of Terror[11], several severe crimes, e.g. murder, kidnapping and sabotage, are punishable as crimes of terror when they are committed with the aim of, for example, severely destabilising fundamental constitutional structures in a state[12]. Similarly, the Act on Punishment for Public Calls for Recruiting and Education Regarding Crimes of Terrorism and other Particularly Serious Criminality[13] is based on a European Union framework decision and makes it illegal to call for or recruit or educate for terrorist purposes[14], and the Act on Measures against Money Laundering and Financing of Terrorism[15] enables banks

7 2:1 Form of Government, one of Sweden's constitutional acts [Sw. *Regeringsformen*].

8 Penal Code [Sw. *brottsbalken*], 16:8.

9 See, for example, Government Bill 1948:20, p. 445.

10 Penal Code, 29:2.

11 Sw. Lagen (2003:148) om straff för terrorbrott.

12 Act on Punishment for Crimes of Terror, §§ 2-3.

13 Sw. Lagen (2010:299) om straff för offentlig uppmaning, rekrytering och utbildning avseende terroristbrott och annan särskilt allvarlig brottslighet.

14 Act on Punishment for Public Calls for Recruiting and Education Regarding Crimes of Terrorism and Other Particularly Serious Criminality, 3-5 §§.

15 Sw. Lagen (2009:62) om åtgärder mot penningtvätt och finansiering av terrorism.

and other financial actors to monitor the origin of their customers' assets[16]. Based on a United Nations convention, the Act on Punishment for Financing Particularly Serious Criminality in Certain Cases[17] makes it a crime to collect, provide or receive money for terrorist purposes[18].

Sweden's laws on immigration contain several provisions that are indirectly aimed at hindering extremism and radicalisation. The Foreigners' Act[19] excludes war criminals and individuals regarded as security risks from the right to acquire refugee status or to receive a residence permit in Sweden on other grounds[20]. A residence permit may also be revoked if a person who has received a permit is later found to be a security risk[21]. A person in this category may also be deported from Sweden while visiting the country temporarily[22].

Sweden's criminal procedure law also has several provisions that are aimed indirectly at extremism and radicalisation. To investigate crimes of terrorism, for example, wiretapping is allowed more broadly than for other crimes and even before a crime has been committed if there is 'a particular reason to assume' that a crime will take place[23]. More legislation to prevent terrorism is being drafted[24].

1. Soft Law

As already mentioned, the legal measures aimed at preventing extremism and radicalisation are indirect and certainly do not encompass everything entailed by these concepts. On the other hand, Sweden has a significant amount of soft law available and has taken numerous political initiatives on these issues.

In a report to parliament in 2011, the government gave its view on measures that need to be taken against violent extremism. The government pointed to the need to strengthen awareness of democratic values, to increase knowledge of violent extremism, to strengthen structures for co-operation within society, to prevent individuals from getting involved with groups that engage in violent extremism and to provide

16 E.g. Act on Measures against Monetary Laundering and Financing of Terrorism, 2:1.

17 Sw. Lagen (2002:444) om straff för finansiering av särskilt allvarlig brottslighet i vissa fall.

18 Act on Punishment for Financing Particularly Serious Criminality in Certain Cases, § 3.

19 Sw, Utlänningslagen (2005:716).

20 Foreigners' Act, 4:2 b - 3, 5:1, 2 a 2 d, 5 a:3, 6 a:3.

21 Ibid, 4:5 b, 5 c. 5 a:5, 6 a:12, 13, 7:3.

22 Ibid, 8:3, 11, 12.

23 Act on Measures to Prevent Certain Specially Serious Crimes [Sw. *lagen (2007:979) om åtgärder att förhindra vissa särskilt allvarliga brott*] and Act on Measures to Investigate Certain Subversive Crimes [Sw. *lagen (2008:854) om åtgärder för att utreda vissa samhällsfarliga brott*].

24 State Public Reports 2015:63, 2016:8, 40.

support to people who leave such groups, to counteract the occurrence of ideologically motivated violence and to deepen international co-operation[25].

In 2014, the government appointed a special national coordinator to safeguard democracy against violent extremism[26]. The coordinator's mission is to strengthen and support cooperation in work aimed at safeguarding democracy against violent extremism, both locally and nationwide[27]. This mission has been carried out by arranging conferences and seminars, as well as visiting municipalities where violent extremism seems to be a problem. The coordinator has also arranged training and contributed to media covering the matter[28]. It seems as if the biggest part of the coordinator's work has been to make local authorities aware of the problem and also to coordinate work on this issue between them and the state authorities, i.e. the police and the Swedish Security Service[29]. The system with a special coordinator has been seen as temporary[30]. The coordinator has thus proposed to the government[31] that, from 2018, their activities be integrated into the Swedish Civil Contingencies Agency[32]. However, the agency rejected this proposal and instead argued that the activities of the coordinator should be integrated into any of the authorities that deal with crime prevention[33]. It seems as if it is not very desirable for state authorities to have the responsibility of preventing violent extremism. At the time of writing, the government had not yet decided on how this work would be organised in the future.

Recently, the Swedish Agency for Youth and Civil Society[34] was tasked with developing and distributing guidelines for co-operation between municipalities and civil society organisations in work aimed at securing democracy against violent terrorism[35]. In addition, the Swedish Agency for Youth (nowadays integrated into the Agency for Youth and Civil Society) has received financial contributions to support organisations that aim to prevent individuals from connecting with violent extremist movements and to support individuals who leave such movements[36]. These activities are still being carried out[37].

25 Government Letter to Parliament 2011/12:44 p. 7 ff.

26 Sw. Nationell samordnare mot våldsbejakande extremism; dir. 2014:103.

27 Terms of Reference 2014:103 p. 1.

28 National Coordinator to Safeguard Democracy against Violent Extremism, <www.samordnarenmotextremism.se/in-english> (accessed 1 Oct 2018).

29 Sw. Säkerhetspolisen.

30 Terms of Reference 2014:103.

31 State Public Reports, 2016:92.

32 Sw. Myndigheten för samhällsskydd och beredskap.

33 Ref 2017-950.

34 Sw. Myndigheten för ungdoms- och civilsamhällesfrågor.

35 Government decision 29 Dec 2016.

36 Government Letter to Parliament 2011/12:44 p. 41 f.

37 Government decision 20 Dec 2016.

The Swedish Prison and Probation Service[38] also has a soft-law mission regarding violent extremism and radicalisation. The service has reported to the government that it has ensured that it has enough knowledge on religious matters and has decided that prison chaplains (as well as the relevant personnel from non-Christian religious communities) have to be checked by the Swedish Security Service before carrying out their duties[39].

The police, the Swedish Security Service, the Swedish National Council for Crime Prevention[40], the Swedish Media Council[41], the Swedish Defence University[42], the Swedish Civil Contingencies Agency and the National Board for Health and Welfare[43] also have missions related to tackling violent extremism. As outlined below, the Agency for Support to Faith Communities has also been given tasks in this area.

2. Effects of Legislation Tackling Extremism and Radicalisation on Religious Freedom of Religious Communities and on Individual Religious Liberty

Since there is no Swedish legislation aimed directly at extremism or radicalisation, there has been no impact on the freedom of religious communities or individual religious liberty. Indirect legislation has not had any such effect either.

3. Effects of Soft Law

In a report to parliament, the government stated that anti-terrorism activities must respect human rights, the principles of law and individual integrity[44]. This means that religious freedom must be included and respected. So far, no signs to the contrary have been seen.

Since 2012, the Agency for Support to Faith Communities (and its predecessor) has had a mission from the government to expand and deepen dialogue with faith communities aimed at stimulating work with democracy and democratic awareness, including gender equality[45]. The government reports to parliament about the agency's mission as a way of securing democracy against violent extremism[46]. The agency's task is to distribute state funding among faith communities. In order to qualify for financial support, faith communities must contribute to maintaining and strengthening

38 Sw. Kriminalvården.
39 Ref 2016.25417-1.
40 Sw. Brottsförebyggande rådet.
41 Sw. Statens medieråd.
42 Sw. Försvarshögskolan.
43 Sw. Socialstyrelsen.
44 Government Letter to Parliament 2014/15:146 p. 6.
45 See Government decision 12 Dec 2016.
46 Government Letter to Parliament, 2011/12:44 p. 35 ff.

the basic values that Swedish society is built upon[47]. The government decides which faith communities are eligible for support[48]. Underlying the mission for dialogue —although left unsaid— is probably the thought that faith communities that are shown to support violent extremism will lose their financial support from the state.

The aforementioned 2011 report to parliament[49] regarding state activities to secure democracy against violent terrorism also mentions that the Swedish Agency for Youth (now the Swedish Agency for Youth and Civil Society) has been tasked with distributing financial support to civil society organisations for activities that strengthen young people's democratic values[50]. There is probably an underlying thought regarding this kind of financial support that organisations that are proved to support violent extremism will not receive further support.

V. Educational measures to tackle extremism and radicalisation: laws, policies and programmes

In 2011, the government tasked the Living History Forum[51] with distributing, especially to schools, methodologies and working materials aimed at strengthening democratic values among young people[52]. No other educational measures seem to have been taken.

1. Autonomy of Religious Schools and the Rights of Parents and Children

Based on the School Act[53], Swedish municipalities are responsible for organising preschools, primary schools, secondary schools and upper secondary schools for all children who are resident within the boundaries of the municipality. The School Act, however, also allows anyone —an association, company or religious community— to start a private school, which will be granted financial support from the state and the municipality to the same extent as municipal schools. A large number of private schools have been established through this system, some of which are operated by religious communities or by entities connected to such communities. Some private schools have a Muslim orientation. All schools —both municipal and private schools— have to follow the curriculum determined by the state, although a religiously oriented private school, for example, may also include religious activities during school time. All schools are supervised by the state authorities.

47 Act on Support to Faith Communities, § 3 (Sw. *lagen (1999:932) om stöd till trossamfund)*.
48 Ibid, § 4.
49 Government Letter to Parliament, 2011/12:44.
50 Ibid, p. 35 f.
51 Sw. Forum för levande historia.
52 Government Letter to Parliament 2011/12:44, p. 37.
53 Sw. Skollagen (2010:800).

The matter of violent extremism has so far not led to changes in the school system. However, there are some people who have called for the banning of religious private schools. An important decision in this matter was recently made by the Social Democratic Party (Labour), which is Sweden's biggest political party. However, the reason behind these statements seems not to be a fear of links between such schools and violent extremism but are related rather to religious private schools' view on equality between girls and boys, for example.

The opinion that religious private schools should be banned may, of course, be discussed, which has certainly happened. From a legal point of view, you could question whether such a ban would be in compliance with Sweden's commitment under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its provisions on religious freedom. A decision that state (and municipal) support should not be provided to religious private schools is perhaps more in line with the convention's provisions. But even if such a decision were taken, there might be a discussion as to whether such a limitation would be regarded as discriminatory.

VI. Conclusion

Although Sweden has not had much experience with violent extremism, compared to many other European countries, the authorities have been active in preventing future attacks. It is probably impossible to say whether the measures taken have been sufficient or successful. It should be noted, however, that these measures have not, so far, had any significant impact on the religious freedom of religious communities or individuals, although some actions may have touched on the issue of religious freedom as indicated above.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN THE NETHERLANDS

Sophie van Bijsterveld [1]

I. Introduction: the social context

The socio-political and religious make-up of the Netherlands has been fairly stable for a long time. For decades, about a third of the population has adhered to various mainstream Protestant denominations, a third of the population has been Roman Catholic, and a third of the population has either adhered to other, smaller denominations or has not had any religious affiliation. The latter category also includes the relatively small percentage of Muslims living in the country. The social and political context has been one of a solid welfare state, a secular climate combined with a high degree of tolerance and electoral shifts within familiar parameters.

In only a short period of time, much has changed. Recent surveys show a steep decrease of church membership in the Christian sphere. By the end of 2015, 10% of the population were members of the mainstream Protestant Church, and 23% were members of the Roman Catholic Church [2]. In 2018, the percentage of Muslims of various national backgrounds was estimated at 6% of the population [3]; the percentage of Hindus and Buddhists in 2015 at 0.6% and 0.4%, respectively [4].

[1] Prof.dr. Sophie van Bijsterveld is a professor at the Radboud University, the Netherlands.

[2] These numbers are published online. See <http://www.ru.nl/kaski/onderzoek/cijfers-rooms/virtuele_map/katholieken/> and <https://www.ru.nl/kaski/onderzoek/cijfers-overige/> (accessed 5 Jan 2019); also see T. Bernts and J. Berghuijs, *God in Nederland. 1966-2015* (Utrecht, Ten Have, 2016).

[3] See W. Huijnk, *De religieuze believing van moslims in Nederland. Diversiteit en verandering in beeld* (Den Haag, Sociaal en Cultureel Planbureau, 2018), p. 6, also available at <https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2018/De_religieuze_beleving_van_moslims_in_Nederland> (accessed 30 Sep 2018). Also see <https://nos.nl/artikel/2163084-het-aantal-moslims-stijgt-maar-met-hoeveel.html> (accessed 5 Jan 2019).

[4] H. Schmeets, De religieuze kaart van Nederland. 2010-2015. Den Haag: CBS [Central Bureau of Statistics] Dec 2016, also available at <https://www.cbs.nl/nl-nl/publicatie/2016/51/de-reli-

Immigration has increased significantly over the last few years. There were 204,000 immigrants in 2015, 230,000 immigrants in 2016, 235,000 immigrants in 2017 and 241,000 immigrants in 2018[5]. The total number of the population as of early January 2019 was nearly 17.3 million[6].

Quarterly surveys conducted by the Netherlands Institute for Social Research (SCP) show that, over a prolonged period, issues of immigration, integration and civility/values and norms, among other things, have been high-ranking concerns among citizens[7].

A significant development is that the classic social welfare state is in a process of transformation in the sense that the state is withdrawing financially from significant areas of the social domain. The responsibility of large portions of this domain is being transferred from the national level to the municipal level; at the same time, rights to social services in a number of areas have been transformed into facilities that can be granted in a customised fashion, and severe budget cuts have been put in place.

In the political domain, the anti-Islam PVV party became the second-largest party in the country in the 2017 general elections, and a political party with a Muslim/minority focus entered the Lower House of Parliament for the first time. In the 2017 general elections, issues of national identity, preservation of Dutch cultural values, immigration and integration, and public safety and security were major themes.

II. Public and political debate

Dynamics in the domains of religion, society, the state and politics, as mentioned above, impact the public and political debate. One of the results is that after decades in which religion was a blind spot in society, politics and for the state, it now features prominently in public and political discussions and it is interwoven with a variety of prominent policy issues[8].

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gieuze-kaart-van-nederland-2010-2015> (last accessed 5 Jan 2019), p. 5. Schmeets provides slightly lower estimates than other sources of the number of Muslims in the Netherlands.

[5] These numbers are taken from Statistics Netherlands (CBS) <https://www.cbs.nl/nl-nl/nieuws/2019/01/voor-derde-jaar-op-rij-100-duizend-inwoners-erbij> (accessed 5 Jan 2019). The numbers include asylum seekers, immigration through family unification and immigration from other EU countries. Emigration is not included.

[6] See the online CBS-Population Counter, <https://www.cbs.nl/nl-nl/visualisaties/bevolkingsteller> (accessed 5 Jan 2019).

[7] See the SCP website for an overview of available titles and downloads, <https://www.scp.nl/Publicaties/Terugkerende_monitors_en_reeksen/Continu_Onderzoek_Burgerperspectieven> (accessed 5 Jan 2019).

[8] See, extensively, S. van Bijsterveld, *State and Religion: Re-assessing a Mutual Relationship* (The Hague, Eleven International Publishing, 2018).

The migrant crisis that has manifested itself in Europe over the last few years and the way the EU and national governments have handled this crisis have been at the forefront of public and political debate. Part of this debate has focused on the subject of religion. This has also been the case with respect to the civil war in Syria and the international stance in response to it, especially in connection with the phenomenon of Dutch nationals (with or without a migrant background) who travelled to Syria as jihadists or who planned to do so, or their actual or planned return to the Netherlands. National safety and security are key concerns in these areas, but this phenomenon also impacts discussions on integration and on the nature and preservation of cultural values and norms in the Netherlands.

Public and political debates on measures to be taken against undesired foreign financing of Islamic institutions in the Netherlands, the prevention of the entry into the country of foreign 'hate imams' and the prevention of the effective manifestation of the views of hate imams within the Netherlands can also be seen in the perspective of the securitisation of religion. The purpose of measures that are adopted or contemplated in these fields is to prevent or combat the undesired religious influence of Dutch Muslims, to prevent the radicalisation of Dutch Muslims and, ultimately, to prevent terrorism. Under discussion in the political realm are possibilities to respond to jihadist preaching; the latent issue of promoting the use of the Dutch language in religious services has also surfaced again[9].

Another cluster of themes is connected to the financial, economic and euro crises that have manifested themselves over the last few years. These crises, which have a European and even global dimension, have had a great impact at the national level as well. Job losses and decreased job security, increased tax pressure and severe budget cuts in many important areas of social and public life have not gone unnoticed. These developments impact religion in different ways. First, they affect the socio-political climate in that political discussions with budget implications gain a sharper edge, and this works unfavourably for the acceptance of substantive immigration[10], especially when the problematic sides of immigration are clear, and this includes immigrants' Islamic background. Second, the financial withdrawal of the state from the social domain raises the question again of the role of churches as social support organisations and the co-operation of churches with, notably, municipalities in the provision of social support.

These developments and the public and political debates concerning these developments have manifested themselves, as mentioned above, over the last few years.

[9] See, for instance, 'Mogelijke strengere wet tegen jihadistische preken', *Nederlands Dagblad*, 28 Mar 2018; A. Overbeeke, 'Overheid gaat niet over taal in kerkdienst', *Ad Valvas*, 28 Mar 2018, <https://www.advalvas.vu.nl/opinie/overheid-gaat-niet-over-taal-kerkdienst> (accessed 5 Jan 2019).

[10] This obviously has budgetary consequences, especially where it concerns asylum seekers.

However, they build on subtler, but nevertheless real, trends and developments that go back at least until just prior to the turn of the century, where the position of Islam in the Netherlands was, for the first time, openly questioned and criticised, a trend that more firmly established itself after the 2001 terrorist attacks in New York and Washington DC and subsequent terrorist attacks in Western European cities. In its social component, the trends of the retreat of the classic welfare state, the financial cutbacks in the social domain and the belief in state regulation and control in many areas of the social domain even find their origins in the 1980s.

As to the position of religion as such in the public and political debate, more or less apart from the developments described above, two distinct trends can be observed. One concerns the field of tension between religion and secularism: this is notably addressed by proponents of a secular state, who argue that religion should be treated as a private affair and that religion should be ignored in the public domain regardless of the religion concerned. The second concerns the field of tension with regard to the position of Christianity (and Judaism) vis-à-vis Islam. What are perceived as problematic aspects of Islam only strengthen this field of tension. The traditionally more accommodationist view pertains not only to Christianity but also to Islam. It favours equal treatment between religion and has a generous understanding of freedom of religion. More recently, a field of tension has emerged here as well. The question is what equal treatment between Christianity and Islam can actually mean and where the justified limits of freedom of religion lie[11].

A complicating factor for supporters of either approach is the question of core cultural values and national identity that has been emerging in recent years. In this context, so-called Judaeo-Christian values are introduced as a category, values that should be preserved over and in opposition to those of Islam. For those who are sympathetic to this debate, it raises questions with regard to their basic positions on religion in the public domain. Another complicating factor for supporters of either approach is securitisation and limiting fundamental freedoms for the sake of public order and safety, promoting a balance more towards public safety and security rather than stressing fundamental rights —this does not conform to their basic positions. For the accommodationists, this is clear at first glance. For supporters of a secular approach, this may be true as well, at least for those who, from a fundamental-rights perspective, are critical of laws and policies on public safety and security regardless of their religion. All this makes debates on religion in the public domain and on measures to improve public order and safety and to prevent or combat terrorism and radicalisation fascinating but sometimes also somewhat muddy. Here is an illustration: a number of recent changes in the law that affect or concern religion are not as

[11] See VAN BIJSTERVELD, State and Religion: Re-assessing a Mutual Relationship.

such motivated by the goal of countering radicalisation or preventing terrorism but have a primarily secular motivation or are meant to promote other specific rights or values; however, it also appears that fear or rejection of the use of those provisions by adherents of Islam do play a role[12].

III. Legal and political framework

Before discussing the legal and policy framework regarding radicalisation and extremism, it is useful to briefly sketch the dynamic with regard to the securitisation of religion[13]. This makes it easier to place the various measures in context.

One of the first signs of interest in religion as a modern security issue can be traced back to a 1992 report by the Homeland Security Service (*Binnenlandse Veiligheidsdienst,* BVD). In the context of international terrorism, the report also pointed out 'religious, isolationist, and anti-integration tendencies' that they detected in certain circles[14]. A subsequent report carefully distinguished between various types of behaviour and deliberately employed narrow definitions, but it did not propose any legislative change or new policy measures[15]. At the time, these reports caused quite some consternation. From the 2001 terrorist attacks in New York and Washington DC onwards, a stormy development occurred in which definitions of concepts of terrorism and radicalisation were broadened; the focus of attention shifted from terrorism and radicalisation to polarisation and the undermining of social cohesion. Extremism and religious orthodoxy came within focus[16], and, where Islamic orthodoxy was concerned, Salafism became an object of concern. In connection with these developments, integration was viewed differently, specifically as it related to security concerns[17]. In the same period, the Homeland Security Service was transformed

[12] See below examples of the explicit ban on conscientious objection to perform same-sex marriages by civil registrars or the civil court judgment holding that the Dutch state violated the UN Treaty on the Elimination of All Forms of Discrimination against Women by allowing the reformed political party SGP to implement its traditional religiously inspired view that women should not have the passive right to vote.

[13] These developments, up to 2013, are critically assessed by B. de Graaf, 'Religie als proleem van orde en veiligheid. Salafisme onder vuur' in S. van Bijsterveld and R. Steenvoorde (eds), *200 jaar Koninkrijk. Religie, staat en samenleving* (Oisterwijk, Wolf, 2013), pp. 353-375.

[14] BVD, Ontwikkelingen op het gebied van de binnenlandse veiligheid. Taakstelling en werkwijze van de BVD (Den Haag, MinBZK, 1992).

[15] BVD, Terrorisme aan het begin van de 21ste eeuw. Dreigingsbeeld en positionering BVD (Den Haag, MinBZK, 2001).

[16] This focus manifested itself to the extent that research was even conducted on orthodox children in a traditionally conservative Protestant town. See H. Moors et al, *Eigenheid of eigenzinnigheid. Analyse van cultuur- en geloofsgerelateerde denkbeelden en gedragstuitingen in de gemeente Ede* (Tilburg, IVA, 2009).

[17] See De Graaf 'Religie als proleem van orde en veiligheid. Salafisme onder vuur', p. 366.

in 2002 into the General Intelligence and Security Service (*Algemene Inlichtingen en Veiligheidsdienst*); a special office was established in 2004, that of the National Coordinator for Security and Counterterrorism (*Nationaal Coördinator Terrorismebestrijding en Veiligheid,* NCTV); the number of people involved in its work grew; and a number of programmes and measures were implemented. Over the course of time, both legislative measures and policies were aimed not only at repression or countering developments but also at prevention. These developments were stimulated by the terrorist attacks that took place in a number of Western European cities over the last decade. A new chapter in this development was induced by the phenomenon of jihadism, usually young radicalised Dutch nationals joining the Islamic State, and a number of them returning. In 2014, the government adopted the 'Netherlands comprehensive action programme to combat jihadism: Overview of measures and actions', a coherent perspective on how to deal with jihadism.

A 2017 coalition agreement called 'Confidence in the Future' confirms that the government will continue to address radicalisation by promoting prevention and effective deradicalisation and will continue to combat terrorism. To do so, the coalition agreement states the intention to, among other things, enact new legislation in this field. In this context, the coalition agreement specifically mentions hate preachers, jihadism, people who return from Syria or intend to do so and foreign financing of religious institutions in the Netherlands[18].

1. The Conceptual Framework: Some Key Concepts

Dutch law does not define the concept of terrorism, even though recent years have seen a substantive expansion of legal instruments for dealing with terrorist offences in both the Criminal Code and the Criminal Procedure Code, and through expansion of laws aimed at preventing terrorism, such as the Intelligence and Security Services Act. The Temporary Act Administrative Measures on Counterterrorism (*Tijdelijke Wet bestuurlijke maatregelen terrorismebestrijding*) has also created extensive possibilities for using administrative measures against individuals at a stage when they are not yet a suspect in the sense of criminal law. Despite this lack of legislative definition, the EU Council Framework Decision contains a definition of the term 'terrorist dimension', i.e. the aim of 'seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any

[18] Coalition Agreement 2017 'Vertrouwen in de toekomst' [Confidence in the Future, pp. 3-4 <https://www.rijksoverheid.nl/regering/documenten/publicaties/2017/10/10/regeerakkoord-2017-vertrouwen-in-de-toekomst> (accessed 5 Jan 2019).

act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation'[19].

Concepts such as radicalisation, extremism and jihadism do not feature in legislation; however, they are used in policy documents. For practical purposes, authoritative definitions are produced by the NCTV.

In the 'Netherlands comprehensive action programme to combat jihadism: Overview of measures and actions', radicalisation is defined as 'an attitude that shows a person is willing to accept the ultimate consequence of a mind-set and to turn [it] into actions. These actions can result in the escalation of generally manageable oppositions up to a level [where] they destabilise society due to the use of violence, in conduct that deeply hurts people or affects their freedom or in groups turning away from society'[20].

In the same action plan, extremism is defined as 'the designation of the phenomenon that involves people or groups breaking the law and executing (violent) illegal actions to influence political decision-making in an extra parliamentary manner'[21]. The NCTV sees a connection at present between both right- and left-wing extremism and the influx of asylum seekers in the Netherlands.

Global jihadism is defined by the action plan as 'an ideological movement of political Islam which is based on a specific interpretation of Salafist teachings and on the works of Sayyid Qutb and seeks a global dominance of Islam and the establishment of an Islamic state (caliphate) through armed struggle (jihad)'[22].

[19] Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA)**,** *Official Journal L 164/3*. The definition used by the NCTV (see below) says: 'Terrorism: from ideological motives threatening, preparing or using serious violence against people, or actions intended to cause severely disruptive social damage, with the purpose of effecting changes, inciting fear among the population or influencing political decision-making' (p. 34).

[20] From the Ministry of Security and Justice, the National Coordinator of Security and counterterrorism, and the Ministry of Social Affairs and Employment, 'The Netherlands comprehensive action programme to combat jihadism Overview of measures and actions', Aug 2014, see <https://english.nctv.nl/binaries/def-a5-nctvjihadismuk-03-lr_tcm32-83910.pdf> p. 33 (accessed 5 Nov 2018).

[21] Ibid, p.3. On the website of the national coordinator, extremism is described as: 'the term used for the phenomena whereby persons or groups intentionally cross the boundaries of the law in pursuit of their ideals. Activists may come across as loud in expressing their opinions, however, they are non-violent and stay within the boundaries of the law. Activism turns into extremism when deliberately committing criminal offences, such as threats and destruction'. See the website of the Ministry of Justice and Security's National Coordinator for Security and Counterterrorism <https://english.nctv.nl/organisation/counterterrorism/to-counter-terrorism/Extremism/index.aspx> (accessed 5 Jan 2019).

[22] 'The Netherlands comprehensive action programme to combat jihadism Overview of measures and actions', p. 32.

2. Legislation Adopted to Tackle Radicalisation and Extremism

The current legislative and non-legislative initiatives aimed at tackling radicalisation and extremism stem from the 'Netherlands comprehensive action programme to combat jihadism: Overview of measures and actions'. This action plan contains a total of 38 actions under the headings 'Risk reduction regarding jihadist travellers', 'Travel interventions', 'Radicalisation', 'Social Media' and 'Information-sharing and cooperation'. All these measures are intended to tackle radicalisation and extremism. These actions are differentiated according to whether they are based on new initiatives or existing measures or whether they strengthen existing measures. Four times a year, the government sends an updated overview with a progress report on the implementation of each of these 38 actions[23].

Most proposed legislative measures can be found under the first two headings. They contain controversial legislation such as loss of nationality or preventive administrative measures for those who are suspected but not yet a suspect in terms of criminal law.

Under the heading of 'Radicalisation - disrupting disseminators and recruiters', no new legislation is proposed. As far as legislation is concerned, the instigation of a criminal prosecution for a violation of an existing law is mentioned or the prioritisation of such prosecution (recruitment for armed struggle, hate crimes) or the application of existing administrative law (refusal of a visa for preachers who incite hatred and violence).

Under the heading 'Counteracting Radicalisation', no legislation is mentioned at all[24].

Legislation has been enacted recently or is being contemplated that may indirectly play a role in tackling radicalisation (see Section 5 below). Legislation has also been enacted recently or is being contemplated that is not related to tackling radicalisation but is not entirely separate from concerns about Islam (see Section 4).

[23] For the evaluation report of the action programme, see Inspectie Veiligheid en Justitie, Ministerie van Veiligheid en Justitie, *Evaluatie van het Actieprogramma Integrale Aanpak Jihadisme* (Den Haag, Ministerie van Veiligheid en Justitie, 2017), <http://www.binnenlandsbestuur.nl/Uploads/2017/10/Evaluatie-van-het-Actieprogramma-Integrale-Aanpak-Jihadisme.pdf> (accessed 5 Jan 2019).

[24] Legislation is mentioned under other headings, mostly in the sphere of travel. It must be said, however, that in previous years, a substantive number of changes were made to the Criminal Code and Criminal Procedure Code in an effort to counter terrorism; see, for instance, M. A. H. VAN DER WOUDE, 'De erfenis van tien jaar strafrechtelijke terrorismebestrijding in Nederland', *Strafblad,* Feb 2012, <http://www.sdu.nl/pdf/Artikel1_Strafblad_0112.pdf>; N. J. M. KWAKMAN, 'Een overzicht van straf(proces) rechtelijke instrumenten ter bestrijding van terrorisme', <http://nicokwakman.blogspot.nl/2012/02/strafrechtelijke-instrumenten-ter.html> (accessed 5 Jan 2019).

3. Policies Tackling Radicalisation and Extremism

Most policies tackling radicalisation and extremism are non-legislative. The list of these measures is too long to enumerate them all here. Disruption of the dissemination of communication or actions concerning jihadist propaganda, strengthening information and knowledge exchange between officials at the national level and between the national and local level, as well as networks of professionals are addressed. Implementation and co-operation of enforcement institutions are mentioned. Educational institutions receive attention, as does co-operation with Islamic communities themselves, and the strengthening of networks of key figures from the communities and public officials. The same is true for strengthening resilience against jihadist propaganda.

A National Training Institute for Countering Radicalisation (*Rijksopleidingsinstituut tegengaan Radicalisering*) has been established to offer training programmes for professionals in the public and semi-public sphere. A number of guidelines have been issued as well for municipalities, schools and corporations.

IV. Effects of the measures on religious freedom

1. Effects of the Legislative Framework Tackling Radicalisation and Extremism on Religious Freedom

The effects of the legislative framework tackling radicalisation and extremism on religious freedom vary. Direct effects on religious freedom occur both as a result of legislation that concerns religious radicalisation and extremism and as a result of the application of general legislation to concrete cases where religious radicalisation or extremism is involved. An example of the former is legislation that is aimed at combating money laundering also in the context of religious radicalisation, legislation that through the effect of the principle of equal treatment also applies to Christian organisations and entails significant administrative burdens. An example of the latter is an administrative decision to ban a particular hate imam from a particular geographic area on the basis of the Temporary Act Administrative Measures on Counterterrorism[25].

Measures aimed at tackling radicalisation and extremism rarely affect freedom, at least not substantively. At least in part as a side effect of the greater issues of tackling radicalisation and extremism, freedom of religion is affected by legislation as well as

[25] The lawfulness of this administrative decision was confirmed by the court of first instance in the Hague, Rechtbank Den Haag, 23 Nov 2017, ECLI: NL:RBDHA:2017:13597, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:13597> (accessed 5 Jan 2019).

court rulings that, though not aimed at tackling radicalisation and extremism cannot be seen as entirely separate from concerns about Islam.

2. Individual Freedom

The Lower House of Parliament has voted in favour of a ban on face coverings, including the burka, in certain public or semi-public spaces. The bill is now pending in the Upper House. Another example is the abolition, in 2014, of the penalisation in the Criminal Code of disparaging blasphemous statements. Another legislative measure is the explicit legislative ban on employing as civil registrars individuals who refuse to perform same-sex marriages. These developments do not stem solely from the intent to tackle radicalisation and extremism, but also, at least in part, from concerns about Islam.

The above-mentioned administrative decision to ban a particular hate imam from a particular geographic area can be seen as a restriction of religious freedom, albeit a justified one. The decisions by a mayor exercised in the context of their public-order competencies to prevent a hate imam from speaking at an Islamic conference were initially upheld, but ultimately struck down in court[26]. These types of decisions also affect the communal and institutional dimensions of freedom of religion.

3. Communal and Institutional Dimensions of Freedom of Religion

An example of a (mainly administrative) restriction of communal religious freedom is the increased burdens for churches and religious communities to qualify for a tax exemption as a so-called public benefit organisation (*Algemeen Nut Beogende Instelling*). These restrictions stem from anti-money-laundering measures, in part aimed at countering or controlling money flows used for purposes of radicalisation. Churches of a large variety of denominations, united in a national co-operative structure, have come to an agreement with the tax authorities to mitigate the administrative burdens and requirements[27].

[26] See Rechtbank Oost-Brabant, 23 Dec 2015, ECLI:NL:RBOBR:2015:7607, respectively, Rechtbank Oost-Brabant, 30 Jan 2017, ECLI:NL:RBOBR:2017:415. On this issue, see J. Brouwer and J. Schilder, 'Haatpredikers, openbare orde en het censuurverbod' (2016) *Nederlands Juristenblad*, p. 749-751. Also see the ensuing discussion in P. Cliteur, 'Herbezinning op wettelijk kader ter bestrijding van anti-democratische bewegingen is nodig' (2017) 92 *Nederlands Juristenblad*, pp. 1890-1893; and J. Brouwer and J. Schilder, 'Anti-democratische bewegingen niet bestrijden met censuur' (2017) 92 *Nederlands Juristenblad*, pp. 3016-3017; and P. Cliteur, 'The Times They Are A-Changin', (2017) 93 *Nederlands Juristenblad*, p. 3018.

[27] See the website of the *Interkerkelijk Contact in Overheidszaken*, a structure in which a large variety of churches and Jewish communities co-operate, <http://www.cioweb.nl/> (accessed 5 Jan 2019); also see R. Steenvoorde and E. Hirsch Ballin, 'Een herleving van de departementen van Eredienst?' in S. van Bijsterveld and R. Steenvoorde (eds), *200 jaar Koninkrijk: Religie, staat en samenleving*

In the context of spillover effects, at least in part, we should mention the ruling of the Supreme Court on civil matters that the state violated the UN Convention on the Elimination of All Forms of Discrimination against Women by allowing the SGP, a traditional, orthodox reformed political party —the oldest party in the Netherlands that has been continuously represented in the Dutch parliament— not to allow women to be elected in representative public bodies for their party on the basis of their biblical views on the relationship between men and women[28]. The case was not filed by women from the SGP but by feminist and human rights groups. In an obiter dictum, the court of first instance referred to the possibility that other parties could appear in the future that have a similar view on the relationship between men and women.

It is clear that the court rulings and the legislation mentioned in Sections 4.1 and 4.2, although not triggered by a desire to tackle extremism and radicalisation but merely loosely related to this, do have an effect of limiting freedom of religion, either individually or communally, regardless of whether these limitations are seen as justified or not.

4. Effects of Policy Measures on Religious Freedom

As discussed, policy measures do not always entail true restrictions of freedom of religion. An exception is the refusal of entry into the country or the refusal of a visa for so-called hate imams. Sometimes, such a refusal does not have to take place, such as when entry into the country can be prevented by, for instance, the voluntary withdrawal of an invitation to an imam.

Another issue that is being discussed and contemplated is that of countering undesired foreign influence, also through the financing of Islamic institutions in the Netherlands. This issue has been debated in parliament for some time. It is also taken up in the above-mentioned 2017 coalition agreement. Despite the fact that this concerns a difficult issue to tackle in terms of legalisation and policy measures and the fact that it is even hard to analyse as a phenomenon in itself[29], an approach has been adopted to deal with it. In this approach, diplomatic contacts with foreign authorities

(Oisterwijk, Wolf Legal Publishers, 2013), pp. 325-352, especially p. 349; and R. Steenvoorde, 'In het Algemeen Belang?' (2011) 1 *Tijdschrift voor Religie, Recht en Beleid*, pp. 30-42.

[28] See HR 9 Apr 2010, ECLI:PHR:BK4549, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2010:BK4549> (accessed 5 Jan 2019); also see *SGP v The Netherlands*, App no 58369/10 (ECHR, 10 Jul 2012).

[29] See, for instance, S. Hoorens, J. Krapels et al, 'Foreign financing of Islamic institutions in the Netherlands: A study to assess the feasibility of conducting a comprehensive analysis', <https://www.rand.org/pubs/research_reports/RR992.html> (accessed 5 Jan 2019).

have a prominent place[30]. It can be debated to what extent such initiatives do or do not affect religious freedom.

In a number of situations, soft influence is hard to qualify in clear terms of limitations of religious freedom. Often measures are positive rather than negative. When focusing not on religion but on non-religious 'trigger factors', freedom of religion is not even in view[31].

When countering radicalisation, it is not always a religious community that is the 'adversary' of public authorities; it can partner with (local) governments in recognising and combating the radicalisation of its own members. This is recognised by the above-mentioned action plan. It is even suggested to municipalities that they maintain contact with Salafist movements to assess whether co-operation for the purpose of recognising and combating radicalisation of its members is fruitful or whether such contacts will merely lead to public legitimisation of Salafist views.

V. Educational measures to tackle radicalisation and extremism

Occasional incidents with Islamic schools have stimulated a debate on the desirability of the current dual system of education, a system with public, religiously neutral schools and private, confessional schools funded on the same footing as public schools. As the school system is solidly anchored in the Constitution, change is not likely anytime soon.

1. Legislation

A law entered into force in June 2017 that gives the education minister the power to cease recognition of degrees from an institution of higher education if a formal or informal representative of the institution makes discriminatory statements. This applies regardless of the quality of the education provided at the institution[32]. The only concession that was made during the process of enactment was that an independent committee would be established to advise the minister on the exercise of this power in specific cases. Although some other procedural requirements exist, this amounts to a controversial and broad discretionary power.

[30] See the letter from the Ministers of Justice and Safety and from the Minister of the Interior and Kingdom Relations to the Second Chamber of Parliament, *Brief van de Ministers van Justitie en Veiligheid en van Binnenlandse Zaken en Koninkrijksrelaties*, 16 Mar 2018, (Nationale Veiligheid; Informatie- en communicatietechnologie (ICT)), *Kamerstukken II*, 2017-2018, 30 821, No 42, pp. 1-7, notably p. 4 and p. 6.

[31] See, for instance, the online brochure, 'Triggerfactoren in het radicaliseringsproces', <https://www.nctv.nl/binaries/Brochure%20Triggerfactoren_tcm31-126179.pdf> (accessed 5 Jan 2019); also see the background study by A. R. Feddes, L. Nickolson and B. Doosje, 'Triggerfactoren in het Radicaliseringsproces', Expertise-unit Sociale Stabiliteit & Universiteit van Amsterdam, Sep 2015, available at <https://www.socialestabiliteit.nl/professionals/triggerfactoren> (accessed 5 Jan 2019).

[32] Bescherming namen en graden hoger onderwijs (dossier number 34 412).

A few other positive legislative developments deserve mention here, even though they are not focused on tackling radicalisation and extremism.

First of all, a law was adopted in 2016 to secure structural public funding for extracurricular and voluntary education in a particular religion within public, neutral elementary schools. Education in one's religion may be important to preventing a self-invented or radicalised version of, especially, Islam. Another positive development is the debate on the possible obligatory introduction of education about religion in secondary schools. However, it is uncertain whether this will materialise.

Elementary schools are also legally obliged to educate their pupils in 'citizenship' and, to pay attention to the topic of homosexuality. Schools, especially in the private (confessional) sector, can determine for themselves how to teach these subjects.

2. **Policy Measures**

To support schools and teachers in preventing radicalisation and in being alert to early signs of radicalisation, a number of tools have been developed. The NCTV, for instance, provides guidelines for recognising radicalisation at educational institutions[33].

Specifically for schools (primary, secondary and some forms of tertiary education), the School and Safety Foundation has developed training materials and information tools for schools on themes such as radicalisation, discrimination and polarisation in the context of providing a 'safe social learning environment'[34], which pertains not only to preventing radicalisation or polarisation but also to the absence of discrimination or bullying.

Social safety is also a dimension of school inspections. Alleged neglect by a school to provide social safety can be reported to the school inspection authority (*vertrouwensinspectie*)[35].

[33] See 'Handreiking voor signalering en begeleiding veiligheids- en leefstijlrisico's in het HBO', <https://www.nctv.nl/organisatie/ct/terrorismebestrijding/index.aspx> (accessed 5 Jan 2019).

[34] This expression is used on the English version of the School and Safety Foundation's website; see <https://www.schoolenveiligheid.nl/english/> (accessed 5 Jan 2019).

[35] In the period from 2011-12 to 2013-14, radicalisation was not or was rarely the subject of such notifications. See 'Aantal meldingen vertrouwensinspectie voor primair, voortgezet en speciaal onderwijs en middelbaar beroepsonderwijs in periode 2011/2012-2013/2014', <https://www.onderwijsinspectie.nl/documenten/publicaties/2015/04/01/aantal-meldingen-vertrouwensinspectie>; in the period thereafter, the number of notifications concerning radicalisation increased slightly, see Factsheet Meldingen Vertrouwensinspecteurs Over De Sectoren PO, VO, SO, MBO en HO OVER SCHOOLJAAR 2016-2017 (including an overview of the years 2014-15 and 2016-17), <https://www.onderwijsinspectie.nl/documenten/rapporten/2018/03/29/meldingen-vertrouwensinspecteurs-over-de-sectoren-po-vo-so-mbo-en-ho-schooljaar-2016-2017 >, (both accessed 5 Jan 2019), <https://www.onderwijsinspectie.nl/documenten/publicaties/2015/04/01/aantal-meldingen-vertrouwensinspectie> (accessed 5 Jan 2019).

Recently, initiatives have also been developed outside a school context to teach parents (especially mothers) to recognise the early signs of radicalisation of teenagers.

The autonomy of religious schools is not affected by soft-law measures. They are rather tools and instruction materials for teachers regardless of whether it is a religious school or not. The only problematic measure is the above-mentioned provision that introduces the discretionary power of the education minister to withdraw recognition of degrees.

VI. Conclusion

As early as the 1990s, the first studies were published by the Homeland Security Service connecting developments within certain Islamic groups in the Netherlands with risks related to integration in the context of international terrorism. The new securitisation of religion was born. This trend was strengthened by the terrorist attacks in the United States in 2001 and subsequent attacks in European cities and elsewhere in the world. In the slipstream of 2001, a substantive package of anti-terrorism legislation was put in place. At the same time, attention was also extended from terrorism to radicalisation and extremism —working definitions of which were expanded— and Salafism. The phenomenon of jihadism has led to a series of new legislative and, particularly, non-legislative measures. With this, attention has also shifted from mere repression to prevention as well. This takes place against a background where proverbial tolerance in the Netherlands has dwindled in many areas of life, certainly not only religion, and where the balance between individual liberties and societal interests have shifted somewhat in favour of the latter. These developments have been both criticised and applauded.

The direct effects of these developments on freedom of religion are not unequivocal. In many instances, freedom of religion is not limited, and where it is, one can say that if any justified reason for limitation of this right exists, it is for activities that undermine the democratic constitutional state as such. Obviously, in less dramatic actions, a fair balance must be sought between individual liberty and legitimate societal interests. Clarity and concise definitions are important as well. Religious orthodoxy, for instance, is not synonymous with radicalism or extremism.

Recent legislative measures restricting religion are not always inspired by the aim of tackling radicalisation or extremism but are a product of other societal developments or concerns. And, in addition to restrictive measures, there have also been positive legislative developments.

A large percentage of measures aimed at tackling radicalisation are soft policy measures. They may be restrictive, or they may be facilitative. Sometimes, it may not even be easy to tell the difference.

SECURITISATION OF RELIGIOUS FREEDOM: RELIGION AND THE LIMITS OF STATE CONTROL IN THE UNITED KINGDOM

Norman Doe
Rebecca Riedel [1]

I. Social context

In 2011, Christianity remained the largest religious group in the United Kingdom, with 59.3% of the population, whereas Muslims were the second-largest group, with 4.8%[2]. There has also been an increase in those reporting to have no religion[3]. As of May 2017, net long-term international migration was estimated to be up 248,000 in 2016, which is statistically significant, as this figure is down 84,000 since 2015. This change was driven by a considerable increase in migration, which was up 40,000 from 2015, and this was mainly EU citizens (117,000 up 31,000 from 2015). Immigration was estimated to be 588,000, with a decrease of 43,000, and this was not considered to be statistically significant[4].

II. Political and public debate

In recent years, there have been numerous terrorist incidents that have had a religious aspect, including the London bombings (7 July 2005), the Westminster Bridge attack (22 March 2017), the Manchester Arena bombing (22 May 2017), the London Bridge and Borough Market attacks (3 June 2017) and the Finsbury Park attack (19 June 2017), all of which led to extensive public and political debate as to how the United Kingdom should deal with extremism and, where appropriate, radicalisation as a contributory factor.

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[2] Office for National Statistics, 'Religion in England and Wales 2011', 2012.

[3] Ibid.

[4] Migration Statistics Quarterly Report, May 2017.

Two key branches of the debate are whether the government should adopt a zero-tolerance approach or a more liberal approach to radicalisation. The 'Prevent' policy document is the United Kingdom's main normative means of tackling radicalisation in order to combat extremism and terrorism[5]. 'Prevent' was issued under the Counter-Terrorism and Security Act (CTSA) 2015 by the Department for Education. Its main purpose is to impose a duty on specified authorities, such as the police, schools and local government, with due regard to the need to prevent people from being 'drawn into terrorism'. Schedule 6 lists the specified authorities subject to this duty.

Supporters of 'Prevent' argue that the strategy is adequate: the government has stated that the strategy prevented 150 people, including 50 children, from entering contact zones (such as ISIS-controlled areas) in Iraq and Syria in 2015[6]; and, among senior police figures, the chief constable of Leicestershire is typical in saying that 'Prevent' was 'absolutely fundamental' to tackling terrorism in the United Kingdom[7].

However, the document has been criticised for being 'not only unjust but also unproductive' due to its 'overly broad definition of extremism' (see below) and for creating 'a systematic risk of violations of the right to freedom of expression, the right against discrimination and the right to privacy'. In addition, some have argued that it should be replaced by a more liberal approach, for instance: 'Doctors fear that their obligation to report patients to the authorities is in conflict with their duty of confidentiality and will undermine the doctor-patient relationship'[8]. Again, according to the Justice Initiative report (2016), 'the current Prevent strategy suffers from multiple, mutually reinforcing structural flaws, the foreseeable consequence [of] which is a serious risk of human rights violations'. These flaws include what is claimed as the unfair 'targeting of "pre-criminality", "non-violent extremism", and opposition to "British values"'. Moreover, 'tackling non-violent extremism and "indicators" of risk of being drawn into terrorism lack a scientific basis … the belief that non-violent extremism - including "radical" or religious ideology - is the precursor to terrorism has been widely discredited by the British government itself'[9]. In June 2017, however, the former chief crown prosecutor, Nazir Afzal, accused several Muslim groups of spreading misinformation about the 'Prevent' strategy, particularly the groups'

5 HM Government, 'Revised Prevent Duty Guidance for England and Wales', revised 16 Jul 2015.

6 Secretary of State, 'Counter-terrorism: Written question - 51248', 31 Oct 2016.

7 BBC News, 'Prevent scheme "fundamental" to fighting terrorism', 27 Dec 2016.

8 A. Singh, 'Instead of fighting terror, Prevent is creating a climate of fear', *The Guardian*, 19 Oct 2016.

9 Open Society Justice Initiative, 'Eroding Trust: the UK's Prevent Counter-Extremism Strategy in Health and Education', Oct 2016.

claims that it is 'intrusive'[10]. Further, the prime minister has proposed new laws to tackle technology companies that fail to remove extremist content from the Internet[11], but Max Hill, an independent reviewer of terrorism legislation, has said that he has struggled to see how it would help to criminalise 'company bosses who "don't do enough". How do we measure "enough"? What is the appropriate sanction? We do not live in China, where the internet simply goes dark for millions when government so decides. Our democratic society cannot be treated that way'[12].

III. Legal and political framework

1. Definition of Extremism, Fundamentalism and Radicalisation

'Prevent' defines 'extremism' as 'vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs'[13]. Extremism also includes 'calls for the death of members of our armed forces, whether in this country or overseas'[14]. As seen above, the category 'British values' has been criticised as being too vague[15].

'Prevent' defines 'radicalisation' as 'the process by which a person comes to support terrorism and extremist ideologies associated with terrorist groups'[16]. This could arise in educational settings (including universities) or where preaching occurs (including places of worship) (see below). The point at which to intervene to tackle radicalisation is much debated: on the one hand, intervening too early may be inappropriate, as individuals may hold radical views without being a threat to society; on the other hand, waiting for individuals to exhibit extremist behaviour may be too late[17]. 'Prevent' defines 'interventions' as 'projects intended to divert people who are being drawn into terrorist activity'. They may include various means of support, encouragement of civic engagement and even, importantly, providing 'mainstream services (education, employment, health, finance or housing)'[18].

[10] A. Norfolk, 'Muslim groups accused of spreading misinformation about the Prevent strategy', *Daily Telegraph*, 3 Jun 2017.

[11] Prime Minister's Office, 'UK and France announce joint campaign to tackle online radicalisation', 13 Jun 2017.

[12] 'Terror legislation watchdog Max Hill QC calls for media to take "greater care" in giving publicity to terrorists', *Press Gazette*, 3 Jul 2017.

[13] HM Government, 'Revised Prevent Duty Guidance', Section F.

[14] Ibid.

[15] Open Society Justice Initiative, 'Eroding Trust'.

[16] HM Government, 'Revised Prevent Duty Guidance'.

[17] D. Barrett, 'Tackling radicalisation: the limitations of the anti-radicalisation prevent duty' (2016) *European Human Rights Law Review*, p. 531.

[18] HM Government, 'Revised Prevent Duty Guidance', Section F.

A further issue with 'Prevent' is that 'the majority of the focus is on Muslims'[19]. Baroness Hale thinks this could alienate communities[20]. Further, the classification system[21] used to determine the risk of an individual being drawn into terrorism has been criticised by 140 leading researchers[22]. Red flags for risk include engagement with a group, cause or ideology[23]; intent to cause harm[24]; and the ability to cause harm[25].

The Terrorism Act 2000 defines 'terrorism' as 'the use or threat of action where… the use or threat is designed to influence a government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause'[26]. An act falls under this definition if it involves serious violence against a person or serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or a section thereof or if it is designed seriously to interfere with or disrupt an electronic system[27]. The offence has since been expanded and now includes 'encouraging terrorism'[28].

It is also an offence to collect or make a record of information likely to be useful to a person committing or preparing a terrorist act, possessing a document or record containing such information[29] and disseminating terrorist publications[30]. In *R v Ahmed Faraz*, a bookseller was convicted of dissemination of terrorist publications because books in his store were possessed by known terrorists[31]. On appeal, it was held the books were not 'terrorist publications' —the test is whether the material encourages terrorist acts. Judge Christopher Pitchford stated that 'the danger is that the

[19] D. Barrett, 'Tackling radicalisation', pp. 531, 536.

[20] Baroness Hale of Richmond, 'Freedom of religion and freedom from religion' (2017) *Ecclesiastical Law Journal*, pp. 3, 9.

[21] HM Government, 'Channel: Vulnerability assessment framework', Oct 2012, s 1-3.

[22] L. Blackwood *et al*, 'From Theorising Radicalisation to Surveillance Practices: Muslims in the Cross Hairs of Scrutiny' (2015) *Political Psychology*, p. 8.

[23] Feelings of grievance or injustice, feeling under threat, a need for identity, meaning and belonging, a desire for status, a desire for excitement and adventure, a need to dominate and control others, susceptibility to indoctrination, a desire for political or moral change, opportunistic involvement, family or friends' involvement in extremism, being at a transitional time of life, being influenced or controlled by a group, relevant mental health issues.

[24] Over-identification with a group or ideology, 'them and us' thinking, dehumanisation of the enemy, attitudes that justify offending, harmful means to an end, harmful objectives.

[25] Individual knowledge, skills and competencies, access to networks, funding or equipment, criminal capability.

[26] Terrorism Act 2000, s 1(1).

[27] Ibid, s 1(2).

[28] Ibid, s 1.

[29] Ibid, s 58.

[30] Terrorism Act 2006, s 2: this includes anything that 'glorifies' terrorism.

[31] Ibid, s 2.

jury would condemn the publication purely by reason of its association with known terrorists'[32].

The Counter-Terrorism Internet Referral Unit (set up in 2010 and run by the Metropolitan Police) investigates 1,000 pieces of potentially 'extremist' material every week[33]. In the year ending March 2017, the Crown Prosecution Service, Counter-Terrorism Division, brought 79 prosecutions for terrorism-related offences, an increase of 28 (55%) on the 51 brought the previous year. Sixty-eight per cent of the accused were convicted, compared with 92% the previous year. The increase in the number of trials was driven by a large increase in the number of individuals charged with terrorist fundraising (from 2 to 12) and for preparing terrorist acts (from 20 to 27)[34].

2. Legislation Enacted to Prevent Terrorism and Tackle Radicalisation and Extremism

Immigration: Links are claimed between immigration and terrorism. Under the Immigration Act 1971, a points-based system is used[35] that enables the entry of individuals ranging from 'highly skilled workers' (tier 1) to 'temporary workers' (tier 5)[36]. Except for individuals under tier 1 and 'youth mobility' under tier 5, 'a migrant must be sponsored by a UK-based employer or educational institution'[37]. There are special rules on ministers of religion: the applicant must have been working in such a capacity for at least one year[38]. The United Kingdom also applies the 1951 United Nations Convention on the Status of Refugees[39]. Applications for asylum are made to the UK Borders Agency[40]. An asylum and immigration tribunal oversees the pro-

[32] [2012] EWCA Crim. 2820, see esp. para. 46.

[33] United Kingdom Parliament, Hansard, 2015-06-11, HC Deb, 11 Jun 2015, c 1367.

[34] Home Office for Security and Counter-Terrorism, 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2017: Statistical Bulletin 08/17', Jun 2017.

[35] Immigration Rules, part 6A, paras. 245AAA-245ZZE.

[36] Ibid, r 245ff.

[37] D. McLean, 'Immigration, National and Regional Laws and Freedom of Religion: Report for UK' in A. Motilla (ed), *Immigration, National and Regional Laws and Freedom of Religion* (Leuven, Peeters, 2012) p. 249.

[38] Immigration Rules, Appendix A, paras. 85-92. Defined as 'a religious functionary whose main regular duties comprise the leading of a congregation in performing the rites and rituals of the faith and preaching the essentials of the creed'.

[39] D. McLean, 'Immigration', p. 249; 1951 United Nations Convention on the Status of Refugees as extended by the 1967 Protocol.

[40] A so-called 'case owner' will take on the application: 'Home Office, UK Border Agency' job description: 'owning cases from beginning to the end of the process, including the commissioning of enforcement activity, detention, setting of removal directions and considering applications under the Immigration rules'.

cess. Asylum seekers are provided with accommodation, financial support and free healthcare should they require it[41].

Religious hatred: Under the Racial and Religious Hatred Act 2006[42], 'religious hatred' is 'hatred against a group of persons defined by reference to religious belief or lack of religious belief'. This includes, for example, the public performance of a play; distributing, showing or playing a recording; and broadcasting or including a programme in a programme service. For words, behaviour, written material, recordings or programmes to be considered religious hatred, they must be threatening, and there must be either an intention to stir up religious hatred or recklessness as to whether or not religious hatred is stirred up. If an individual accused of inciting religious hatred was inside a dwelling and had no reason to believe that the words or behaviour used or the written material displayed would be heard or seen by anyone outside that or any other dwelling, this is a legitimate defence[43].

Proscribed (religious) organisations: The Terrorism Act 2000 lists 'proscribed organisations'[44], such as Al-Qaeda, the Abdallah Azzam Brigades and the Abu Nidal Organisation[45]. The home secretary may to add to, remove from or amend the list. An organisation 'is concerned in terrorism if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism'[46]. It is an offence to be, or to profess to be, a member of a proscribed organisation, which includes expressing or inviting support for a proscribed organisation[47]. Furthermore, organisations with the same name as one listed are now included[48], and the Terrorism Act 2000 states that 'an organisation remains proscribed irrespective of any change in name'[49]. It is an offence to hold, to arrange or to help arrange a meeting (of three people or more) for the purpose of encouraging support for a proscribed organisation or furthering its activities[50], and to wear clothing or an item in public that would arouse reasonable suspicion that the person is a member of such an organisation[51].

41 Asylum Support Regulations 2000, S.I. 2000/704, as most recently amended by the Asylum Support (Amendment) Regulations 2008, SI 2008/760.

42 See the Crown Prosecution Service website: <https://www.cps.gov.uk/publications/prosecution/cases_of_inciting_racial_and_religious_hatred_and_hatred_based_upon_sexual_orientation.html>.

43 Racial and Religious Hatred Act 2006, s 29.

44 Terrorism Act 2000, s 11-13.

45 Home Office, 'Proscribed Terrorist Organisations', May 2017.

46 Terrorism Act 2000, s 3.

47 Ibid, s 11-12.

48 Ibid, s 22.

49 Terrorism Act 2006, s 21. Also see J. Alder and K. Syrett, *Constitutional & Administrative Law* (11th edn, London, Palgrave, 2017) p. 632.

50 Terrorism Act 2000, s 12.

51 Ibid, s 13.

The Terrorism Act 2006 addressed for organisations that promote or encourage terrorism[52] and introduced the Proscribed Organisations Appeal Commission (POAC)[53]. To be removed from the list of proscribed organisations, an organisation must first apply to the home secretary. In the case of a refusal, an appeal can be lodged with the POAC[54], which is made up of a senior judge and two other members. A further appeal may be lodged with the Court of Appeal[55].

Information-gathering: The Counter-Terrorism Act 2008 regulates the gathering and sharing of information for counter-terrorism purposes, and extends police powers in respect of entry, search and seizure[56]. These may be used if authorised by a senior police officer who 'reasonably suspects that an act of terrorism will take place' and 'reasonably considers' that the authorisation is 'necessary to prevent such an act'[57].

Restrictive measures as to individuals: The Terrorism Prevention and Investigation Measures (TPIM) Act 2011 introduced notices[58], namely, the 'requirements, restrictions and other provisions' that may be imposed on an individual (such as overnight residence, travel restrictions and exclusions from specified areas; restrictions on financial services, property transfers, possession and use of electronic communications, employment or studies; and reporting and monitoring requirements[59]. A TPIM notice may be imposed by the home secretary if prescribed conditions are met[60]. However, an individual may request that the home secretary remove a TPIM notice. Should the home secretary refuse, the individual may request that the courts quash the notice[61]. According to a report from March 2014, 10 TPIM notices have been issued —the details of each notice are generally anonymised, but all recipients were involved in Al-Qaeda-related terrorism, and nine of them were British citizens[62].

The Counter-Terrorism and Security Act 2015 is aimed at preventing people travelling from the United Kingdom to fight for terrorist organisations overseas[63]. A police officer who has reasonable grounds to believe a person intends to be involved

52 Terrorism Act 2006, Part II.

53 Terrorism Act 2000, s 5, as amended by the Terrorism Act 2006, s 22.

54 Ibid, s 4, as amended by the Terrorism Act 2006, s 22.

55 Home Office, 'Proscribed Terrorist Organisations', May 2017, 4.

56 Counter-Terrorism Act 2008, s 1.

57 A. W. Bradley *et al*, *Constitutional & Administrative Law* (16th edn, London, Pearson, 2015) p. 550.

58 Terrorism Prevention and Investigation Measures Act 2011, s 2.

59 Ibid, Schedule 1.

60 Ibid, s 3.

61 Ibid, s 16.

62 *SSHD v AY* [2012] EWCH 2054; *BX v SSHD* [2010] EWCH 990 (Admin); *SSHD v CC and C*F [2012] EWHC 2837 (Admin).

63 Counter-Terrorism and Security Act 2015, s 1, Schedule 1.

in terrorism overseas may stop and search them[64]. A Code of Practice regulates the exercise of powers[65].

The secretary of state may issue a temporary exclusion order (TEO) to prevent an individual returning to the United Kingdom if they reasonably suspect that the individual is or has been involved in terrorism-related activity overseas, and if they reasonably believe that the order is necessary to protect the public, provided a court has granted permission to do so. The court must give permission unless the decision is considered 'obviously flawed'. However, if the secretary of state reasonably believes that there is an urgent threat, they may impose a TEO notice without court permission; this must, immediately after being granted, be referred to the court, and the court must determine within five days whether the decision was 'obviously flawed': if it was, it may be quashed, but if not, the order will be confirmed and come into effect on notification of its imposition. It remains in force for two years unless revoked[66].

When a TEO is in force, 'any British passport held by the excluded individual is invalidated'. If the citizen is permitted to return to the United Kingdom, they may be subject to reporting requirements, such as those under a deradicalisation programme. The person may also be required to live in a specified location[67].

The statutory prevent duty: The Counter-Terrorism and Security Act 2015 lists those authorities that must have 'due regard to the need to prevent people from being drawn into terrorism'[68]. However, a university or college, for example, 'must have particular regard to the duty to ensure freedom of speech, and the importance of academic freedom'[69]. In order 'to identify and support individuals who are vulnerable to being drawn into terrorism', a panel must be put in place[70]. The panel consists of 'the responsible local authority' and 'the chief officer of police for a police area the whole or any part of which is in the area of that authority', as well as any 'other persons [that] the responsible local authority considers appropriate'[71]. The panel is 'to assess individuals who are referred to it', and it 'must draw up support plans with a view to preventing the person being drawn into terrorism'[72]. Neither the act nor the 'Prevent' strategy defines 'assessment'; however, they do detail what prevention

64 Ibid, para. 2(7)(b).
65 Ibid, s 18.
66 Ibid, ss 2, 3 and 4, and Schedule 2.
67 Ibid, ss 4-9, 16.
68 Ibid, Schedule 6.
69 Ibid, s 31.
70 Ibid, s 36.
71 Ibid, s 37.
72 H. Barnett, *Constitutional & Administrative Law* (Abingdon, Routledge, 2016) p. 558.

entails, namely: 'reducing or eliminating the risk of individuals becoming involved in terrorism'[73].

3. Legislation Indirectly Relevant to Tackling Radicalisation and Extremism

The police Special Branch was merged with the Anti-Terrorist Branch in 2006 to form the Counter-Terrorism Command. Run by the London Metropolitan Police, it is overseen by the Counter-Terrorism Coordination Committee, which consists of senior police officers[74]. Though not 'an official security and intelligence service, [it] assists both the security service and the Secret Intelligence Service' in their statutory duties; indeed, terrorism is the "key priority" for the Special Branch'[75], and it is responsible for 'gathering intelligence on threats to public order and community safety'[76].

The Protection of Freedoms Act 2012, which amends the Regulation of Investigatory Powers Act 2000, requires local authorities, for example, to obtain judicial approval before using covert investigatory techniques[77]. The Counter-Terrorism and Security Act 2015 amends the Data Retention and Investigatory Powers Act 2014 to require that communications service providers retain additional communications data[78]. This allows the authorities to determine the identity of the person using the Internet at a particular time[79]. The Act also empowers the authorities to carry out schemes to enhance the information available to impose security measures on aviation, shipping and rail[80]. Furthermore, the Crime and Security Act 2010 amends police powers on search and seizure[81].

4. Soft Law, Recommendations and Policies Tackling Radicalisation and Extremism

As seen already, an important innovation under the CTSA 2015 is the 'Prevent' strategy. The guidance provided by the strategy focuses on leadership, partnership and capabilities[82]. All authorities 'should demonstrate an awareness and understanding of the risk of radicalisation in their area, institution or body', and 'all specified

[73] HM Government, 'Revised Prevent Duty Guidance'.

[74] National Police Chief Council, 'Terrorism in the UK', <http://www.npcc.police.uk/CounterTerrorism/CounterTerrorismPolicing.aspx> (accessed 1 Jun 2017).

[75] Home Office Guidelines on Special Branch Work in the United Kingdom (2004), para. 20.

[76] Bradley et al, Constitutional & Administrative Law, p. 512.

[77] 'Local specified authorities' defined under the Regulation of Investigatory Powers Act 2000, s 38(7).

[78] Regulation of Investigatory Powers Act, s 4(1).

[79] Counter-Terrorism and Security Act 2015, s 21.

[80] Ibid, ss 22-25.

[81] The insertion of '7D' to follow '7C', amended by the Crime and Security Act, s 56.

[82] Prevent Duty Guidance, 2015, section C, 16-20.

authorities will need to give due consideration to it'[83]. The guidance states that this is an extension of schools' responsibility[84] 'to keep children safe and promote their welfare'[85].

There have been many suggestions to reform the strategy, such as improving religious education in schools[86] and strengthening community cohesion[87]. There are also, however, many other resources and tools available for schools, though it has been claimed that these other resources have not been tested sufficiently[88].

IV. Effects of the measures on religious freedom

The effects of the Counter-Terrorism and Security Act 2015 and 'Prevent' on the exercise of religious freedom by religious communities and by individuals is a matter of debate. On the one hand, Baroness Hale considers that the government's belief that non-violent extremism 'can create an atmosphere conducive to terrorism and can popularise views which terrorists then exploit'[89] needs to be 'challenged'[90]. Indeed, there is uncertainty as to the definition of 'radicalisation' within the context of the Act and 'Prevent' (see above)[91]. In turn, Baroness Warsi thinks that 'Prevent' lacks a 'community cohesion' aspect, and the Muslim Council of Britain reported that 'their perception of the strategy from community members was that it was not working and that there was a lot of suspicion around it'[92].

On the other hand, now in its 10th year, the 'Channel' programme (see below), which incorporates 'Prevent' as part of the government's 'CONTEST' strategy, is due for a major overhaul, and ministers plan to strengthen guidance for schools and universities. Suspected Islamic extremism remains the most likely reason for referral, accounting for 70% of the 4,000 cases treated each year. Moreover, Security Minister Ben Wallace said earlier this year: 'Prevent is fundamentally about safeguarding and supporting vulnerable individuals at risk of radicalisation, in a similar way to process-

[83] Ibid, 14.

[84] Enforced by the Early Years Foundation Stage, which places these duties on providers in order to protect the most vulnerable and impressionable members of society.

[85] Prevent Duty Guidance, 2015, section E, 60.

[86] J. Orchard, 'Does Religious Education Promote Good Community Relations?' (2015) 36(1) *Journal of Beliefs & Values*, p. 40.

[87] P. Thomas, *Responding to the Threat of Violent Extremism* (London, Bloomsbury, 2010).

[88] Radicalisation Research website: <http://www.radicalisationresearch.org/guides/what-can-schools-do-about-radicalisation/> (accessed 1 Jun 2018).

[89] HM Government, 'Revised Prevent Duty Guidance'.

[90] Baroness Hale of Richmond, 'Freedom of religion and freedom from religion' (2017) *Ecclesiastical Law Journal*, p. 6.

[91] 'School heads raise alarm over new duty to protect students from extremism', *The Guardian*, 9 Jun 2015.

[92] UK Parliament, 'Radicalisation: the counter-narrative and identifying the tipping point', Aug 2016.

es designed to protect people from gangs, drug abuse, and physical and sexual abuse', adding that it 'is making a positive difference and we've seen a significant impact in preventing people being drawn into terrorism'. Minister Wallace also said that he agreed 'that it is vital Prevent is understood as first and foremost a safeguarding process'. Around a quarter of people supported by the voluntary Channel programme are in favour of far-right concerns —the 'Prevent' strategy deals with all forms of terrorism and does not focus on any one community[93].

1. Effects of Norms (Tackling Radicalisation/Extremism) on the Religious Freedom of Religious Communities and Affiliated Institutions

The effect of these regimes on the freedom of faith communities was commented upon by the government in October 2015, when it announced its new counter-extremism strategy[94]. The strategy builds on the statutory 'Prevent' duty but goes further by focusing on four areas: countering extremism, building a partnership with all those opposed to extremism, disrupting extremists and building a more cohesive society. Specifically in relation to faith communities, it announced: first, the Department for Communities and Local Government is commissioning a new programme of support to help faith institutions to establish strong governance that 'aims to strengthen and support places of worship of all faiths in order to improve governance, increase their capacity to engage with women and young people, challenge intolerance and develop resilience to extremism'. As a result, '[t]he programme will provide training on key issues alongside support for faith institutions facing specific challenges'. Second, it is not for government 'to regulate faith leaders, but government does have a responsibility to ensure that those working in the public sector are suitably trained. The Government will therefore work in partnership with faith groups to review the training provided to those who work as faith leaders in public institutions'[95]. This work is ongoing.

[93] H. Yorke, 'One in four "extremists" reported to Government's deradicalisation programme are far-Right sympathisers, figures show', *Daily Telegraph*, 15 Feb 2017, <https://www.telegraph.co.uk/news/2017/02/15/one-four-extremists-reported-governments-deradicalisation-programme/> (accessed 1 Aug 2018).

[94] 'PM: New counter-extremism strategy is a clear signal of the choice we make today', <https://www.gov.uk/government/news/pm-new-counter-extremism-strategy-is-a-clear-signal-of-the-choice-we-make-today> (accessed 1 Aug 2018).

[95] F. Cranmer, 'Parliamentary Report: Counter-Extremism', (2016) *Ecclesiastical Law Journal*, p. 223.

2. Effects of the Norms on Individual Religious Liberty

In relation to individuals, Baroness Hale discusses various incidences of children travelling to ISIS-controlled areas[96]: while 'we should do all we can to protect them from these risks, [we should try] hard to avoid further alienation from British society'; and 'if … "radicalising" means no more than that a set of Muslim beliefs and practices is being strongly instilled in these children, that cannot be regarded as in any way objectionable or inappropriate'[97]. The protection of children in this context has come before the courts. In *London Borough of Tower Hamlets v M* (2015), for example, two local authorities made a number of children wards of the court for fear that they would travel to ISIS-controlled areas[98]. However, the system has its limitations: in *Tower Hamlets LBC v B*, a young Muslim woman was placed back into her family home (where it was recognised that she was at risk of radicalisation) due to the fact that no foster care was available for her[99]. Further research is needed on such cases.

3. Effects of Policy on Religious Freedom of Religious Communities and Individuals

'Prevent' is the principal policy mechanism by which the potential of radicalisation within religious communities and their affiliated institutions, as well as among individual believers, is managed or regulated (see Section 4.1).

V. Educational measures to tackle radicalisation or extremism

1. Laws, Policies and Programmes

Compliance with 'Prevent' on the part of schools is monitored by the Office for Standards in Education, Children's Services and Skills (Ofsted)[100]. In 2015, the Department for Education issued a call for evidence that informal out-of-school education in England had been inspected in the context of concerns with regard to some Muslim *madrasas* and informal classes run by ultra-Orthodox Jewish groups about issues such as corporal punishment and health and safety[101]. The evidence

[96] *London Borough of Tower Hamlets v B* [2015] EXCH 2491 (Fam); *London Borough of Tower Hamlets v M* [2015] EWCH 869 (Fam).

[97] Baroness Hale, 'Freedom of religion and freedom from religion', p. 9.

[98] [2015] EWHC 869 (Fam).

[99] [2016] EWHC 1707 (Fam).

[100] Ofsted inspects schools with the aim of providing information to parents to promote improvement and to hold schools to account. It reports directly to government and is both independent and impartial: <independenteducationconsultants.co.uk>.

[101] Department for Education, 'Out-of-school education settings: call for evidence, Government consultation', 26 Nov 2015.

revealed that 'inspectors had found 15 unregistered [illegal] schools … many of them faith schools'[102]. In response to the call for evidence, Frank Cranmer, secretary of the Churches' Legislation Advisory Service, considered that while the churches fully support 'the broad aim of keeping children safe generally from the risk of harm, including emotional harm, and promoting their welfare, some of the proposals in the package were fairly vague', adding that the Churches' Legislation Advisory Service 'suggested that the proposal, though understandable, [had] not been fully thought through and [seemed] disproportionate to the mischief it [was] seeking to cure'[103].

Soon after, the minister for education explained that having an inspection was 'not a way of regulating religion. We are not infringing people's freedom to follow particular faiths or hold particular beliefs. In fact, the mutual respect and tolerance of those with different faiths and beliefs is one of our core British values, alongside democracy, rule of law and individual liberty, and nothing in the proposals infringes on that'[104]. However, for Ofsted, 'thousands of children are in danger of being radicalised as they remain hidden from authorities in unregistered schools'[105].

2. **Autonomy of Religious Schools**

In England, schools may be designated as having a 'religious character'[106]. First, the basic position as to admission is one of tolerance: pupils from outside the faith in question are to be admitted, but religious schools, under the Equality Act 2010, may discriminate on grounds of religion as to who is admitted if the school is over-subscribed[107]. Second, as to religious education, in a foundation or voluntary controlled school with a religious character (i.e. maintained schools receiving state funding), religious education must be in accordance with an agreed syllabus[108]. Voluntary aided schools with a religious character (supported by a charitable foundation, which is frequently a religious organisation) have more freedom, as religious education must be in accordance with the trust deed or the tenets of the religion specified[109]. Third, 'in relation to worship, no distinction is made between foundation, voluntary aided and

[102] 'Inspectors to go after illegal schools follow "serious" threats to children, Ofsted says', *The Telegraph*, 11 Dec 2015.

[103] F. Cranmer, 'Regulating out-of-school education', *Law & Religion UK*, 20 Jan 2016.

[104] Westminster Hall, 20 Jan 2016, Minister for Education Nick Gibb.

[105] 'Ofsted warning over thousands of children in danger of radicalisation', *The Telegraph*, 16 May 2016.

[106] School Standards and Framework Act 1998, s 69(4). Education is a devolved matter in Wales, Scotland and Northern Ireland, which are not covered in this study.

[107] Ibid, s 84.

[108] Ibid, Schedule 19, para. 3.

[109] Ibid, Schedule 19, para. 4.

voluntary controlled schools with a religious character'[110]. State schools without a religious character must hold a daily act of worship, which must be 'wholly or mainly of a broadly Christian character'[111].

Independent faith schools may be set up by any group, but they must be registered[112]. They are subject to inspection[113]. In contrast to maintained schools, these schools are privately funded. Moreover, '[i]ndependent schools can be designated as having a religious character in the same way as a foundation or voluntary school'[114]. They are not bound to follow the national curriculum or requirements as to religious education and collective worship[115]. However, the Independent School Standards must be met[116]. These provide requirements as to the quality of education provided as well as 'the spiritual, moral, social and cultural development of pupils'[117]. These statutory standards go further than the common law in equipping a child for life[118].

'Prevent' applies to all school types. The CTSA 2015 also places a responsibility on authorities to establish 'Channel panels', which operate under 'Prevent' and must include the local authority and chief constable of the local police. A young person would be referred to 'Channel' (in accordance with a designated process) should a school believe that they are particularly vulnerable to being drawn into terrorism[119].

Indeed, as to the inspection of a school by Ofsted, it has been recognised that 'aside from the obvious desire to safeguard pupils from radicalisation, a failure to pro-actively manage these issues could lead to an unfavourable outcome following inspection. This could be very damaging for a school's reputation'[120].

3. **Rights of Children and Parents**

In England, the law takes into consideration the (religious) beliefs of parents in relation to religious education. If a parent requests that their child 'be wholly or partly

[110] M. Hill, R. Sandberg and N. Doe, *Religion and Law in the United Kingdom* (2nd edn, Alphen aan den Rijn, Kluwer Law International, 2014) p. 186.

[111] R. Long, 'Relationships and Sex Education in Schools (England)', Briefing Paper No 0610 3 Aug 2018 , House of Commons Library.

[112] Education Act 2002, ss 158, 159.

[113] Ibid, ss 162A, 162B.

[114] Hill, Sandberg and Doe, *Religion and Law in the United Kingdom*, p. 188.

[115] A. Bradney, *Law and Faith in a Sceptical Age* (Abingdon, Routledge-Cavendish, 2009), pp. 131-132.

[116] Education Act 2002, Part 10.

[117] Hill, Sandberg and Doe, *Religion and Law in the United Kingdom*, p. 189.

[118] 'Secretary of State for Education and Science ex parte Talmud Torah Machzikei Haddass School Trust' *The Times*, 12 Aug 1985.

[119] Counter-Terrorism and Security Act 2015, ss 36 and 37.

[120] Winckworth Sherwood, 'A Legal and PR Response to the Prevent Duty: Preventing Extremism in Schools: the Legal Duties and Implications', Jan 2016, s 1.2.

excused' from receiving religious education, the pupil is to be excused unless the request is withdrawn. A pupil may also be withdrawn to receive religious education elsewhere if they 'cannot with reasonable convenience' be sent to a school where the desired type of religious education is provided. Parents may also withdraw a child, and sixth-formers have the right to withdraw themselves, from acts of religious worship[121].

Baroness Hale has argued that, socially, 'the notion is developing that inculcating certain religious beliefs can be harmful enough to justify state intervention in family life'[122]. However, the secretary of state for foreign and commonwealth affairs has called for the law to treat radicalisation 'as a form of child abuse', arguing that 'we need to be less phobic of intrusion into the ways of minority groups and less nervous of passing judgment on other cultures'[123]. As we have seen, if it is decided that a child is vulnerable to radicalisation, then their freedom is limited in so far as they may be subject to the processes envisaged by the Channel programme (see above).

VI. Conclusion

The United Kingdom has introduced a wide range of legal and policy measures to prevent terrorism, extremism and radicalisation. Terrorism itself is subject to an increasingly complex body of criminal law and other legislation that enables the police and other government bodies (including government ministers) to take preventative action when terrorist activity is suspected or committed. The exercise of these powers is subject to supervision by the courts in accordance with the rule of law. The United Kingdom also uses soft law to address religious and other forms of extremism and radicalisation, though these two terms are not defined in law. The government's 'Prevent' strategy takes centre stage. It provides a regime that seeks to ensure that individuals (mainly the young) are not 'drawn into terrorism'. While the 'Prevent' duty is statutory, the 'Prevent' system is non-statutory —a type of soft law. The system has been criticised as illiberal, though we await a full debate about the technical effects of the scheme on collective and individual religious freedom and the extent that limits on the exercise of this right may be justified on the basis of protecting society from the effects of terrorism. The scheme is soon to be reviewed.

121 School Standards and Framework Act 1998, ss 71 and 71A.

122 Baroness Hale of Richmond, 'Freedom of religion and freedom from religion', p. 13.

123 B. Johnson, 'The children taught at home about murder and bombings', *The Telegraph,* 2 Mar 2014.