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The three-fold paradox concerning Salafism in Europe, ECtHR-case law and counter-terrorism measures

An interdisciplinary study on international legal and political approaches regarding
Salafism in Europe in the 21st century

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Abstract

This study discusses Salafism, as a fundamentalist interpretation of Islam, in relation to the case law of the ECtHR and counter-terrorism measures of four European states. Within each of these three subjects, a paradox is identifiable. The study analyzes the Islamic legal tradition *Shari'a*, the Salafist interpretation thereof, the approach of the European Court of Human Rights (ECtHR) towards Islamic fundamentalism and recent counter-terrorism measures taken by Belgium, France, Germany and the United Kingdom. It finds that *Shari'a* is subject to many different interpretations, and, as a result, it reveals the dilemma of the ECtHR and national counter-terrorism measures between the protection of the democratic society at one hand and the protection of fundamental freedoms at the other hand.

Research is conducted through English and Arab literature, ECtHR-case law and policy documents. Ultimately, this study shows the relevance of an interdisciplinary perspective on a political movement and its cultural and legal tradition. The cultural, legal and political analysis of *Shari'a* and Salafism provides a thoughtful view on *Shari'a* and the different orientations it encompasses. In this way this study gives insight in the legitimacy of the judgments of the ECtHR on (violent) Islamic fundamentalist claims on articles 9-11 and 17 ECHR. This study also contributes to the debate on fair and adequate counterterrorist measures that succeed in protecting public safety, while upholding the values of democracy and rule of law as embodied in the ECHR.

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Preface

The first time I had a conversation about Salafism, I realized how little I knew about this topic. It was 2014, just before the major terrorist attacks in Paris, Brussels and Nice. Sitting with a friend of mine in the train, we discussed the lecture we had just attended. Being both active in politics, we were both able to develop and defend a strong opinion – albeit that my opinion was largely based on news, media and basic knowledge. My friend labelled Salafists as terrorists, stating that nuance in politics about their individual freedom of religion would result in an enormous loss of seats in the next parliamentary elections, because the public would not (want to) understand that nuance. Sometimes, he said, tolerance and mutual understanding had a limit, as apparently is in the case with Salafism in Europe.

I did not want to agree. I felt it was unjust to interfere in one's freedom of religion for their individual beliefs. And I did not want to believe that all Salafists were terrorists. But I could not effectively defend my stance of view – as my friend was much better informed.

About two years later, I was biking alone on a dark evening through an empty park in Strasbourg, France. I had just heard the news about another terrorist attack, this time in London near the Westminster. Working on the topic of Salafism every day, as part of my research for this study, I started to feel scared. What if some individuals would perpetrate a similar attack in Strasbourg?

The day after, I realized my hesitation the night before was a logical consequence of my choice for this research topic. Anyway, I focused on separating personal feelings from objective research. I continued reading, thinking and discussing everyday about Salafism. I did not let any emotions influence my motivation, interest and academic eagerness to understand more about the situation we today find ourselves in in Europe.

All of this has resulted in the study which you are about to read. I am enormously grateful to everyone who helped me finish this thesis. Supervisors, friends, conversation partners and my parents – without you I would have lost my motivation yet soon.

To you, the reader, I just want to finish by emphasizing that objectivity, understanding and nuance are key in today's society. Without each of these three aspects, our precious societies will fall victim of ignorance, intolerance and public populism.

Introduction

Since its emergence in the late nineteenth century, the Islamic-fundamentalist ideology Salafism has had increasing influence on Muslim and non-Muslim populations, as well as Middle-Eastern and Western states. Worldwide there are roughly 50 million Muslims following the Salafist ideology, including around 17.000 French citizens and 5.000 German nationals. Many forces have contributed to the enhanced visibility of Islam and, as part of it, Salafism. A few of them include: increases in the European Muslim population in contrast to decreases in the population of non-Muslim Europeans; calls for the application of elements of Islamic law in traditionally majority Christian nations and Europe's economic dependency on Middle Eastern oil (Cole Durham Jr & Kirkham, 2012).

However, the ordinary citizen of Western-European countries only learned about Salafism in the aftermath of the recent terrorist attacks in, amongst others, Belgium, France and Germany. The terrorists defiantly committed their attacks in the name of Islam, as they shouted 'Allahu Akbar', making this cry generally feared in Western life. Most perpetrators were (homegrown) Salafi-jihadists supporting Da'esh in Syria and Iraq.

As the most visible Salafists used violence to enforce their ideology upon Muslims and non-believers, there is a common misunderstanding about Salafism and violent extremism. Many Salafists reject any form of violence. Only a small percentage of Salafists are militant, accepting the use of violence to reach a *jihad*. In the context of the terrorist attacks, the pursuit of a *jihad* is commonly understood as a total war to enforce Islam upon all Muslims and non-believers, but this only goes up for so-called Jihadi-Salafists. The other, non-violent Salafists want to reach a moral *jihad* individually or within their community. They try adopt a purist lifestyle based on the dictates of the Qur'an and the habits of Prophet Muhammad ('*Sunnah*'). In any way, Salafism remains difficult to define due to its ambiguity and fragmentation. Although it is a movement with clear characteristics, it is not homogenous. There can even be contradictory tendencies among the various groups across the regions and countries. Here we find the first paradox identified in this study: while claiming to understand the one and only real 'truth', the group itself is strongly divided by religious interpretation and concrete application.

There European Salafists are protected by the European Convention on Human Rights (hereafter: ECHR). The European Court of Human Rights (hereafter: ECtHR) in Strasbourg, France, has decided on four interesting cases concerning Islamic fundamentalist individuals and

associations¹. The ECtHR had to decide between freedom of assembly and freedom of expression versus the safety of the democratic society. It has set a clear standard regarding *Shari'a* in Europe, stating that this legal regime is incompatible with European Convention values, such as human rights and democracy. However, the ECtHR has not clarified which *Shari'a* interpretation it bases its approach upon. Moreover, the ECtHR stated that the pursuit of a *jihad* might give enough ground for State interference. While discussing the legal issues arising from the presence of Salafists in Europe, following articles 9-11 and article 17 ECHR, a second paradox becomes identifiable in the ECtHR's singular approach towards the non-generalizable topics of *Shari'a*, *jihad* and Islamic fundamentalism.

Moreover, since the 9/11 attacks by Al-Qaida in the United States, many governments of Western-European countries have taken strong counter-terrorism measures, such as the implementation of new legislation and de-radicalization educational programs, to prevent another terrorist attack. The governments of, *inter alia*, Belgium, France, Germany and the United Kingdom have adopted new policies. However, some of these counter-terrorism measures potentially undermine the Salafists' freedom of religion, freedom of assembly and freedom of expression. The third paradox becomes clear from these measures. While trying to protect the society and human rights against terrorism, some governmental policies are potentially breaking down these same human rights in the light of counter-terrorism, which were originally meant to protect citizens from the state.

This study discusses Salafism in relation to the ECtHR-case law and recent counter-terrorism measures of Belgium, France, Germany and the United Kingdom. To address this issue, this study poses the following research question: **to what extent might the legal tradition behind Salafism offer critical insights in the legitimacy of recent ECtHR-case law on (violent) extremism and in the legitimacy of recent counter-terrorism measures in the light of the ECHR and its principles of the rule of law, democratic society and cultural and legal freedoms for all?**

¹ This study will discuss *Kalifatstaat v. Germany*; *Hizb Ut-Tahrir v. Germany*; *Kasymakhunov and Saybatalov v. Russia* and *Refah Partisi (The Welfare Party) and Others v. Turkey*.

1) Importance of the study

Since June 2014, the self-proclaimed Islamic State or Da'esh has “conducted or inspired” over 140 terrorist attacks in 29 countries other than Iraq and Syria, of which 25 attacks occurred in Western-European countries, leaving more than 200 deaths (CNN, 2017). As a result, the level of alert across Europe has been high and remains high. The attacks have led to a significant fear among many European citizens. Pew Research Center measures that “among the myriad threats that Europe faces in 2016, the scourge of IS registers most strongly. (...) A median of 76% say that the Islamic militant group in Iraq and Syria known as IS is a major threat to their country” (Pew Research Center, 2016).

It is no wonder that governments and international organizations make efforts to combat terrorism. They try to counter terrorism and protect their countries' citizens with ‘hard’ measures, like new legislation concerning returned foreign terrorist fighters, as well as ‘soft’ measures, such as de-radicalization programs. Many security professionals have adopted a view on ‘Islamism’ as a manifestation of radical ideology that poses a threat to national security in some way (Porter, 2009). However, many misconceptions exist about the nature of Islam, *Shari'a* and Salafism. Since there is a wide variety of interpretations among Muslims about religious extremism, it is impossible to generalize the Salafist movement. Besides, the concept of Salafism takes on many forms – one can define it as an ideology, a movement or organization or even as a form of government.

It is hoped that this study leads to a better understanding of the cultural and historical background of *Shari'a* and Salafism, to always secure human rights in new policies and legislations concerning Islamic fundamentalism and counter-terrorism. It will furthermore provide a framework of the most relevant ECtHR-case law and it will discuss the legitimacy of modern counter-terrorism measures in the light of religious extremism. This study will thus add to the debate about freedom of religion and measures taken ‘to protect the democratic society’ on the European continent. The current academic knowledge is limited to one-sided approaches of the topics mentioned above, hence either observing the (development of the) Salafist ideology or focusing on the potential controversial values between Islam and human rights. However, this study adopts a multidisciplinary approach, by including the ECtHR's case law and conducting research on counter-terrorism measures which potentially violate human rights.

2) Research problems and hypothesis

Since the major problem addressed by this study is approached by an interdisciplinary, wide-ranged research, the main question is also three-fold. By focusing on (i) the cultural and historical background of Salafism, (ii) relevant ECtHR-case law, and (iii) four Council of Europe Member States' counter-terrorism approaches, this study ultimately combines the topics into one conclusion. However, the three-fold approach also leads to the identification of three paradoxes.

The best way to understand Salafism in its current context is to look at the culture and the background of the ideology. This requires an understanding of *Shari'a* and Salafism. An overview of the development and various applications of *Shari'a* and Islamic law will be discussed. Among other issues, the various Sunni legal doctrines which are recognized as *Shari'a* interpretation are discussed, as well as the Islamic idea of legal pluralism and the seemingly controversial Western-Islamic values of constitutionalism, equality and the freedom of religion. For this first research topic, the question will be **“What is the legal tradition of Islam and how does the Salafist movement interpret it?”**

With the knowledge of the cultural background of Salafism in mind, we can make a link to the ECtHR's-case law. The ECtHR has not specifically decided on Salafism, although *Kalifatstaat v. Germany* is regarded Salafist², but it has also ruled on the other Islamic fundamentalist groups 'Hizb Ut-Tahrir' (*Hizb Ut-Tahrir and others v. Germany*³ and *Kasymakhunov and Saybatalov v. Russia*⁴) and 'Refah Partisi' (*Refah Partisi 'the Welfare Party' and Others v. Turkey*⁵). These cases will be discussed to see how the ECtHR has dealt with Salafism or the call for application of *Shari'a* and *jihad* in its Member States. By looking at these cases, this study analyzes the challenges that Salafist claims pose to the European Convention and its fundamental principles of a democratic society and rule of law. This topic will answer the question: **“How does the case law of the European Court of Human Rights deal with extremist claims to freedom of religion?”**

² *Kalifatstaat v. Germany* (dec.), no. 13828/04, 11 December 2006 (hereinafter: *Kalifatstaat v. Germany*)

³ *Hizb Ut-Tahrir v. Germany* (dec.), no. 31098/08, 12 June 2012 (hereinafter: *Hizb Ut-Tahrir v. Germany*)

⁴ *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, 14 March 2013 (hereinafter: *Kasymakhunov and Saybatalov v. Russia*)

⁵ *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, ECHR 2003-II (hereinafter: *Refah Partisi v. Turkey*)

To answer the interdisciplinary research question, the political approach applied in this study will complement the aforementioned cultural and legal aspects. The problems involved with the Salafist claims and the Western legal system, makes an analysis of the contemporary Salafist-inspired position and violent consequences at the one hand and the Western responses on the other hand so important. Firstly, starting with an outline of counter-terrorism measures during previous eras of terrorist threat by the Western German Rote Armee Fraktion (RAF) and the Northern Irish Republic Army (IRA), this study will include several examples of possible approaches to prevent terrorist attacks from happening. Secondly, Belgium, France, Germany and the United Kingdom, as four Member States of the Council of Europe and consequently States Parties to the ECHR, are researched as to their recently taken counter-terrorism measures. The analysis of the political aspect of the research question will lead to an answer to the question: **“How are previous terrorist threats being solved and which counter-terrorism measures are currently taken against Salafist related terrorist threats in the light of rule of law and human rights?”**

With the knowledge and expertise of the three sub-topics described above, the ultimate goal of this study is to discuss the legal problems in relation to the ECHR in the context of the problems caused by the rise of Salafism in Europe. The thesis approaches the problem with an open mind, inspired by the idea that a society and legal system based upon ideals of tolerance and multicultural pluralism must opt for a realist position of dialogue and integration in order to work towards social cohesion and inter-communal trust.

The answers to the fundamental questions based on the main question underscore this study’s hypothesis: the democratic society and rule of law principles as established in the European Convention of Human Rights are under pressure from both the universalistic, theocratic pretensions of Salafists and the counter-terrorism measures taken by countries as a result of the threat of Salafist-inspired terrorism.

3) Methods and sources

The three-part nature of this study’s research question requires an interdisciplinary approach to the methods and sources applied. Researching cultural, political and legal topics, a multitude of methods is used. To capture the traditional religious analysis of Islam, *Shari’a* and Salafism, this study examines the literature by Arabic as well as Western scholars in a qualitative method

used for social sciences. An overview of the ECtHR case law will then be made using the relevant judgments and decisions, as well as arguments posed by prominent scholars. This will however be based on interdisciplinary legal research. To understand the political approach Western countries currently apply in their fight against terrorism, a thorough analytical framework will be sketched based on Western literature as well as the countries' policies in a qualitative manner.

The qualitative research method is specifically applicable for social sciences, as it tries to build a certain theory and seek explanations and solutions, rather than testing a theory and seeking universal laws. The study concentrates on the social meanings, instead of the frequency of certain records. Its strengths can be summarized as “best suited to the study, understanding and explanation of the complexities of social and political life (...), through in-depth interviewing and observation, to learn and understand the underlying values of individuals and groups” (Pierce, 2008, p. 45). On the contrary, the qualitative method is criticized due to the risk for misinterpretation, since the researcher must analyze the interpretations of the subject from their world – which is different from the researcher's own world or interpretation. Concerning the analysis of *Shari'a* and Salafism, how can ‘a young, white, female and non-Arabic speaking’ researcher ‘see the world through the eyes of a person from a wholly different culture’? To surmount this problem, this study will include Arabic as well as Western sources from prominent scholars, and it will adopt an objective approach thus not providing specific final recommendations for policy-makers.

The interdisciplinary legal research is seeking answers that are consistent with the existing body of rules, by making at least some reference to other, external factors. An ambiguous or uncertain legal ruling can often be more easily interpreted when knowledge about its proper historical or social context is present. The ECtHR-case law is analyzed from a sociolegal framework. This study will identify relations between the legal content and the extralegal social context. By including this latter extralegal social context, differences between the real world and the legal reality become clear. As one legal scholar states: “on the basis of legal norms and standards (how things should be) no reliable deductions can be drawn as how things are” (Schrama, 2011, p. 150). This approach also brings some difficulties. One of the steps of such socio-legal research is for example to unravel the rationale of rules resulting from case law. Being a purely internal legal step, sometimes the interests which are balanced against each other are not made explicit. To overcome this difficulty, a variety of cases resulting from Grand Chamber as well

as Sections judgments and decisions will be compared, using its texts but also including any separate opinions by judges.

Two separate research methods come also with a difference in referencing. Concerning case law, references will appear in the footnotes. For all other references, the sources are both stated in in-text brackets and more extensively in the list of sources at the end of this study.

It must be noted that there are many interesting subjects relevant for this study. The current migration wave from Syrian refugees to European countries, for example, could also be integrated into the study. A deeper focus on the underlying causes of Jihadi Salafist radicalization might be useful for countries' counter-terrorism approaches. The ideas of Islamic scholars regarding human rights including the existing Islamic human rights framework is another interesting subject, having also closely to do with Salafism. Or research into the ideals pursued by Salafists in Europe through intensive contacts and interviews, could provide new insights into their stance on Western values such as democracy and human rights. However, due to limitations the scope of this study will be narrowed to the three topics as set out above.

I. The Islamic legal tradition and Salafist interpretations

The “Nine Eleven” attacks on the World Trade Center in New York City, which took place on September 11, 2001, were a major setback for the relations between the Muslim world and the West. The unprecedented event with far-reaching consequences for geopolitics, brought the study of Islam and the emphasis on its supposedly controversial values to the foreground. The war in Iraq, the Israel-Palestine conflict and the current IS/Da’esh war in the Middle East have all led to an increase of the tensions between the Western and Muslim countries involved. Adding to that the recent attacks by Jihadists in several Western-European countries and the consequential legitimization of the *jihad* by Islamic State, one could easily stress the incompatibility of Islamic values with Western values such as democracy and human rights.

However, many misconceptions persist among Western citizens and policy-makers about the values and attitude of Muslims towards such topics. Ideas persist that “Islam [is] a menacing power with a clear intent to destroy Western civilization” (Kalin, 2004, p. 143) or that “the idea of democracy does not exist in the Islamic world” (Kalin, 2004, p. 171), counting up to the idea that Islam is “a very evil and wicked religion” (Kalin, 2004, p. 167).

One can easily discard such views as valueless, without relevance for the mainstream view concerning Islam. However, with the indications that the total number of Muslims worldwide will rapidly increase in the forthcoming 10 years – growing even faster than the number of Christians⁶, it is relevant to establish an objective framework concerning the past, present and future of Islam, Islamic law and fundamentalism. The question answered in this chapter will be: **“What is the legal tradition of Islam and how does the Salafist movement interpret it?”** By discussing the legal system of Islam, as well as the Salafist ideology, this chapter will provide understanding about the legal tradition behind Salafism and the variability of Salafist interpretations of it.

From Prophet Muhammad to Shari’a

The history of Islam as a religion is a vibrant one, as are all major religion’s histories. The era of Prophet Muhammad marks a significant point in Islam’s history. He can be regarded as the main figure in Islam, apart from Allah. He received revelations, which he taught to his followers. He believed that the old faith needed to be restored, because the society which they

⁶ A statistical study provided by David Barrett and Todd Johnson show the increase in total number of Muslims and Christians, with Muslims increasing about 50% in 2025 compared to 2000, whereas the number of Christians grows with ‘only’ 31% (Barrett & Johnson, 2002). See for the table <http://www.wnrf.org/cms/statuswr.shtml>.

lived in had become weak, and there was no regard anymore for the vulnerable. He believed that social justice should be the main characteristic of Islam (Armstrong, 2001).

The society soon prospered as a result of his teachings. Prophet Muhammad had brought peace to the Arab world, which his four successors (*khalifahs*) sustained. Noteworthy is that the separation between Shi'a and Sunni Muslims yet occurred in this very beginning of Islam, as a result of a dispute regarding the succession of the Prophet as leader of the Arab world.

The revelations contained many commands, admonitions and explicit prohibitions concerning the regular life of Muslims on a wide variety of issues. However, they did not contain much legal material. Hence the necessity developed to create a collection of the rudimentary socio-religious values of the new religion (Hallaq, 2005). *Shari'a* was founded: based on the Quran, the *hadith* (tradition, or behavior of the Prophet), consensus (*ijma*) and analogy (*qiyas*), it functioned as a guide to daily life and legal disputes. As a result of the law's ability to adapt to the course of time, the legal reasoning and the processes towards decisions of cases are currently different from the way it was when *Shari'a* was being developed. One crucial feature is the different interpretations that are possible within *Shari'a*.

From the 18th century on, many Islamic reformers challenged the statesmen of the Ottoman Empire, due to the threat they experienced from Western modernism, with a variety of views on the future of Islam. Both traditionalist fundamentalists and Western-inspired modernists succeeded to spread ideas and attract supporters. This, and the widespread Islam over the major Arab world and southern-Asian continent, both culminated into many varieties of the interpretations of the Quran and the organization of the state in terms of the separation of politics and religion.

Today, one out of five people in the world belongs to the Islamic faith (Hallaq, 2009). As of 2016, Islam was the world's second-largest religion after Christianity, with 1.6 billion Muslims professing it (Desilver & Masci, 2017). They are brought together under a human rights system, which is divided into two main international organizations being the Arab League and the Organization of Islamic Conference, each with its own human rights documents. The *Shari'a* takes a prominent position in both institutions' documents. Therefore the next chapter will discuss *Shari'a*, its scope and its variability.

1) *Shari'a*

As with the history of Islam, the development and contemporary meaning of *Shari'a* is rather impossible to describe in only one chapter. However, as stated in the introduction, a wide range of misconceptions exist among Westerners about the scope, variability and character of Islamic law. Therefore this study elaborates on *Shari'a* and its different interpretation among Muslims. It is impossible to generalize the scope of *Shari'a* and Islamic law. All national laws and legal documents of Arab countries have to be consistent and compatible with *Shari'a*, but the interpretation among countries differs substantially. Furthermore, the variability of *Shari'a* is an extremely important feature of the legal doctrine. There are four Sunni legal schools of Islam and three Shi'a schools. This study concentrates on the Sunni schools since the Salafist ideology is inspired by one of these Sunni schools. Almost every (Sunni) Muslim identifies him-/herself with one of the four legal schools, resulting in a wide variety of the understanding and application of *Shari'a*, traditions and beliefs.

This study will also discuss a very interesting but relatively unknown topic among Western people, namely the issue of legal pluralism. The 'Medina project' is an idea which Muhammad introduced, with the aim to incorporate several cultures into the societal system, to then form a multi-cultural community with various legal systems. This study will analyze legal pluralism in the Islamic tradition and see if such an agreement could have a place in the Western world. Lastly, this study will shortly discuss existing and potential tensions between Western values and Islamic norms.

The *Shari'a* is applied in almost every Muslim-majority country. The Quran and Sunna are the original sources of *Shari'a*, yet the legal doctrine has evolved after many other sources, methodologies and perspectives. It was created after divine revelations, written down by experts and adapted according to local cultures and customs as well as the work of Muslim jurists (Black, Esmaili, & Hosen, 2013). Thus, although the body of rules that we consider today as 'Islamic law' may be based on the two original sources of law, in fact the majority of rules being applied today are based on over 15 centuries of juristic interpretations, scholarly work and some pronouncements by authorities. Islamic law is now applicable, at least in part, in over 55 Muslim countries and in several non-Muslim countries (e.g. India), spreading over the Middle East into Asia, Africa and Europe.

The difference between *Shari'a* and Islamic law is rather important to make: "the modern concept of Islamic law, which includes the various tribal and moral norms of different Muslims

societies, is different from traditional or pure theoretical Sharia” (Black, Esmaeili, & Hosen, 2013, p. 3). Those legal rules deriving from God’s revelations, described in the Quran and Sunna, form the *Shari’a*, whereas the more modern regulations form part of the broader concept of Islamic law. Moreover, *Shari’a* is mainly a system of religious norms that includes many non-legal elements, such as social, economic, moral, educational, intellectual and cultural practices.

a. Scope of the *Shari’a* as a law

As mentioned above, one can discuss *Shari’a* as a set of rules derived from the Quran and Sunna. It is then also interesting to see the impact of this set of rules in contemporary Muslim-majority countries. A traditional, uniform approach of the *Shari’a* would say that these countries should be governed by a strict interpretation of these rules, and since they apply to all Muslims (irrespective of the country they currently live in), these rules can be argued to be pan-Islamic or similarly and consistently applicable. An argument following this generalization, would finally conclude that the legal system in all Muslim-majority countries would be the same. However, the scope of *Shari’a* has changed fundamentally after the fall of the Ottoman Empire. Muslim states first adopted Western-inspired legal codes, which resulted in hybrid systems of Western- and *Shari’a*-inspired traditions. But with the increased influence of reformists, a re-Islamization took place and *Shari’a* became part of national constitutions and laws. Although the authorities act in conformity with *Shari’a* rules, the interpretation of these rules can change fundamentally between two states.

The flexibility and adaptability of *Shari’a* overtime led to a wide variety of positions on the definition and nature of *Shari’a* and its application in the contemporary society among jurists, authorities and ordinary Muslims. However, we can make a prudent separation between those areas originally governed by *Shari’a* – such as family law and inheritance law – and those regulated by modern regulations, inter alia, health law, food production, travel laws, immigration and the environment (Black, Esmaeili, & Hosen, 2013). The first areas are particularly mentioned in the text of the Quran. The other, more modern legal subjects, were not revealed to Prophet Muhammad but were later necessary to regulate by modern law. These subjects are therefore based on modern regulations, often made by states and parliaments in Muslim countries. They therefore also vary greatly among contemporary nation states. The new regulations do not replace *Shari’a* rules, rather they supplement them where necessary. The

regulations are thus part of the Islamic legal order (or ‘Islamic law’), and not in conflict with the *Shari’a*.

In the 1920s, most Muslim countries applied a mix of Western- and *Shari’a*-inspired law. Mainly family law and the law of succession were governed by the *Shari’a*. But the various interpretations between the legal schools and a shift of powers around the 1970s led to a bigger difference between countries in their application of the law. Several countries re-Islamized some domains of the law in which the Western-inspired law had dominated. They introduced for example *Shari’a* penal codes, and some of them applied *Shari’a*-inspired tax and bank rules.

Today, in almost all Muslim countries the *Shari’a* is upheld as the formal motivation for the law of the land. Many constitutions refer to the *Shari’a*, stipulating its principles are the basis of legislations. Hence we can distinguish *Shari’a* as leading in family- and inheritance law, and partially leading in criminal law, private and state law. The national constitutions define all different fields of law. The legal implications of the *Shari’a* interpretation vary from country to country. An example is apostasy from Islam. This is considered a capital crime under *Shari’a*, but it is copied in national legislations only in a few Muslim-majority countries (although administrative policies might reach the same end).

To exactly define the scope of *Shari’a* in the 21st century, an analytical overview of the national laws of all Muslim-majority countries should be composed because any generalization would be unjustified. However, this analytical overview is left for further research due to the limited scope of this study. Before the fall of the Ottoman Empire, it might have been more appropriate to generalize *Shari’a* as a law, but the ‘law’ has changed due to the influences of Western codes and the re-Islamization. Many of the national laws are considered to be compatible with *Shari’a*. Therefore a difference between ‘progressive’ Islamic countries such as Tunisia, and ‘conservative’ countries such as Saudi Arabia can exist, without one or the other acting upon laws which violate the *Shari’a*.

b. Variability of *Shari’a*

Islamic jurisprudence has developed over fourteen centuries, since the first revelations to Prophet Muhammad until today. Over this time, various schools of jurisprudence have emerged, each interpreting and applying the *Shari’a* differently. Many schools have disappeared, but there are eight schools recently officially recognized. Almost all Muslims support one of such schools, depending largely on their geographical location. As a result, the *Shari’a* is interpreted

differently across the Islamic world. Although the four Sunni schools generally ‘agree to disagree’, there is considerable discrepancy between the Sunni, Shi’a and other schools. This study takes a deeper look into the Sunni schools.

One of the most important features of the *Shari’a*, and Islam as a whole, is the wide variability in interpretations as a consequence of the pervasive role of the doctrinal legal schools (or *madhhab*). In 2004, some 200 Islamic scholars officially recognized eight legal schools of *Shari’a*, of which the four Sunni schools are the Hanafi, Maliki, Shafi’i and Hanbali schools. They are named after four master-jurists, or teachers, who attracted many ideas with their compelling ideas and views of the interpretation and application of the *Shari’a*, which their students developed into doctrines. As a result, the Muslim society is rather divided concerning solutions for occurring legal problems.

In general, the four Sunni schools agree on most points but disagree on details. Their supporters compromised to ‘agree to disagree’, or to accept that all Sunni schools were equally right on a certain topic if differences aroused. As a result, in the legal doctrine there may be four equally right, but different, answers to any given question.

The Hanafi school is generally considered to be the most flexible and liberal in Islamic law, including in the areas of treatment of non-Muslims, individual freedoms and criminal law. It became the official school of the Ottoman Empire in the 16th century and remains therefore the most influential school in the world today, applied in Afghanistan, Turkey, Albania, Pakistan, as well as the United Arab Emirates. Abu Hanifa (702-772 CE) relied extensively on *ra’y* (or personal opinion) and rational thought, beside *qiyas* (analogical reasoning) as a method of solving legal problems (Hasan, 2012). He also favored the use of *istihsan* (juristic preference), through which the jurist or judge (*qadi*) could ameliorate harsh consequences that would otherwise follow from strict legal reasoning (Khan, 2013). In this way, the jurists were allowed to look beyond the literal application of the rules to consider whether their decisions were appropriate and in the interest of the public. This leads that some ancient and contemporary Islamic legal jurists believe imam Hanifa applied principles of equity (Khan, 2013).

The Maliki school of jurisprudence is the third-largest of the four Sunni schools, followed by approximately one in four Muslims worldwide. It has its main followers in, amongst others, Egypt, Morocco, Algeria, Libya and Tunisia. The imam Malik (711-795 CE) approached the Sunna from a narrow view, stipulating that only those practices that were validated by the first

three generations after the Prophet could constitute the *hadith*, and not any other practices as collected and written down later (Khan, 2013) (Hallaq, 2009). The Prophet and the following three generations of Muslims acted as a “living Sunna” and could therefore most appropriately be viewed as a lawgiver (Hasan, 2012). The Malikis, in contrary to the Hanafi school, give equal importance to the public interest, analogy (*qiyas*) and the juristic preference (*ijtihad*), but the third major source of Islamic law would be *ijma* (or consensus) of the people of Medina. The Malikis are considered less liberal than the Hanafis.

The second-largest school of jurisprudence among Sunnis is the Shafi'i school, based on imam Al-Shafi'i's (767-820 CE) teachings. It is prevalent among Muslims in, inter alia, Yemen, lower Egypt, the Palestinian Territories, Jordan, Indonesia and Syria. The Shafi'i school tends to strike the balance between reason and authority (Hasan, 2012). It has a strong faith in the *hadith* (traditions and habits of the Prophet), stating it as the ultimate source of the Sunna, whereas it does not consider *istihsan* (see Hanafi school: juristic preference) as an acceptable source. Where the text of the Quran or *hadith* would be ambiguous, the Shafi'i school seeks guidance next from *ijma* (the consensus of Muhammad's companions, some of which became later Caliphs), since this would not amount to “human legislation” of Islamic law (Khan, 2013). This is comparable to the Maliki school. The Shafi'i school is generally considered more conservative than the Hanafi and the Maliki schools.

Named after the Iraqi scholar Ahmad ibn Hanbal (780-855 CE), the Hanbali school, is the smallest school of jurisprudence, although it has broadened its influence since the late 1970s. It is predominant in Saudi Arabia and is followed by a significant number of Muslims in Oman, Qatar, Bahrain and Kuwait. The Hanbali jurisprudence adheres to orthodoxy and tradition, while it minimalizes the role of analogical reasoning (*qiyas*) as a method to solve a legal problem (Hasan, 2012) (Khan, 2013). Especially in the wake of challenges to the Islam, mainly posed by Western influences, only tradition could save Islam. Coming forth from the Hanbali beliefs, centuries later Muhammad ibn 'Abd al-Wahhab (1703-1792) gained much influence and support by advocating a very strict adherence to traditionalism. More recently, this stream is known as Wahhabist-Salafism. Its followers generally condemn innovations or any deviation from the Quranic rulings (Hasan, 2012) (Meijer, 2014).

The Shi'i Muslims are divided into three main branches: the Twelvers, the Ismaili and the Zaidi. The Twelvers believe that there were twelve imams after the Prophet's death. This group is largest among Shi'i Muslims worldwide, representing about 10 percent of all Muslims

worldwide. The Ismaili and the Zaidi schools are comparable with the Twelvers concerning their jurisprudence, application and interpretation of *Shari'a*, but they have different views about the number and identity of the Imams, as well as the legitimacy of the Rightly Guided Caliphs (Fadel, 2014)⁷.

For historical reasons and other recent developments, the Islam manifested itself generally as legally pluralistic and tolerating in practice. At least the four Sunni schools accept each other's way of reasoning and subsequently its interpretation and application of *Shari'a*. However, between these four schools and the other four, non-Sunni schools, "truth tends to be seen as a zero-sum game, and those find themselves in disagreement are prone to call each other infidels" (Cook, 2003, p. 6). The fact also remains that there is no 'central authority', legalizing one or all methods of practicing Islam above any others, thus resulting in an incredible amount of different interpretations of *Shari'a*. Equally important to stress is the enormous role these schools in the 21st century still play in Muslim's way of life.

c. Legal pluralism: the Medina Charter

These four Sunni schools underline another important feature of Islamic law. Islamic law is characterized by legal pluralism, as a concrete result of the various interpretations that have been developed in the past. There is no single legal stipulation that has priority or monopoly over other interpretations of the law. Legal pluralism, for Islamic law, is two-sided. The law not only acknowledges local custom and takes it into account, but it also offers an array of options of solutions for one legal problem based on the same facts. Besides, those options that have become more suitable in a more modern world can replace older interpretations (Hallaq, 2009). This is why Islamic law is flexible, adaptable to different societies and regions and able to change over time and place.

One of the oldest notion of legal pluralism can be found in the 'Medina Charter', a contract signed between Muslims and the Jewish tribes of Medina (then called *Yathrib*) around 768 A.D. This charter might therefore be the world's first constitution. It specifies the rights and responsibilities of the tribes which were brought together into one community under Prophet Muhammad's leadership. Securing a social and peaceful political community, the Charter established the principle of legal sovereignty of every religious group when dealing with their

⁷ The interested reader on this topics should consult Professor W. Hallaq's 'The Origins and Evolution of Islamic Law' (2005).

religious matters. Thus it laid a framework for a multi-religious legal system (Kosebalaban, 2009).

The Medina Charter proves that tolerance and pluralism have been important characteristics of Islam since its origins in the seventh century. Non-Muslim minorities are well-protected in Islamic law – although Islamic scholars differ from opinion if they have the same rights and privileges as Muslims (Emon, 2012). In modern times, some Muslim intellectuals and reformers have embraced the idea of pluralism and democratization, basing themselves upon the *hadith*, to argue that also the Quran supports equality and pluralism:

“There shall be no compulsion in [acceptance] of the religion [Islam]” (Fromherz, 2014, p. 262).

However, it must be noted that this pluralism and tolerance has also known its backlashes against some religious minorities in the Muslim world, especially in the beginning of the spread of Islam and during the late twentieth century with the rise of nationalism. Still, there are a large number of Muslim intellectuals and leaders who are advocating democratic pluralism. Recognizing that pluralism has its roots in Islamic history, many of these advocates have pointed to the pluralizing tendencies of their faith (Fromherz, 2014). Currently, most modern Muslim states have eliminated restrictions and discriminatory rules on non-Muslims. In general, all are considered equal citizens and equal before the law (Saeed & Saeed, 2004).

d. Controversial Islamic-Western values

The legal pluralist tradition and tolerance feature of Islamic law might come to some as a surprise. As stated before, there is a wide range of misconceptions about Islamic values which would be incompatible with Western values. This study will therefore shine some light on (seemingly) potential controversial Islamic-Western values. Most noteworthy are the Islamic conceptions of constitutionalism, equality and freedom of religion.

Constitutionalism

Constitutionalism in other words can be described and translated as “rule of law”, *Rechtsstaat* and *état de droit*. It can point at a written or generally agreed body of law, equally applied to all members of the society, but it also reflects the cultural norms and values and civilizations goals of its citizens, as well as the limitation of the state’s powers in society and the scope of action of the state’s institutions (Kleidosty, 2015).

In the sense of Islamic law, there are a number of observations to be made. God has revealed numerous constitutional principles to Muhammad, which have been written down in the Quran. There are for example those related to preservation of human dignity, the right to life and the security of private life. Also in the Medina charter, numerous constitutional rights are mentioned, such as the right to social welfare, citizenship and the free exercise of religion. With the development of *Shari'a*, Islamic constitutional principles were applied in full. Even modern Muslim states have incorporated such rights, either singularly or collectively, in their constitution or official documents – as in the Cairo Declaration on Human Rights in Islam (1990).

These states have committed themselves to a very basic set of ideas which follow the idea of constitutionalism, with the idea of creating a set of laws with equal application to all citizens, representing all citizens by the state and a limitation of the powers and the scope of state institutions. This last restriction of powers is especially designed so that both personal and social freedoms can flourish. To some extent in the political system, the *shura* council (partly comparable with a Senate), represents the idea of the people's representation.

However, modern Muslim states also differ strongly from each other in their conception and application of constitutionalism. The current constitution of Saudi Arabia discharges any democratic, constitutional system but instead declares monarchy to be the system of governance. Leadership thereof is destined for the founding king's blood descendants. Other Muslim states' constitutions contain similar provisions, e.g. those of Morocco, Bahrain and Syria.

A short analysis of the application of constitutional rules in past and present times learns that there are constitutional principles laid down in the Quran and *Sunnah*. However, its application, representation and interpretation differs per state, as it is subject to the political system of each Muslim state.

Equality: status of women

Another often heard argument is that human rights clash with Islam because of the (unequal) status of women. However, this discussion can be held from two perspectives - either from 'Islam as a religion' or 'Islam as a culture'. Concerning Islam as a religion, the Quran is the main source for defining the status of women. The Quran grants both sexes equality from their birth on, and thus also equal accountability to God for their faith, actions and moral behavior.

It even sees a place for women in economic and political affairs⁸. However, it also described some inequalities in inheritance rules, family law and criminal persecutions and procedures, which should be understood in the context of the seventh century. Still, a number of nineteenth- and twentieth-century scholars agree that the Quran itself does not support any explanation for unequal treatment and a differing status of women in contrast to men.

On the cultural level however, women have not been treated as men's equals. The cultural level refers to the ideas and practices of Muslims in the context of changing socio-economic and political circumstances. In the twenty-first century, we hear more often from 'feminist Muslims', those women fighting the so-called 'gender jihad', the struggle for justice for women within the global Muslim community (Wadud, 2006).

As an example, one such 'Muslim women's rights defender' states that the *hijab* has been given disproportionate symbolic significance both within and without Islamic communities. Amina Wadud herself does not consider it as a religious obligation or a moral value, but she recognizes it as a public declaration of Islamic identity (Wadud, 2006). However, the *hijab* is often seen as a result of coercion and communal pressure. According to her, the reason for the gender *jihad* and the treatment of women "has been justified by religious and secular discourse, interpretation, and action (...)" (Wadud, 2006, p. 254).

In short, the Quran provides equality between men and women, but interpretations and traditions resulted in unequal treatment of women. The 'religious Islam' provides mechanisms for a fresh interpretation of the women's role and status. A backslide of this equality however occurred in the 'cultural Islam', partly as a consequence of conservative, nationalist and paternalist reforms, now leading to the necessity (but often inability) for women to challenge their community and the state about the inequality they experience.

Freedom of religion

Besides the values of constitutionalism and equality, a regularly mentioned 'conflicting' Islamic value would be the freedom of religion and subsequent apostasy. This debate is often held within and outside the Muslim community. The two concepts are closely connected, but this study, however, describes the existence and possibility of legal pluralism within the Islamic

⁸ For a methodological analysis of Quranic verses regarding the status of women, this study recommends to read the chapter by Halim Rane in T. Lovat (ed.) 'Women in Islam: Reflections on Historical and Contemporary Research' (2012)

communities. Therefore, a linkage is made between apostasy and freedom of religion, whereby freedom of religion gives the possibility to desert one religion or to convert from one to another religion. Apostasy in this sense means the desertion of Islam, or the conversion from Islam to another religion.

In the debate on apostasy, there is a wide variety of interpretations among Muslims as to whether religious freedom includes the possibility to change or desert from one's religion. On the one hand, the ratification of international human rights document indicate that some Muslim countries accept the freedom of religion, and as part of that, the possibility to change religion. On the other hand, in countries such as Saudi Arabia and Malaysia apostasy is not recognized as freedom or right and is sometimes even criminally prosecutable (and punishable by death, in the case of Saudi Arabia) (Saeed & Saeed, 2004).

The question of freedom of religion for Muslims is not solved yet. Many different interpretations of the legitimacy of apostasy exist among constitutions and legal systems, but also among Muslims. Different from the two other topics discussed, apostasy is not mentioned specifically in the Quran, hence a distinction between Islam as a 'religion' and a 'culture' would be unfair to make. On the contrary, the freedom of religion is included in the Quran, as explained in the subchapter on Legal pluralism. Moreover, the international human rights documents, such as the two United Nations Covenants, prescribe the freedom of religion – although not all Muslim countries have signed and ratified them. In short, whether or not there is freedom of religion, and subsequently the right to apostasy, in the Islamic tradition, depends strongly on the legal interpretation of a state or community.

As this study focuses largely on Salafism as one of the possible interpretation of the legal tradition behind Islam, we will continue by researching the ideology.

2) Salafism

a. Understanding the ideology

Salafism is a specific interpretation of *Shari'a* and Islamic law. The term Salafism derives from the term 'the pious forefathers' (*al-salaf al-salih*), which were the first three generations of Muslims after the Prophet's death. They had first-hand experience of the habits and sayings of Muhammad, and they saw the rise of Islam. Thus they are regarded by Salafists as exemplary for the correct way to live. Classic Salafism emerged between somewhat between 780 and 1328

as a result of influential doctrines by, amongst others, Ahmad ibn Hanbal and Taqi al-Din ibn Taymiyya. It re-emerged in Wahhabism, an 18th-century reform movement in central Arabia, following the teachings of Ibn ‘Abd al-Wahhab who believed that Muslims had become ignorant of their religion. This lay at the root of Islam’s political and spiritual decline since the Golden Age – the time of the Prophet and the four Rightly Guided Caliphs. Only re-assertion of absolute monotheism and the belief in the Oneness of God and a return to the Quran and Sunna could retrieve the past glory.

Contemporary Salafism emerged around the late 19th-century following such thinkers as Muhammad ‘Afghan (Egypt), Jamal al-Din al-Afghani (Persia) and Rashid Rida (Syria). This was mainly as a response to Western cultural, political and economic developments which were regarded as a threat to Islam. The Western technological developments were however seen as a model for emulation. A return to the Islamic sources would not contradict the utilization of this new technology, according to some Salafist reformers. Wahhabism, on the contrary, completely rejects Western models of technology in their pursuit of purification of their doctrine. This movement is especially strong in Saudi Arabia. At present, the foreign and economic policy of Saudi Arabia is determined without regard for the *Shari’a*, whereas the religious establishment controls all societal policies.

All contemporary Salafists share one important characteristic: they pledge for a return of the ‘Golden Age’ of the Islam, the formative period of the religion during which Muslim rulers established one of the largest empires in history, flourishing in, amongst others, culture, science, innovations and economics. The Salafist movement has become increasingly popular. As one scholar puts it: “in a contentious age, Salafism transforms the humiliated, the downtrodden, disgruntled young people, the discriminated migrant, or the politically repressed into a chosen sect that immediately gains privileged access to the Truth” (Meijer, 2014, p. 13). The success of Salafism is thus mainly a result of their provision of an alternative model of truth and social action, thereby welcoming every individual wishing a re-identification. Their strongest appeal is their capacity to say “we are better than you”, claiming a superior moral understanding and intellectual superiority of religious knowledge (Meijer, 2014). Furthermore, it gives the individual a concrete goal, which is to become active role models (‘a true believer’) of the Islam instead of just passive followers. It is a universal movement, de-territorialized and de-culturised, which leads to the easy and simple creation of new virtual communities on a local level but spread all over the world.

Interestingly, the Salafist movement does not legitimize coercion by threats or violence – which is solved through very strict control. According to them, coercion in religion is prohibited, but warnings from God are used to discipline one another. Hence the pressure to conform exists firmly, and those who do not embrace their ideology can be ‘punished’ by social exclusion (Roex, 2013). By stressing brotherhood and sisterhood, a uniform group identity is created, and social exclusion thereof is therefore a harsh sanction. But again, there are considerable differences in the practical execution of such beliefs among Salafists, both between the various forms of Salafism and between Salafists living in Europe or in Muslim-majority countries.

Politics: a division within Salafism

The Salafist movement is not centrally organized. Internal and informal collaboration takes place between religious leaders and organizations, and the religious authority is diffuse, pluralist and subject to change (Roex, 2013). Hence, Salafists are both united and divided. They have a common religious creed, which is the strict adherence to the *tawhid* (or Oneness of God), coming with principles and methods for the application of their religious beliefs. They also reject a role for human reasoning, logic and desire in daily life. By strict following the rules of the Quran and Sunna, Salafists believe they avoid the biases of subjectivity and personal interests, thereby completely rejecting the idea of legal pluralism because there is only one singular truth of God’s commands. They focus on the superiority of Islam over the Western world and belief in the decay of Muslim societies as a result of the Muslim’s estrangement from the true faith. Most Salafist movements reject modern democratic and state-building concepts such as ‘nation’, ‘constitution’ and ‘citizenship’, but instead see the implementation of these concepts into the Muslim community as an essential cause of the current fragmentation of the Islamic world (Lazar, 2009).

However, they are divided on the application of religion to new issues and problems which challenge the immutable principles of the religious sources. Here a division regarding contemporary politics emerges among Salafists. This has led to three major factions within Salafism. One can identify him- or herself as a so-called ‘quietist’, a ‘politico’ or a ‘jihadi’⁹. The quietists reject politics, but instead emphasize the use of nonviolent methods of propagation, purification and education on the individual level. The politics see politics as a

⁹ There is no single correct term for the three streams; they are also distinguished as, among others, predicative/purist; political/pietistic; revolutionary/radical Salafists (Amghar, 2007) (Lazar, 2009) (Wiktorowicz, 2006)

necessary tool as it impacts social justice and legitimates God's ultimate legislation, so they are openly activist by calling for political reform. Jihadists transcend politics by taking a more militant position, arguing that the current context of Islam and society calls for violence and revolution to reach their common goals (Wiktorowicz, 2006). The three factions do have the same creed, but disagree on the different solutions for occurring challenges. This difference is a consequence of a varying contextual analysis, interpreting (geo-)politics and development in a different religious context.

Besides, another distinction within the Salafist movement can be made. In general, Salafists living in Europe might be less opposing to governmental authority than Salafists living in conservative Muslim-majority countries. Concerning Salafists in the Netherlands, it is even suggested that quietist and political Salafists do not strive for the establishment of *Shari'a* in the country, and that they reject undemocratic methods as employed by organized Salafist groups such as Hizb Ut-Tahrir, Sharia4Belgium and Sharia4Holland. They respect democratic authority (albeit conditionally) and do not call its followers to engage in *jihad*, as they react nonviolently to critical statements about Islam (Roex, 2013). In short, Salafists can identify themselves all as 'brothers and sisters', but strongly disagree in the practices of their ideology, depending on their views and the country they live in.

Jihad

The three previous mentioned orientations of Salafism differ in opinion on the way to achieve solutions for new challenges. The Salafist principles and practices, like loyalty/disavowal and commanding good/forbidding wrong, can be translated into political tools. For Salafists, *jihad* is one such concept on which a variety of opinions and interpretations exist. *Jihad* can be translated as "the effort to live in the way that God had intended for human beings" (Armstrong, 2001, p. 6).

In the Quran, *jihad* is explained as "a struggle in which the believers (Muslims) are expected to strive with their wealth and 'person' for the sake of God" (Saeed, 2002, p. 73). This struggle can take place at several levels: individually one can free him- or herself from sin, bad deeds, thoughts and words; or purify him- or herself spiritually. Hence this is a non-violent effort to engage in a *jihad*. It can also mean to use one's ability to help others, thus giving one's wealth for worthy causes such as doing something beneficial for one's family or community. Another form of *jihad* is referred to as 'jihad of the pen', which means writing and publishing about one's faith to defend it against attacks by religious adversaries and opponents. A last form of

jihad is the struggle against oppression and injustice perpetrated against individuals and the community, in which the individuals pursuing a *jihad* can engage in (potentially) violent activities (Saeed, 2002). The three types of Salafists also interpret the *jihad* differently, resulting in the meaning of *jihad* ranging from non-violent to violent struggles.

Since the September 11 attacks in the USA, most non-Muslims now associate *jihad* closely with terrorism, which often would evoke killing, bombing and suicide bombing against the West (Saeed, 2002). But in Islamic law, *jihad* as war would be only permitted to defend the homeland against invasion and aggression, for the propagation (but not enforcement) of religion, and to penalize those who harm or violate peace treaties and agreements. *Jihad* thus cannot be used in case there is an absence of a threat of invasion or if there is peace between the Muslim state and others. However, again amongst Muslims (not only Salafists), differing opinions exist as to whether *jihad* can be waged against non-Muslims and countries where non-Muslim form the majority of the population. They can agree that the Quran justifies *jihad* as a consequence of oppression and persecution – not as a result of difference of religion. This interpretation of *jihad* was leading in the 20th century, and could – arguably - even be fully compatible with international rights of self-determination, freedom and independence – rights extremely important under colonial rule and foreign domination (Özkaya Lassalle & Akgül, 2016).

The Islamic scholar Abdullah Saeed argues that “under no circumstances, jihad, in the sense of fighting, [was] to be used to oppress others and create injustice and what the Quran calls *fitnah*, or, [...] terror” (Saeed, 2002, p. 76). However, in the modern times, the interpretation of *jihad* differs between a ‘defensive’ (to be waged if one was limited in its daily practice of Islam) and ‘offensive’ understanding of the concept. Modern reformers, amongst others influential members of the Egyptian Muslim Brotherhood, of the twentieth century believed *jihad* implied both a ‘revolution’ against tyranny and oppression and a means of establishing an Islamic socio-political order. Thus *jihad* could also be waged against Muslims and non-Muslims who opposed the implementation of such an order based on *Shari’a*, or to Muslim governments which failed to implement one through which God’s sovereignty on earth could be established.

In the 1970s and 1980s, *jihad* was re-interpreted by several militant Muslims groups in places such as Egypt and Syria. They adopted a ‘we-versus-them’ approach, creating a separation between them and their adversaries, be they Muslims, Muslim governments, non-Muslims or the West. They often believed that the goal of defeating their enemy justified the use of all

possible means, including terror against non-combatants (which were defined as “all who were citizens of a country and paid taxes that enabled the state to engage in ‘oppressive’ activities against Muslims” (Saeed, 2002, p. 84)). This idea is reinforced by extremist organizations like Al-Qaeda and Islamic State.

Making a distinction between Al-Qaeda and IS is at its place. Although IS grew out of Al-Qaeda supporters, they differ in terms of their main enemy. IS focuses on attacking Shi’a and other religious minorities and fights to enforce the ‘correct’ Islamic beliefs and practices upon all Muslims, whereas Al-Qaeda wants to hit the US in order to free the Middle East from the ‘imperialist, colonialist’ foreigners.

Ultimately, IS seeks to build their own state. With the establishment of an army and state-like structures on the territories it controls, it goes beyond terrorism (Byman, 2015). Once settled, IS wants to expand the state and consolidate control over other Muslim countries, such as Jordan, Lebanon and Saudi Arabia, all based on sectarianism and the ‘we-versus-them’ separation of society. All non-Salafi groups, even other Islamist groups such as Hamas, are considered ‘deviant’, which is even worse than ‘infidels’ – followers of a different religion than Islam (Bunzel, 2015). Eventually, they believe that territorial control will bring them victory, and not necessarily terrorism against the West.

With the successful expansion of territory since 2014, IS has attracted many fighters from the Middle East as well as other countries. The exact numbers vary, but the CIA in September 2014 estimated that IS had between 20.000 and 31.500 fighters in Iraq and Syria; the UK-based Syrian Observatory for Human Rights estimated between 80.000 and 100.000 combatants (BBC News, 2014) (Al Jazeera, 2014). Besides national citizens, also non-citizens of Syria and Iraq join the insurgencies. Those people are called ‘foreign fighters’. The number of foreign fighters in Iraq and Syria in 2015 is estimated by the New York-based security consultancy ‘Soufan Group’ to be 27.000-31.000 people (Syrian Observatory for Human Rights, 2015). It is in any way clear that IS has increased its strength, and consequently its appeal to potential fighters, over the last years.

b. In Europe

Of the around 30.000 foreign fighters, in 2016 some 4.000 are said to be European (Van Ginkel & Entenmann, 2016). However, there are many more Muslims affiliated with the Salafist ideology. That, as is stipulated before, does not mean they all agree with the idea of an Islamic

state based on the Salafist interpretation, neither do they agree with the use of violence to pursue a *jihad* to create one such state. The term ‘European Salafism’ or ‘European Salafist’ would therefore not be legitimate, since Salafism in Europe has to be understood in all its complexity. Generalizing Salafism in Europe to ‘European Salafism’ would mean to neglect the wide range of movements and tendencies that are in constant rivalry and disagreement with each other. A nuance towards the three terms of Salafism, namely quietist, politico and jihadi, has to be applied also when discussing the European context.

In Europe, considerably influential on the Salafists’ convictions are the local *ulamas* (religious leader, ‘guardians of the legal and religious traditions of Islam’) which are acting most efficiently at the level of micro-communities. The various Muslim movements in Europe are each ‘competing’ over domination of the mosques and religious centers of communities, because here the community is most easily influenced and guided towards conviction. An *ulama* can make the difference between supporters of the jihadist Salafist movement and the quietist belief (Lazar, 2009). Since there is not one official religious authority which dictates right and wrong in Sunni Islam, the *ulamas* can all apply unique interpretations on religious dogmas.

Besides the *ulamas*, there are several Muslim international institutions based in the West. The most important is the Saudi NGO World Muslim League, which main function it is to support Muslims in non-Muslim countries. With their regional council in the UK, it supports financially many Islamic projects. Their money however derives from the Saudi state, and since the League is more competitive in terms of budget, the Saudi money often comes before other Muslim countries’ financial support. Moreover, the League coordinates the Brussels-based International Council of Mosques, who controls, finances and coordinates places of worship. Apart from these institutions, the Islamic Development Bank and a private Islamic bank led by a Saudi billionaire are important institutions financing European Muslims and Muslim projects. The Saudi money is however not only directed towards Islamic projects, but is also provided for funding and supporting various radical movements – among which the Salafist groups (Lazar, 2009).

The Jihadist Salafism is spreading efficiently through radicalization in prisons, on the internet, among groups of friends or families, but also through popular mosques. In London, Amsterdam, Brussels, Paris and Hamburg, besides many other cities, grand mosques have been and sometimes still are under Jihadi influence. This is the result of both the exodus of a certain

number of Afghan jihadist refugees and the Algerian diaspora and subsequent resettlement in Western countries in the 1990s. The organized groups split off after successful counter-terrorist and de-radicalization measures by the receiving countries, but some former members joined European cells of Middle Eastern Salafist groups. Before 9/11, the European values of freedom of expression, assembly and religion were providing an open environment for radical speech, the settlement of Islamist organizations and financial support of fundamentalist groups in several Western European countries (Lazar, 2009). However, after 9/11, the policy towards Islamist leaders and movements has become stricter. Despite counter-terrorist measures, since 2001 there have still terrorist attacks by Jihadist Salafists taken place in Europe.

It would be interesting to mention the precise number of Salafists in Europe. However, because of the many varying interpretations and the unorganized local groups, the amount of supporters is difficult to measure (Algemene Inlichtingen en Veiligheidsdienst, 2015). Still, some intelligence services from European countries have recently published the number of Salafists. In Germany in 2016, the president of the Federal Office for the Protection of the Constitution stated that “there are 9.200 Salafis in Germany, up from 8.900 in June and about 5.500 three years ago” (Los Angeles Times, 2016). How many of those belong to the quietist or political streams of Salafism is unknown to the public. The aforementioned 4.000 European foreign fighters can more easily be labeled as Jihadi Salafists. By early 2016, almost a third of these combatants appear to have returned to their European countries of origin (Van Ginkel & Entenmann, 2016).

3) The legal tradition and cultural background of Salafism

The complete understanding of the development and practices of *Shari'a*, Islamic law, Islam's present features and Salafism is extremely difficult and cannot be described in only one chapter. There are many more details, influential thinkers and important events and historical notions that can be included in order to get a thorough understanding of Salafism in Europe in its current context. The main challenge for this chapter was therefore to find an answer to the question “what is the legal tradition of Islam and how does the Salafist movement interpret it?” There is one clear conclusion. There is not one Islam, nor is there one Islamic law or one Salafism. There is a huge variety among Muslim scholars, interpreters and influential thinkers about the precise interpretation of the Quran and the *hadith*, or the habits of Prophet Muhammad.

The legal tradition of Islam, the *Shari'a*, is not generalizable, as its interpretation differs strongly among Muslims. Based on the Quran and *hadith*, the *Shari'a* prescribes certain rules of lifestyle, politics and religion, but does not set out specific rules that are applicable in today's society. Therefore the influence of legal scholars, imams and other influential Muslims, as well as a state's interpretation of *Shari'a*, can set a Muslim's beliefs. One such interpretation is the Salafist thought, as a traditionalist, fundamentalist movement. By strictly applying the habits of Prophet Muhammad and the rules as set out in the Quran, they separate themselves from 'the others' or non-believers in society, thus adopting a singular approach towards Islam and *Shari'a*. Paradoxically, even within Salafism, a wide range of interpretations and applications of the *Shari'a* exist. The *jihād*, for example, can be non-violent on an individual level or on a community-level, or waged violently against all 'other Muslims' and 'weak Muslim governments' – or even against non-Muslims. The various Salafist-inspired groups, such as Al-Qaeda and Islamic State, demonstrate the difficulty and tension that exists in defining the enemy.

With this knowledge in mind, this study will analyze several cases of the ECtHR and recent counter-terrorist policy development of the Council of Europe and its Member States. This will lead to an answer on the question to what extent the legal tradition behind Salafism can offer critical insights into the ECtHR-case law and counter-terrorist measures, which follow the European values of cultural and legal freedoms to be enjoyed by all European citizens.

II. Fundamentalism and the protection of the democratic society

1) Introduction

The previous chapter provided an insight into the variability of *Shari'a*, among which one stream is the Salafist interpretation and ideology. Salafism hence is regarded as a religious movement with a strict interpretation of the legal rules deriving from the Quran and *hadith*. With the existence of Salafist groups and associations in Europe, it would be interesting to see whether a clash exists between fundamental freedoms as established through the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR), as the final protector of such freedoms, has established wide jurisprudence concerning the fundamental freedoms and the protection of the democratic society. Therefore, in this chapter, the main question is **“How does the case law of the European Court of Human Rights deal with extremist claims to freedom of religion?”**

Through the jurisprudence, the ECtHR has recognized Islam as a world religion, which falls within the scope of article 9¹⁰. Cases concerning Islam and Islamic traditions were thus also taken into consideration. Consequently, it has decided over cases concerning the wearing of an Islamic headscarf¹¹, marriage under the legal age¹², and blasphemy¹³. However, concerning Islamic ideologies, Islamic law and Islamic associations, the case-law is relatively small. It is therefore difficult to answer the question on how the ECtHR deals with Salafism, specifically. To complete this study with a European legal approach to Salafism, the scope of this chapter is enlarged to claims which are considered extremist, either by the State Party involved and/or by the ECtHR. To answer the question, cases concerning the existence of an extremist organization in Germany, membership of a supposed extremist/terrorist organization in Germany and Russia and the application of Islamic law in Turkey are discussed. The cases, judgments and relevant dissenting opinions will be analyzed as to come to an answer on how the ECtHR deals with *Shari'a* in Europe and Islamic fundamentalist ideas.

Firstly, however, the legal framework is sketched following the judgments and decisions of the ECtHR in other relevant cases. Hence it is learned that the ECHR provides only for democracies to exist in Europe and that States Parties must guarantee democratic pluralism within such

¹⁰ E.g. *Leyla Sahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI (hereinafter: *Leyla Sahin v. Turkey*)

¹¹ *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014 (extracts) (hereinafter: *S.A.S. v. France*)

¹² *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V (hereinafter: *Khan v. the United Kingdom*)

¹³ *Choudhury v. the United Kingdom*, no. 17439/90, 05 March 1991

democratic societies. Furthermore, the three fundamental freedoms of religion (art. 9), expression (art. 10) and association (art. 11) must be protected by the State, and only several limitations can be legitimized. Thereby is proportionality of the interference into one's rights and freedoms of utmost importance. However, not all acts are protected by the three rights mentioned above, dictates article 17 (prohibition of abuse of rights). Continuing with specific rules concerning the four aforementioned articles, this study introduces a frame of reference in which the four specific Islamic fundamentalist cases can be placed.

2) ECtHR-case law

a. Legal framework

In the light of this study's main question, especially articles 9 to 11 and article 17 of the ECHR are deemed relevant. The freedom of religion often overlaps with other Convention provisions, especially concerning the rights to freedom of expression (art. 10) and freedom of assembly and association (art. 11). In general, the ECtHR, has taken complaints under a combination of these articles clear as to define that religions *per se* should not be subjected to the protection of the ECHR, but that it considers specific cases concerning e.g. political parties¹⁴, religious associations¹⁵ and religious clothing¹⁶. Moreover, article 17 ('prohibition of the abuse of rights') provides a basis for the (il)legitimacy of advocating for a *jihad* in Europe.

The legal framework regarding religious fundamentalism and the ECtHR starts with setting the European constitutional order, a more specific discussion of the four freedoms and rights and, finally, some specific features of cases which are relevant for the subsequent analysis of case law.

First of all, democracy is the only political system which is acceptable within the sphere of the ECHR. In the Preamble to the Convention it is stated that "democracy is a fundamental feature of the European public order"¹⁷. In addition, the Convention includes reference to a 'democratic society' in articles 9 to 11 ECHR. The role of the democratic society is recognized since the limitation of these core rights "must be assessed by the yardstick of what is "necessary in a

¹⁴ E.g. *Refah Partisi v. Turkey*

¹⁵ E.g. *Jehovah's Witnesses of Moscow and Others v. Russia*, no. 302/02, 10 June 2010 (hereinafter: *Jehovah's Witnesses v. Russia*)

¹⁶ E.g. *S.A.S. v. France*; *Leyla Sahin v. Turkey*

¹⁷ *Loizidou v. Turkey* (preliminary objections), 23 March 1995, §70, p. 26

democratic society”¹⁸. The ECtHR has reiterated this in its case law. It has stated that “democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it”¹⁹. It thus rejects other political systems and alternative state orders, at least within the sphere of the Convention.

Establishing this, the ECtHR has said many times that “there can be no democracy without pluralism”²⁰, and political parties are essential to the proper functioning thereof²¹. Hence democratic pluralism is key to the European democracies. This means that a multiple of political parties should be able to exist, and there should be the freedom and ability to oppose the government through the freedom of expression. This freedom, as included in the Convention in article 10, guarantees the functioning of democracy, because not only favorably received information or ideas are protected, but also those that offend, shock or disturb the State or any sector of the population²². If this leads to clashes or tensions between groups, the State, as the ultimate guarantor of pluralism²³, has to ensure that the competing groups tolerate each other²⁴. This occurs often in the light of extremist religious movements which might advocate for certain ideals that can be shocking to others, as for example discriminatory policies against women or LGBT people.

The interplay of articles 9 to 11 ECHR and their importance for the proper functioning of the democracy is reiterated by the ECtHR several times: “the pluralism indissociable from a democratic society (...), depends on [the freedom of religion]”²⁵; “democracy thrives on freedom of expression”²⁶; “the primordial role played in a democratic regime by political parties (...) [under] article 11”²⁷.

The freedom of religion is considered a very sensitive topic for the ECtHR, as it for more than thirty years deemed most cases under article 9 inadmissible, or ‘manifestly ill-founded’.

¹⁸ *United Communist Party of Turkey and Others v. Turkey* [GC], §45, no. 19392/92, 30 January 1998 (hereinafter: *United Communist Party v. Turkey*)

¹⁹ *United Communist Party v. Turkey*, §45

²⁰ *Ibid* §43

²¹ *Ibid* §25

²² *Handyside v. the United Kingdom*, 7 December 1976, §49 (hereinafter: *Handyside v. the United Kingdom*)

²³ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, §38

²⁴ *Serif v. Greece*, no. 38178/97, §53, ECHR 1999-IX; *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, §116, ECHR 2001-XII

²⁵ *Kokkinakis v. Greece*, 25 May 1993, §31 (hereinafter: *Kokkinakis v. Greece*)

²⁶ *United Communist Party v. Turkey*, §57

²⁷ *Refah Partisi v. Turkey* §87

However, since the *Kokkinakis* case²⁸, a huge number of cases under article 9 were considered by the ECtHR. As a result, the ECtHR has recognized a wide margin of appreciation for its States Parties concerning freedom of religion issues.

The ECtHR has adopted certain principles which set a standard of the freedom of religion in all its States Parties. Firstly, it has considered that religion or beliefs are “one of the most vital elements that go to make up the identity of believers and their conception of life”, but that it “is also a precious asset for atheists, agnostics, sceptics and the unconcerned”²⁹. Secondly, it recognized that the freedom of religion is a fundamental pillar of the democratic society and democratic pluralism³⁰. Some important cases lead to a more precise explanation of the Convention regarding the positive and negative obligations of the State. The freedom of religion is primarily a matter of individual conscience, but it also entails to manifest one’s religion in community with others, in autonomy and freely, without arbitrary State intervention³¹. However, the State may limit the individuals’ freedom of religion, including the freedom to manifest a religion, if it clashes with the aim of protecting the rights and freedoms of others. Restrictions may be necessary in order to reconcile the interests of the various groups involved, such as the prohibition of wearing a *hijab* by a school teacher in the light of her pupils’ freedom of religion and the principles of tolerance, non-discrimination and equality³². On the contrary, it is not up to the State to make an assessment of the legitimacy of the religious beliefs or the manifestation of such beliefs³³. Hence a state cannot put away certain religious beliefs based on its own examination thereof.

Article 10 ECHR on freedom of expression has likewise been clarified by the ECtHR. Apart from the cases this study analyses hereafter, several clarifications are noteworthy. The freedom of expression entails the freedom to make statements unfavorable to the State, but simultaneously “an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not

²⁸ *Kokkinakis v. Greece*. It concerns Jehovah’s Witnesses and the Greek state on the topic of proselytism. The ECtHR ruled that Greece had violated article 9 by installing sanctions limiting the Jehovah’s Witness man’s right to practice his religion. It was the first case brought under article 9 which the ECtHR took into further consideration.

²⁹ *Kokkinakis v. Greece*

³⁰ *Ibid*

³¹ *Jehovah’s Witnesses v. Russia* §99

³² *Dahlab v. Switzerland* (dec.), no. 42393/98, pp. 11-12, ECHR 2001-V

³³ *Leyla Şahin v. Turkey* §107; *Manoussakis and Others v. Greece*, 26 September 1996, §47 (hereinafter: *Manoussakis v. Greece*); *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, §78, ECHR 2000-XI; *Refah Partisi v. Turkey*, §91; *S.A.S. v. France*, §55

contribute to any form of public debate capable of furthering progress in human affairs”³⁴, which is surprising in the light of the *Handyside v. UK* case in which the ECtHR ordered that the freedom of expression also applies to information and ideas which might shock, offend or disturb the State or any sector of its population³⁵. Taking this line further and applying it to the cases of Islamic fundamentalism, the ECtHR has considered that “the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as “hate speech””³⁶. On the other hand, statements containing incitements to religious violence are incompatible with the notion of tolerance and the Convention’s fundamental values of justice and peace³⁷. Hence a distinction must be made between statements calling for the use of violence, and those which do not contain such a notion.

The freedom of association (art. 11 ECHR) is subject to a wide margin of appreciation by the State, which has a positive obligation to secure the article’s effective enjoyment³⁸. The ECtHR confirmed that “the autonomous existence of religious communities is indispensable for pluralism in a democratic society”³⁹. The limitation of this right must be used sparingly and only convincing and compelling reasons can justify such restrictions⁴⁰, as we will see in the case of *Refah Partisi*. However, it lays in the State’s authority, to “verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population”, as was, for example, the case of Jehovah’s witnesses who worshipped in unauthorized places⁴¹.

However, even without harming the population directly, a (political) party can be limited for the ideas and changes to the constitutional order it proposes: “a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles”⁴². Parties proposing policies which set forward the destruction of democracy or which incite to violence can therefore not

³⁴ *Gündüz v. Turkey*, no. 35071/97, §37, ECHR 2003-XI (hereinafter: *Gündüz v. Turkey*); *mutatis mutandis*, *Otto-Preminger-Institut v. Austria*, 20 September 1994, §49; *Wingrove v. the United Kingdom*, 25 November 1996, §52

³⁵ *Handyside v. UK*

³⁶ *Gündüz v. Turkey*, §51

³⁷ *Gündüz v. Turkey* (dec.), no. 59745/00, p. 5, ECHR 2003-XI (extracts)

³⁸ *Gustafsson v. Sweden*, 25 April 1996, §52

³⁹ *Jehovah’s Witnesses v. Russia*, §99

⁴⁰ *Ibid* §100

⁴¹ *Manoussakis v. Greece*, §40

⁴² *Refah Partisi v. Turkey*, §98; *Yazar and Others v. Turkey*, nos. 22723/93 and 2 others, §49, ECHR 2002-II

count on the protection of the Convention. In the case of *Refah Partisi*, advocating for legal pluralism and the initiation of *Shari'a* is already regarded as a threat to the democratic society, thus serving as a legitimization for State interference.

Even if a party proposes changes in a seemingly non-violent manner, if the State interferes for a legitimate aim because it has identified only the risk of violence, this can be a justified interference. It is not required that the risk of violence is real, current or imminent⁴³.

A fourth relevant article for this study is article 17, prohibition of abuse of rights. The ECtHR can use the approach of exclusion from the protection of the Convention when comments amount to hate speech and undermine the fundamental values of the Convention. This concretely means that “any remark directed against the Convention’s underlying values would be removed from the protection of article 10 (freedom of expression) by article 17⁴⁴. It has mainly been used in cases including anti-Semitism⁴⁵, racial hate⁴⁶ and threats to the democratic order as constituted by groups and individuals which are inspired by totalitarian doctrine or would lead to the restoration of a totalitarian regime⁴⁷. However, most cases concerning (potential) hate speech and religious insults are taken under article 10, the freedom of expression.

Taking all of the legal rules laid out above into consideration, a short sub-conclusion can be drawn before continuing with the discussion of religious extremism. First, it directly becomes clear that no other system than democracy would match with the Convention’s values. Therefore, efforts to institute *Shari'a* in Europe are most probably either regarded by the ECtHR as sufficient ground for State interference under the limitations of the freedoms of religion, expression and association, or under article 17 as a prohibition of the abuse of rights. Secondly, the State can dissolve associations and movements which could potentially institute a threat to the democratic society, even if the leaders and supporters of such groups do not directly advocate for the use of violence. All of this needs to be according to the limitations set out in

⁴³ *United Communist Party v. Turkey*, §49; *X v. Austria*, no. 5321/71, p. 105; *T. v. Belgium*, no. 9777/82, p. 158; *Association A. and H. v. Austria*, no. 9905/82, p. 187

⁴⁴ *Seurot v. France* (dec.), no. 57383/00, 18 May 2004

⁴⁵ E.g. *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII (extracts) (hereinafter: *W.P. v. Poland*); *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007

⁴⁶ *Glimmerveen and Hagenbeek v. The Netherlands*, nos. 8348/78 and 8506/78, 11 October 1979 (decision of the European Commission of Human Rights)

⁴⁷ E.g. *Communist Party of Germany v. The Federal Republic of Germany*, no. 250/57, 20 July 1957 (decision of the European Commission of Human Rights); *B.H., M.W., H.P. and G.K. v. Austria* (dec.), no. 12774/87, 12 October 1989.

the second paragraphs of the three fundamental freedoms, shortly that the State interference is proportionate, serves a legitimate aim and is necessary in a democratic society.

This knowledge is used to set out the legal framework concerning religious extremism by analyzing three themes which come around in four cases. By doing so, it is tried to get a grasp on the conditions under which the ECtHR does not accept fundamentalist claims to the freedom of religion, or under which circumstances a state can legitimately interfere in one's individual rights and freedoms.

To start with, the ECtHR decided that banning a religious association is legitimized once its leader(s) advocate for the use of violence in the pursuit of their religious ideals, as was the case in *Kalifatstaat v. Germany*⁴⁸. Consequently, the ECtHR found that radical ideas, even if it does not contain a call for violence, might be a legitimate reason for State interference through the application of article 17, as we see in *Hizb Ut-Tahrir v. Germany*⁴⁹ and *Kasymakhunov and Saybatalov v. Russia*⁵⁰. Lastly, most generally, the ECtHR declared the *Shari'a* and the idea of legal pluralism incompatible with the ECHR in the case of *Refah Partisi (The Welfare Party) and Others v. Turkey*⁵¹. The specific order of cases is chosen due to the applicability of the ECtHR's judgment on the topic of Salafism, ranging first from very specifically concerning Salafist movements to general rules applying to all Muslims in Europe.

b. Kalifatstaat v. Germany

In *Kalifatstaat v. Germany*, the ECtHR considers a case under art. 11 ECHR, freedom of assembly and association⁵². As said, the ECtHR takes the articles on freedom of religion, expression and assembly often together. The limitations of these articles are equal, being that any restriction shall be prescribed by law, necessary in a democratic society with a legitimate aim. Prohibition or dissolution of an association is only legitimized in highly exceptional cases if it is proportional and all other formal measures are exhausted.

The first case this study uses for its analysis of ECtHR-case law concerning extremism is the case concerning prohibition of the German Islamist association 'Kalifatstaat' in *Kalifatstaat v. Germany*. The association's object was to restore the caliphate and to create an Islamic state

⁴⁸ *Kalifatstaat v. Germany*, no. 13828/04

⁴⁹ *Hizb Ut-Tahrir v. Germany*, no. 31098/08

⁵⁰ *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06

⁵¹ *Refah Partisi v. Turkey*, nos. 41340/98 and 3 others

⁵² *Kalifatstaat v. Germany*

founded on *Shari'a* law, if necessary with the use of violence. The leader of the association had been sentenced to a four-year term of imprisonment after having twice called for murder of his political rival – both were (self-)declared caliphs. The German Federal Interior Ministry subsequently decided to ban the associations on the grounds that the motives of the association were contrary to the constitutional order and to the idea of international understanding (“*l’idée d’entente entre les peuples*”), and that they represented a threat to national security and other interests of Germany, in particular its relations with Turkey.

According to the applicant’s statements in the German legal procedures, a legitimate state order was not based on the free will of the people and the rule of law, but exclusively on the endless will of Allah. Thus the applicant and other members of Kalifatstaat had adopted an antidemocratic attitude towards the state, what had been confirmed as being part of ‘the essential religious foundations’ of the organization and completely contrary to the authority of (German) state laws. According to the Administrative Court, the applicant had fought actively against the German state, by calling for the use of violence which would be legitimized since ‘democracy was a sickness and the result of the devil, therefore it had to be fought by all of the organization’s members’. Moreover, the applicant had showed intolerance for human rights through public statements against Jews and Turkish rulers in the association’s journal⁵³. The Federal Interior Ministry, and later the Federal Administrative Court and Federal Constitutional Court all considered that the ban on the association in the light of freedom of religion and freedom of association had been proportionate.

The ECtHR decided that the ban imposed on the association had been proportionate to the legitimate aims pursued, and thus declared the application ‘manifestly ill-founded’. The ban pursued, in particular, the interests of the national security and public safety, the prevention of disorder and/or the prevention of crime, and the protection of the rights and freedoms of others. The pursuit of a worldwide Islamic regime based on *Shari'a* law was incompatible with the fundamental democratic principles articulated in the Convention. The statements and conduct of the members and its leader were attributed to the association, and it had demonstrated that they would not shy away from the use of force in order to achieve its objectives. In the ECtHR’s view, less stringent measures would not have sufficed to counter the real and existential threat the association posed to the State and its political system⁵⁴. Thus, the ECtHR took the view that

⁵³ *Kalifatstaat v. Germany*, p. 3

⁵⁴ *Kalifatstaat v. Germany*, p. 1

the applicant association's aims had been contrary to the idea of a 'democratic society', which necessitated the State interference, and decided to not take the application any further.

The case shows the issue of (violent) extremism and the challenge such associations pose to the democratic society. The ECtHR found no violation of the association's freedom of association. Firstly, because Kalifatstaat was a fundamentalist Islamic organization whose members wanted to install worldwide Islamic caliphate based on *Shari'a*. Moreover, its leader and members had openly advocated the use of violence to achieve its objectives. Therefore the threat they posed to the constitution and the public safety was of considerable sincerity, both as a result of its theocratic pretensions as of its leader's advocacy for the use of violence.

This conclusion is interesting in the light of Salafism and the various interpretations that exist concerning the pursuit of a *jihad* and the legitimacy to use violence. As stated in the second chapter, Salafists can be separated into three categories: the quietist and politicos have their ideas, which they do or do not spread, but reject violence. The Jihadi Salafists, however, use force to achieve their *jihad*. The ECtHR in *Kalifatstaat* confirmed that state interference was justified to prevent groups and individuals of the use of force to achieve a worldwide Islamic caliphate based on *Shari'a* law. This concretely means that Jihadi Salafists can be limited in their individual rights and freedoms. But it also means that politico and quietist Salafists cannot pursue a regime based on *Shari'a*, whether they advocate the use of violence or not. Even if they do not advocate the use of violence, but only have theocratic interpretations of a *jihad*, an interference might be in place. Individuals, including politico and quietist Salafists, are only allowed to 'defend' *Shari'a*, but what that entails remains unknown. However, the pursuit of a *jihad* is further taken into consideration by the ECtHR.

As we know that the pursuit of an Islamic regime would be incompatible with the fundamental democratic principles of the Convention, it is interesting to look into cases further explaining this point of view. Two cases that further clarify the ECtHR's perspective, concern the Islamic organization 'Hizb Ut-Tahrir' and two of its members.

c. Hizb Ut-Tahrir cases

The prohibition of an association, whether it is a politically, religiously, or even sports inspired, might be legitimized not only because of its activities, but also because of antidemocratic ideals the association is pursuing. This applies most strongly to anti-Semitic associations, which are often recognized as to stand in contrast with the Convention and its ideals. Although application

of article 10 would be appropriate, such ‘anti-democracy’ cases are more often brought under article 17, prohibition of abuse of rights⁵⁵. However, the ECtHR has broadened the application of article 17 in two cases concerning Hizb Ut-Tahrir.

In the first ‘Hizb Ut-Tahrir’ case of *Hizb Ut-Tahrir and Others v. Germany*⁵⁶, the ECtHR confirmed that the Convention does not protect those ideas that contravene the spirit and values of the Convention⁵⁷. Besides this German case, four more cases involving Hizb Ut-Tahrir have been submitted to the ECtHR, all involving the Russian Federation: *Kasymakhunov and Saybatalov v. Russia*⁵⁸; *Ismoilov and Others v. Russia*⁵⁹; *Muminov v. Russia*⁶⁰ and *Khodzhayev v. Russia*⁶¹. However, only the first case is relevant for this study, since the others concern extradition of non-European citizens following a request of their state.

Hizb Ut-Tahrir (Arabic for ‘Liberation Party’) is a “global Islamic political party and/or religious society” which was established in Jerusalem in 1953, with the aim of liberating Palestine⁶². However, the group’s activities have soon centered on advocating a pan-Islamic state in the form of a Caliphate, by overthrowing governments in Muslim-majority states. Besides this extremist framing, the group has adopted extreme anti-Semitic speech. Hizb Ut-Tahrir operates in over 20 countries across the globe, from Arab countries to European and Central Asian countries. It has been banned in many Muslim-majority countries, including Egypt, Saudi Arabia and Turkey, but also in Russia and Germany. However, in Europe political consensus lacks to define the group as terrorist or not, as clear links with violence have not been established. It does not advocate the use of violence to reach their goals of the establishment of an Islamic Caliphate, but individuals affiliated with Hizb Ut-Tahrir have been involved in violent acts in multiple countries (Counter Extremism Project, 2017). The group is not outspoken Salafist, but is considered extremist.

Hizb Ut-Tahrir v. Germany

The ECtHR has dealt with the prohibition of the national branch of Hizb Ut-Tahrir in the case against Germany, and with extradition of members of the group in the cases with Russia

⁵⁵ E.g. *W.P. v. Poland* (dec.)

⁵⁶ *Hizb Ut-Tahrir v. Germany*

⁵⁷ Ibid

⁵⁸ *Kasymakhunov and Saybatalov v. Russia*

⁵⁹ *Ismoilov and Others v. Russia*, no. 2947/06, 24 April 2008

⁶⁰ *Muminov v. Russia* (just satisfaction), no. 42502/06, 4 November 2010

⁶¹ *Khodzhayev v. Russia*, no. 60045/10, 5 June 2012

⁶² *Hizb Ut-Tahrir v. Germany*, §2

involved. In *Hizb Ut-Tahrir v. Germany*, the German Federal Ministry of the Interior banned the activities of Hizb Ut-Tahrir Germany (the first applicant) after a multitude of public statements which were attributable to the group. The ECtHR declared the complaint inadmissible. The members of Hizb Ut-Tahrir had called for the elimination of the Israeli state, by force, and for the killing of its inhabitants and subsequently the Ministry of Interior decided to ban the group. Moreover, it ordered to freeze the association's assets. The Ministry found that the group's activities were directed against the principle of international understanding and that the association had advocated violence to achieve its goals. Both the Federal Administrative and the Federal Constitutional Court rejected the applicant's complaints⁶³.

The ECtHR declared the application inadmissible since it was considered to be incompatible with the provisions of the Convention (art. 35(3)a). It held that the organization was not entitled to protection of the articles 9-11, because of the application of article 17. The purpose of this article is, as established by the ECtHR jurisprudence, "to prevent groups or individuals from deriving from the Convention a right to engage in an activity that destroys any of the rights and freedoms guaranteed by the Convention"⁶⁴. The values of the organization, namely the destruction of the State of Israel and the killing of all of its inhabitants, were contrary to the values of the Convention, "in particular the commitment to the peaceful settlement of international disputes and the sanctity of human life"⁶⁵. Concerning the pursuit of the *jihad*, the ECtHR observes the Federal Administrative Court's assessment that the *jihad*, in Hizb Ut-Tahrir Germany's case, "was aimed at the violent destruction of Israel as a solution to the Israeli-Palestinian conflict", and that "it constituted a call to take violent action with the intention of causing physical destruction and banishment"⁶⁶.

Article 17 has been clarified yet by the ECtHR as "to prevent individuals and groups from exploiting the rights granted by the Convention for anti-democratic means"⁶⁷. The application of article 17 is however rare. The Hizb Ut-Tahrir is one such extreme case in which the article does apply, although its reasoning can even be strengthened by the distinct context of German history. The German authorities take severe action against anti-Semitic activities and statements in Germany. Muslim fundamentalists, in general, do not legitimize the State of Israel and its

⁶³ *Hizb Ut-Tahrir v. Germany*

⁶⁴ *Lawless v. Ireland (no. 3)*, 1 July 1961, §7 (hereinafter: *Lawless v. Ireland*)

⁶⁵ *Hizb Ut-Tahrir v. Germany*, §74

⁶⁶ *Hizb Ut-Tahrir v. Germany*, §16

⁶⁷ E.g. *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts); *W.P. v. Poland*.

government, as they are seen as occupiers of the ‘Muslim-state’ of Palestine. Therefore, such fundamentalists often advocate the destruction of the Israeli state – either with or without the use of force – which can be considered as anti-Semitic. In short, the ECtHR’s approach to this case was both based on the ideas and motivations of the German group, as well as the activities deemed contrary to the Convention. The ECtHR thereby sets a precedent for other cases in which groups pursue certain extremist ideas which might be received as contrary to the Convention’s values. Hence, the ECtHR introduces a pursuit of (religious) extremist ideas as potentially within the limits of article 17, legitimizing State interference and thus limiting the scope of the freedom of religion. This is elaborated on in the second case concerning two members of the Russian Hizb Ut-Tahrir group.

Kasymakhunov and Saybatalov v. Russia

The Uzbek national, Yusup S. Kasymakhunov (the first applicant) and the Russian national, Marat T. Saybatalov (the second applicant) lodged two complaints against the Russian Federation, stating a violation of their freedoms of religion, expression and association and of discrimination on account of their religious beliefs, whereby the legal provisions of their conviction were inaccessible and unforeseeable. The ECtHR declared the complaints inadmissible. The two applicants were both members of Hizb Ut-Tahrir. The Russian Federation, in 2003, found that this organization was a terrorist organization and therefore prohibited their activities on its territory. The first applicant was arrested and convicted for “aiding and abetting terrorism, founding a criminal organization and using forged documents”⁶⁸ – although the applicant opposed his conviction by stating that he had never called for or resorted to violence and only peacefully spread the ‘political ideology’. The second applicant was charged too with aiding and abetting terrorism, as well as the founding and membership of the extremist organization. He, too, stated that he was opposed to violence and had never been involved in any terrorist activities⁶⁹.

In this case, the ECtHR judges dealt with the nature of the organization, for which they analyzed its teachings and its values concerning the use of force and human rights, as well as its stance against other values of the Convention. The International Crisis Group (ICG), a well-established research NGO, published a report in response to the application of the case, stating that Hizb Ut-Tahrir was not a religious organization, “but rather a political party whose ideology is based

⁶⁸ *Kasymakhunov and Saybatalov v. Russia*, §21

⁶⁹ *Kasymakhunov and Saybatalov v. Russia*, §33

on Islam”. The group rejects terrorism, but in their literature and brochures, behind all the rhetoric, ideological justification for violence – according to the ICG. However, ICG notes that there is no evidence that Hizb Ut-Tahrir was involved in terrorist activities in Central Asia or elsewhere (although the group has admitted participation in several failed coup attempts in the Middle East). It disregards democracy, and moreover, it rejects the concept as an anti-Islamic, Western invention, in clear contradiction with the Quran and Sunna.

The Russian local court examined expert reports submitted by the prosecutor, in which the experts noted that “Hizb Ut-Tahrir’s literature advocated and glorified warfare in the form of jihad, a term which was mainly used in its meaning of “holy war”, to establish the domination of Islam”⁷⁰. The ECtHR finds it not convincing that the organization rejects the possibility of recourse to violence.

Furthermore, the ECtHR continues by observing that “(...) the changes in the legal and constitutional structures of the State proposed by Hizb Ut-Tahrir are [not] compatible with the fundamental democratic principles underlying the Convention”, because “Hizb Ut-Tahrir proposed to establish a regime which rejects political freedoms, such as, in particular, freedoms of religion, expression and association, declaring that they are contrary to Islam”⁷¹.

The ECtHR declared inadmissible the alleged violation of the applicant’s freedoms of religion, association and expression and of discrimination on account of their religious beliefs. It did not render its decision under article 17 on the basis of the willingness of the organization and its members to use violence, but on the antidemocratic ideals the applicants were pursuing.

Following the two cases concerning Hizb Ut-Tahrir, the ECtHR makes clear that article 17 on the prohibition of the abuse of rights can be applied both on the concrete means and on the changes in the constitutional order pursued. Besides, it has stated before that the risk of violence does not necessarily have to be real, current or imminent to justify an interference which pursues a legitimate aim.⁷² Therefore violent as well as non-violent activities can be limited by the article.

This view on the width of article 17 ECHR has an enormous impact on Salafists. Coming back to the subject of *jihad* and religious extremism, it becomes clear that the ECtHR has concluded

⁷⁰ *Hizb Ut-Tahrir v. Germany*, §107

⁷¹ *Kasymakhunov and Saybatalov v. Russia*, §109

⁷² *United Communist Party v. Turkey*, §49

that propagating and glorifying the *jihad* can fall within the scope of article 17 ECHR, if the interpretation of *jihad* contains a violent threat. However, the ECtHR has not further clarified its interpretation of *jihad*, but contrarily generalized *jihad* as a danger for the Convention values. As is stated in the first chapter of this study, not only the Salafist ideology, but also other Muslim movements, can pursue a *jihad*. The ECtHR's assessment has therefore the far-going consequence of limiting many Muslims in their ideals. A court which aims to consistently make non-discriminatory statements, has with this conclusion prejudiced not only Salafists who pursue a *jihad*, but also Muslims which follow non-Salafist interpretations, which make up an enormous part of the European population.

It must be noted that this approach is, however, somewhat consistent in the ECtHR's case-law. In the case of *Refah Partisi*, which was discussed several years before the Hizb Ut-Tahrir cases, the ECtHR has also taken a very firm stance against Islamic ideas, which impacted many Muslims in Europe. The judgment in *Refah Partisi* has a very broad effect, as it is reviewed under article 11 and not under the more specific article 17. It sets out a general outline applicable to all Muslims in Europe, and can consequently be regarded as far-reaching as it not only effects fundamentalist movements, but also all those groups and associations who support the *Shari'a* in Europe.

d. *Refah Partisi and Others v. Turkey*

In the controversial *Refah Partisi and Others v. Turkey* case⁷³, the ECtHR's Grand Chamber held that the Turkish authorities had not violated article 11, the freedom of association, by prohibiting the political party 'Refah Partisi' (Turkish Welfare Party).

The case originated in four applications by the political party and three of its leaders, which alleged the dissolution of the party and the suspension of certain political rights, among which articles 9 to 11.

Refah was a popular Turkish party which obtained approximately 22% of the votes in the general election and 35% of the votes in local elections in 1995 and 1996. As the largest political party in Turkey, it formed a coalition government and came to power. However, the Turkish Constitutional Court dissolved the party on the ground that it had become a "centre of activities contrary to the principle of secularism"⁷⁴ - a principle which is established in the Turkish

⁷³ *Refah Partisi v. Turkey*

⁷⁴ *Refah Partisi v. Turkey*, §23

constitution and being upheld strongly by the (then) Turkish government. Refah pursued the introduction of a legal pluralist system in Turkey, whereby adherents could choose its system so to allow Muslim as well as non-Muslim rules. This legal pluralism had its origins in the previously discussed ‘Medina Charter’. The Constitutional Court also held that Refah intended to replace the democratic order with a system based on *Shari’a*, which was based on statements by several of its leaders and members. Two of the Turkish Court’s judges expressed dissenting opinions stating that “political parties which did not support the use of violence should be able to take part in political life and that in a pluralist system there should be room for debate about ideas thought to be disturbing or even shocking”⁷⁵. In an effort to undo the party’s dissolution, its leaders applied to the ECtHR.

The ECtHR found that the measure to dissolve Refah Partisi as a political party was prescribed by law and that there was a legitimate aim in doing so. As to the question whether it was ‘necessary in a democratic society’, the ECtHR’s Chamber (and later Grand Chamber) found that “a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system”, since it would do away with the State’s intended impartiality and its role as the guarantor of individual rights and freedoms, and it would infringe the principle of non-discrimination⁷⁶. Furthermore, the ECtHR accorded that *Shari’a* was incompatible with the fundamental principles of democracy. It reiterated the Chamber’s view that “it is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts”⁷⁷.

Two concurring opinions were expressed. The first, submitted by two judges, regarded the drastic measure of complete dissolution of a political party elected by popular vote, which would be conflict with the principle of proportionality. The second opinion, by Judge Kovler, aims at the unmodulated findings of the ECtHR regarding the sensitive issues of religion and the Convention’s values, as well as the rejection of the concept of a plurality of legal systems and the general assessment of *Shari’a*.

⁷⁵ Ibid §43

⁷⁶ Ibid §119

⁷⁷ Ibid §123

The judgment is also regarded as highly controversial by legal experts and scholars, for a number of reasons. First of all, Refah was a long established party which had won the most votes in elections, and it formed part of the government. Its leader was even Prime Minister. Second, the ECtHR's incidental assessment of Islam and *Shari'a* was generalized and uniform towards Islam, using expressions framing Refah as an 'Islamic fundamentalist movement' and 'totalitarian'⁷⁸. Third, it is argued, "at no point had Refah proposed legislation or taken other palpable initiatives that bring about the "theocratic order" that the ECtHR concludes they envisioned", but it was only based on statements and symbolic public acts by party members of various standing over a six-year period (Moe, 2012, p. 237).

Whatever the critics, the ECtHR has set a precedent regarding the justifiability (or better said: the lack thereof) of the application of *Shari'a* in Council of Europe Member States. Besides, it appears as if legal pluralism is completely excluded as a legitimate alternative of the current legal framework within the sphere of the Convention. This means concretely for the Salafist movement that any advocacy for the implementation in *Shari'a* appears strongly prohibited, whether it is a violent or non-violent call. Besides, sharing ideas about *Shari'a* might be already going too far, as the whole support for a *Shari'a* based regime seems to be contrary to the Convention's values. However, as seen in *Gündüz v. Turkey*, 'defending' *Shari'a* seems permitted by the ECtHR as it is not regarded 'hate speech'. Where exactly this thin line is crossed, remains yet unknown. Future case law is needed to clarify this point. In any case, one conclusion becomes loud and clear: the ECtHR has taken a firm stance against Islamic ideals and values, whereas Muslims make up the second biggest religious group in European society. Limiting them in their conscience, by stating that their ideas are incompatible with the ECHR, has a far-reaching impact and consequence on these Muslims – not only on Salafists.

3) Compatibility of Salafism with the ECHR following ECtHR-case law

'How does the case law of the ECtHR deal with extremist claims to freedom of religion?' was the question answered in this chapter. Following the explanation of the legal framework applicable to this question, this study has discussed that within the sphere of the Convention, democracy is the only system applicable in the European public order. Subsequently, the freedoms of religion, expression and association are of fundamental importance for the proper

⁷⁸ *Refah Partisi v. Turkey*, §94, §99

functioning of the democracy. Freedom of religion thus often goes together with the two other freedoms. State interference in political parties and other associations can only after strict assessment be justified. However, if a political party or association and/or its leaders call for the use of violence or support an ideology which conflicts with the Convention's values, aiming at replacing the democratic order by a (partly) *Shari'a*-inspired regime, its ban is generally necessary in a democratic society and thus legitimized. The ECtHR dealt with the topic of *jihad* by stating that advocating one would fall within the scope of article 17, prohibition of the abuse of rights, but this would only apply in the case of a 'violent *jihad*' – thus depending on the individual's or legal entity's interpretation.

On a more general level, the ECtHR decided that both the institution of *Shari'a* and the *Shari'a* as a system of law are incompatible with the Convention's values and principles. This affects directly many Muslims in Europe, as well as the popular democratic system of Turkey since the party affected gained the highest support in the previous general elections. This case shows the typical challenge that States Parties to the Convention are confronted with: on the one hand, all individuals should enjoy the three aforementioned freedoms, but on the other hand, the State has the duty to protect the democracy and the public order.

The ECtHR has dealt with this line in specific cases concerning the Islamist groups 'Kalifatstaat' and 'Hizb Ut-Tahrir', as well as the political party 'Refah Partisi'. It has not explored in detail the exact boundaries of what constitutes "religious extremism". However it has established that even groups who do not advocate violence, can be limited justifiably under articles 9-11 and 17. The call for a *jihad* can also be a legitimate reason for State interference. And even calling for the implementation of *Shari'a* and a legal pluralist system can cross the lines of the Convention's protection. The ECtHR decided this call to be a threat to the democratic society, thereby making it an extremist position and legitimizing the party's ban. The ECtHR's dealing with 'extremist claims' has been generalized to a very big extent, infecting not only violent and non-violent Salafists, but also all other Muslims.

It must be said, however, that the ECtHR has not dealt specifically with Salafists or Salafist groups. Up until now, most cases concerning Islamist ideas, contained associations or political parties, or members affiliated with such groups, did not include the Salafist ideology but were Islamic fundamentalist thoughts. This is to be separated from Salafism, because as explained in the subchapter on fundamentalism, there is a wide variety of interpretations of *Shari'a* and not every extreme ideology can established as Salafist. Still, the ECtHR's-case law impacts directly

Salafist groups in Europe. Ranging from wide-spread consequential decisions of *Refah Partisi* to specific limitations concerning fundamentalist association's dissolutions in cases of *Kalifatstaat* and the Hizb Ut-Tahrir cases, the rulings of the ECtHR strongly limit the Salafists' individual freedoms and rights.

Since the ECtHR case law is extremely clear on the incompatibility of *Shari'a* with the Convention's principles, it is interesting to see what approach the CoE's Member States adopt accordingly. The policy approaches can teach us more about the handling of European democracies with Salafists and the potential threat they pose to their national security, both in terms of radicalization and the (non-)violent pursuit of a *jihad* and an Islamic Caliphate based on *Shari'a*, as well as on the risks the counter-terrorism measures bring to the European Convention.

III. Counter-terrorism

1) Introduction

Europe has recently been disturbed by religiously inspired terrorist attacks. In London, Paris, Brussels, Nice, Berlin and many other Western European cities, Jihadi Salafists succeeded to dismay many European citizens. With their interpretation of a *jihad*, the Jihadi Salafists try to impose their ideology upon non-believers and disbelievers. The result thereof is a lack of nuance in Western politics, media and citizens' discourse. But as outlined before, not all Muslims are Salafists and not all Salafists advocate for the use of violence. An unjust generalization is extremely dangerous for the rights of Muslims and, specifically, Salafists in Europe.

However, the framing is a logical result of the jihadist activities during the last few years. Between 2014 and 2016, jihadi attacks killed more than 200 people; in 2015 and 2016 there were twenty-two jihadi attacks. For the preceding fifteen years, the biannual average was six attacks (Nesser, Stenersen, & Oftedal, 2016). Between 2011 and 2016, over 5.000 European citizens went to Syria to engage in combat, a number five times higher than the number of foreign fighters to all previous destinations combined (The Soufan Group, 2015). The November 2015 Paris attacks, also known as the *Bataclan* and *Stade de France* attacks, were one of the most complex terrorist operations ever carried out in Europe.

As stated before, Europeans view the scourge of IS as one of the greatest threat to democracies. The numbers above have, of course, led to this fear. Although after almost every attack the citizens assemble and state that 'fear cannot rule', the increase in police presence on the streets and the reinforcement of security checks through, for example, the French national state of emergency, logically damaged many citizens' morality and optimism. However, the fear has only been fueled by several politicians' statements. After the aforementioned Paris attacks, certain French prominent extremist-right figures called for extreme counter-terrorist measures. Laurent Wauquiez, at that time the secretary general of the governmental French political party 'les Républicains', called for the creation of special centers to counter terrorism in which all suspects of terrorist should be placed: "*toutes les personnes fichées soient placés dans des centres d'internement anti-terroristes spécifiquement dédiés*" (Huffington Post, 2015). This measure would target about 4000 French citizens who were under scrutiny by French intelligence forces.

These counter-terrorism measures are logically a result of the threat of terrorism. To discuss counter-terrorism, it is therefore necessary to comprehend terrorism. Although a universal definition is still lacking one can distinguish certain characteristics of terrorism from other modes of violence and conflict. Terrorism is designed to create a climate of extreme fear; directed at a wider target than the direct victims; it includes attacks against civilians; it violates the norms regulating disputes, protest and dissent; and it is used primarily, though not exclusively, to influence the government's or community's policies (Wilkinson, 2006). It can be used by desperate and weak minorities, by states, by belligerents in times of warfare and by single individuals. A variety of reasons can lay ground for terrorist attacks. They can be motivated by religion, ethnic differences, ideologies of the left, ideologies of the right, or government-induced compliance. Depending on the terrorist threat, counter-terrorism measures will also vary.

Most counter-terrorism measures are not mutually exclusive, nor are they exhaustive. Neither will they all be successful. Important before installing measures is to analyze the reasons of terrorist strikes, to grasp the root causes of terrorism. It is impossible to state that there is a common cause for the terrorists, as it can be the result of poverty, political repression, education (or the lack thereof), discrimination, previous criminal offences or the lack of integration. The best way to combat terrorism, is to prevent the attack from happening. To this end, we can distinguish between hard and soft counter-terrorism measures.

In order to respond to the increased risk of terrorism, in general as well as home-grown terrorism, many Western European states have imposed strict counter-terrorism measures. The United Kingdom, for example, introduced CONTEST – a four-tier approach focused on preventing radicalization, preparing the country in case of attacks, pursuing potential perpetrators and protecting through intelligence. France declared a state of emergency, providing the authorities with far-reaching capabilities including enlarged powers of search, seizure and detention. Belgium has improved its intelligence infrastructure, but it also passed stricter legislation criminalizing new offences. Germany, as a country with a clear history of terrorism, adopted two major anti-terrorism packages about one decade ago, revoking among other tenets the immunity of religious groups from investigation or surveillance and increased cooperation between intelligence and law enforcement agencies, as well as recent bans on IS propaganda and racist rhetoric.

Any reader with some background in human rights can understand the tension between human rights and security measures. Imposing stricter limitations to counter propaganda, prevent radicalization or enable police forces to seize goods can be discriminatory and may contain a violation of the fundamental freedoms of religion, expression and assembly and association. At the same time, such interferences might be justified to preserve the nature of the European Convention and its values. But counter-terrorism measures are often imposed to enable interference with fewer limitations, thus imposing the state's policies also upon opponents or supporters of a different religious or political ideology. Paradoxically, the counter-terrorism measures can easily violate human rights and thus, in itself, form a threat to the democratic values which they desperately try to preserve. The question in this regard is: **“How have previous terrorist threats been solved and which counter-terrorism measures are currently taken against Jihadi Salafist-related terrorist threats in the light of rule of law and human rights?”**

To answer this question, an outline of counter-terrorism and de-radicalization theories will be provided, as well as an overview of previous (successful) counter-terrorism measures in the struggle against the Western German Rote Armee Fraktion and the Northern Irish Provisional Irish Republican Army (IRA). The historical analysis will help placing counter-terrorism measures into the context of four specific countries' approaches: Belgium, France, Germany and the United Kingdom, each state is included in this study for its own specific reasons. At the same time, their approaches are set in comparison with the ECHR and ECtHR judgments to sketch the tensions between human rights and counter-terrorism and to explore the compatibility of the state's policies with the European legal framework.

a. Hard counter-terrorism measures

The hard, or direct, model tends to frame the combat against terrorism in an enemy-centered struggle in which military forces can be deployed and armed forces are primarily in charge of developing the strategy. It is key to learn about terrorism plots before their realization. Hard counter-terrorism measures can include the use of intelligence and law enforcement.

Intelligence

One approach is to increase the use of intelligence to prevent terrorism. The typical terrorist group is numerically small and based on several local cells. Total loyalty to the organization ensures the existence of the group, but the local members are often obsessed with their own

security and secrecy. Besides, the local members have a variety of possibilities to gain access to light portable weapons and materials required for home-made bombs, which makes it difficult to track their traces and lines of supply (Wilkinson, 2006). This poses a challenge to intelligence services for defeating the terrorist campaign. High-quality intelligence is necessary for efficiently gaining knowledge about terrorist networks.

The security authorities need to know a great deal about the suspects of terrorist plots before being able to act. Understanding the aims of the group or individuals, the precise nature of their objective and plans, their political or religious motivations and leadership, memberships and logistic and financial resources all requires secret, covert and comprehensive intelligence. Both police and special services can collect and analyze intelligence.

Intelligence-led counter-terrorism measures also rely heavily on the public. There is thus a two-way communications with the public. The intelligence services share information with the public about activities and relatable signs to be aware of, and they explain what to do with information that potentially relate to possible terrorist threats. By doing so, they can both collect intelligence directly from the community-level and, to a certain extent, warn and prepare the public for potential terrorist attacks. The risk of intelligence, however, is that it soon becomes discriminatory or an interference in one's right to privacy. Several safeguards should be in place to prevent illegitimated gathering of data and to secure the human rights of all in the use of intelligence for counter-terrorism.

Law enforcement

A second counter-terrorism measure is the improvement of the law enforcement. Only two weeks after 9/11, the UN adopted the U.S.-sponsored Resolution 1373 obligating all UN Member States to criminalize terrorist acts and, therefore, to change its legislation if deemed necessary for this goal. This criminalization included the support and financing of terrorist acts; the denial of providing a safe haven to terrorists and the prohibition of any other support for terrorists, such as the provision of arms; and the prompt cooperation with other states in the implementation of these measures (de Jonge Oudraat, 2003, p. 169).

Law enforcement thus can mean both the adaptation of the criminal justice system, by invoking new laws and regulations, and improving the police and security forces. In the wake of 9/11, American local and national police forces mobilized in support of the nation-wide efforts against jihadist terrorism. Security officers went undercover to conduct covert surveillance of

suspected protesters, including members of religious groups, during major public events. Local police officers were tasked with collecting and processing communal data and activities within the community, as a result of their wider mandates which included preventing and investigating crime, as well as maintaining order, patrolling and providing services (Waxman, 2008). Again, both proponents and opponents had arguments in favor and against this strengthening of law enforcement in light of civil liberties.

This latter strengthening of legislation, through establishing international cooperation, forms an important part of law enforcement. Global partnerships lead to the sharing of intelligence and data about terrorism and other crimes, to improve the ability to fight crime and terrorism both domestically and internationally. Modern terrorism is also inherently international, and many states have a shared interest in combating terrorism. Hence cooperation has been established to prevent, among other activities, aircraft hijacking, attacks on diplomats and hostage-taking. But most significant cooperation is bilateral through intelligence sharing, cross-border policing and the extradition of suspects.

Evidence suggests that the combination of law enforcement and intelligence to the end of countering terrorism are most efficient in ending terrorist groups. Between 1968 and 2006, of the 268 terrorist groups 40% ended due to police and intelligence services that penetrated and disrupted terrorist organizations. They succeed mostly as a result of their (often) permanent presence in communities, cities and villages; their better understanding of the local environment and threats; and improved human intelligence (Jones & Libicki, 2008)

b. Soft counter-terrorism measures

Less direct measures in the combat against terrorism are so-called soft measures. These can include the promotion of democracy and the countering of radicalization. These, however, are long-term measures which take much energy through reforms of, for example, education systems and social services.

This approach has been successfully adopted in Singapore. The Singapore government has efficiently dealt with terrorism after recognizing the importance of an ideological response as an integral part of its counter-terrorism approach against local threats of Al Qaeda and the affiliated South-East Asia group 'Jemaah Islamiyah'. They argued that terrorism is the result of motivation through ideology. Therefore, the primary responsibility for combating the ideology would be carried by the Singapore Muslim community. The government called on the Muslim

community to speak out against the ideology that the two groups disseminated. They also called upon local Muslim scholars to prevent that their followers would not be influenced by such ideology. These scholars, the government argued, had the capacity to reach the community through mosques and religious schools in a way the government security personnel failed, and to protect the community against perverse and dangerous religious teachings (Hassan & Pereire, 2006).

Democracy promotion

One soft counter-terrorism approach in Western Europe is to influence the circumstances in which the potential terrorists live in. By sustaining democratic institutions and strengthening the rule of law, terrorists will fail to succeed in undermining the state or provoking it into overreaction. Efforts to promote the democracy by democratic political parties, mass media, trade unions, churches and mosques, schools and other major social institutions, might convince terrorists that their acts are undesirable and counterproductive, and that they can reach their goals in other, non-violent and more legitimized ways.

This approach of promoting democracy is extremely difficult as it takes long-term measures before results will show off. Therefore it has rarely been tried on a large-scale, but successes have been reached in the re-education and rehabilitation of former members of the Spanish Basque Euzkadi ta Askatasuna (ETA) and the Italian Red Brigades.

An efficient democratic government will attempt to provide all human rights to every individual, thus avoiding radicalization as a result of a lack of rights and perceived injustices. Deprivation of civil and political rights can be an enormous trigger for opposition of the government through the use of force, even more than the deprivation in materialistic terms, such as access to jobs, education and housing (Wilkinson, 2006). To this purpose, a possible counter-terrorist measure is the provision of fuller recognition and rights to a minority population by a state to effectively prevent polarization and armed conflict within the society. The Italian government in 1972 granted considerable degree of autonomy to the German-speaking province of South Tirol to greatly diminish the risk of terrorist violence that occurred at that time. A potentially bitter and prolonged civil war was thus effectively prevented.

Counter-radicalization

The idea of counter-radicalization measures is “to undo the radicalization process by engineering the individual’s return to moderate society, usually by providing them with a stable

support network, probing their original reasons for radicalizing, and divorcing them from their extreme beliefs and social contacts” (Hoeft, 2015, p. 6). However, before any effort is made, there must be a clear understanding of what drives people to terrorism in the first place. In most cases, the groups experienced some kind of injustices, whether it was real or imagined, but for a variety of reasons. De-radicalization and rehabilitation need to take such differences into account (Stern, 2010).

Both social grievances and group dynamics can spur young people into terrorism. But not only material aspects can be decisive; psychology also matters. Preexisting personal traumas, such as sexual abuse, exposure to violence in a war situation or the flight from a country of origin, can influence the potential terrorist’s mind. Radicalization also occurs often in prisons. In the end of the de-radicalization process, a change in value and behavior must be reached. Following this approach, Boaz Ganor has developed a Terrorism Equation. He found that using terrorism is the result of both having the motivation to turn to terrorist acts and of having the ability to act accordingly. Counter-terrorism, therefore, will be effective if states seek to both eliminate the terrorists’ motivations and abilities (Ganor, 2008). Following this theory, soft counter-terrorism measures should not only deal with strategies for the prevention of radicalization, but also with already radicalized individuals who pose a risk of the spread of radicalization.

Within the de-radicalization approach one can distinguish again between the causes for radicalization. The scholar Alex Schmid discerns three levels of radicalization, being the micro-, meso- and macro-level. According to Schmid, on the micro- or individual level, individuals radicalize due to problems which are close to the person, e.g. identity problems, failed integration, feelings of alienation and marginalization. Radicalization on the meso-level, or the wider radical milieu, can be attributed to the existence of a social surround that is aggrieved and suffers injustices, which can radicalize smaller groups and lead to the local formation of terrorist groups. On the macro-level, the wider society plays a role, i.e. the role of the government and society at home and abroad; the radicalization of public opinion; lacking socio-economic opportunities for whole sectors of the society, which all lead to the mobilization and radicalization of the discontented (Schmid, 2013).

Concerning radicalization and the analysis of states’ counter-terrorist approaches in the past, it is noteworthy that terrorists have not always been deemed “radical”. For example, IRA members were never “radicalized”, there was no notion of it in the context of terrorism and counter-terrorism. And not all radicalized individuals turn to terrorism or the use of violence.

Some radicals turn to violence, others only radicalize after they have been recruited. The term 'radicalization' has only emerged after 9/11 to describe Al Qaeda and its affiliates (Groppi, 2017).

c. Previous terrorist groups

With the knowledge of the above in mind, this study will shortly analyze the application of the aforementioned counter-terrorism strategies and approaches to previous cases of terrorism. Especially relevant, and to a certain extent comparable with Jihadi Salafism, are the terrorist groups of the 1970s and 1980s. The Western German Rote Armee Fraktion (RAF) and the Northern Irish Provisional Irish Republican Army (IRA) form influential groups with violent tactics of reaching their goals. However, different from current Jihadi Salafists, the groups mostly pursued a political goal and did not follow a religious ideology. Still, the lessons learned from the counter-terrorism approaches are useful in the combat against terrorism in the 21st century.

West Germany: Rote Armee Fraktion

The RAF, or Baader Meinhof Gang, was a Marxist-Leninist terrorist group that appeared in West Germany in the 1970s. Maybe not the most effective terrorist organization, they surely captured the attention of public and media as they were very efficient in broadcasting its message of opposition to the international capitalist system of which West Germany had become a part after the Second World War. Their attacks started with several bombings of buildings, but soon they moved to more violent and deadly attacks on prominent individuals, mainly businessman and bankers, who they considered representatives of the capitalist systems. Even when the leaders of the group were in prison, they succeeded in giving directions to their followers to continue their struggle against the status quo. Thus new organizations, which were inspired by the Baader Meinhof Gang, appeared and attempted new terrorist attacks.

In the 1970s, the main counter-terrorism practices of West Germany were focused on the members of the RAF. The approach was aimed at apprehending the suspects and improving coordination of the police forces' activities in countering terrorism. A specialist anti-terrorism unit was set up. They successfully countered a hijacking on an airplane, thus preventing the death of many passengers and the crew (Lutz & Lutz, 2006). But the most significant innovation was the development of computerized bank of counter-terrorism data. It helped capturing the members of the RAF who were hiding themselves from the police. Finally, they were all

apprehended and sent to prison. Without attacking the rule of law and democratic society, the authorities were successful in the quelling of the RAF (Wilkinson, 2006).

Although the counter-terrorism measures were seemingly successful, the RAF was for a long time able to survive as they were a flexible organization in terms of leadership. They created and developed new generations of leaders as soon as the former leaders were captured or killed. Notwithstanding the efforts of the authorities, maybe the main reason for the end of the RAF was the collapse of communism in the Soviet Union and Eastern Europe (Lutz & Lutz, 2006). With the disintegration of their main idealist system, their Marxist goals and capitalist critiques were more difficult to put forward. In a series of communications in 1992, the surviving group members announced the ceasing of their activities.

Applying the counter-terrorism approaches of West Germany to the analysis of hard and soft counter-terrorism measures as conducted above, it becomes clear that the authorities have chosen to take solemnly hard measures. The combination of intelligence through the collection of data and law enforcement by improving the police forces' cooperation finally led to the end of the RAF, as far as counter-terrorism measures are concerned. The authorities did not rely extensively on soft measures, such as de-radicalization and the promotion of democracy. Especially the promotion of democracy might have been counter-effective since it was the promotion of a political state structure the terrorists rejected completely.

Northern Ireland: Irish Republican Army

The battle of the Irish dissidents seeking to unite the Northern Ireland with the Republic of Ireland has been extremely long. The most recent round of violence, however, started in 1969. The battle was intensified further not only for nationalist reasons, but also because the majority in Northern Ireland was protestant while the Catholic community was a substantial minority group, and the Irish citizens just across the border were also overwhelmingly Catholic. Besides, the Protestants were in a dominant economic position compared to the Catholic population. Repression of the Northern Irish government against Catholic claims to social justice and equal rights, led to confrontations which subsequently led to violence (Lutz & Lutz, 2006). The British army was sent to Northern Ireland to protect against repression and discrimination by the majority. But the Provisional Irish Republican Army (contrary to the Official Irish Republic Army) chose not to avoid violence but continue their attempts to free Northern Ireland.

Over time, individuals in the Protestant community and some businessmen, industrialists and members of the security forces became targets as a warning to the broader groups in the majority community. Car bombs and assassinations were the main weapons. Besides the real use of violence, they often threatened and intimidated all those individuals who opposed the IRA, whether it was by collaborating with British or local authorities or by taking part in a jury or testifying in a court against the IRA and other dissident groups.

As a result of this intimidation, it became increasingly difficult to convict the IRA suspects. In 1972, the Northern Ireland Stormont government urged the use of the emergency measure 'internment without trial'. Since all magistrates, witness and juries were being intimidated by IRA members, there was no other possibility to try and have the suspects convicted, the authorities argued. This measure, however, violated the basic rights as established through the British judicial system (Lutz & Lutz, 2006). The intelligence on which the operation was based was gravely deficient, and many individuals who fell victim of the measure had little or nothing to do with the IRA. Besides, the approach was generally counterproductive as it convinced many Catholics to join the group. They felt that repression and discrimination persisted and, thus, had to be resisted. That year, the number of deaths of IRA terrorism was the highest of all years. The group's political and financial support grew extensively in America. And the victims of the measure became even more bitter, better trained and vaster determined to reach their final cause (Wilkinson, 2006).

The IRA ultimately changed its terrorist activities following negotiations with the United Kingdom and the Republic of Ireland. The Belfast Agreement, also known as the Good Friday Agreement, of 1998, addressed the main issues concerning internal governance, and detailed measures of constitutional changes, decommissioning, security and paramilitary prisoners (Jones & Libicki, 2008). Concluding, the governments have mainly used a hard counter-terrorism approach, including the deployment of troops and intelligence gathering, while to a smaller extent they also promoted democracy by ultimately negotiate to reach a peace agreement.

The variety of counter-terrorism approaches applied in the aforementioned two combats shows the many possibilities that states have in tracking down (potential) terrorists and preventing any further attacks. The human rights and legal framework thereby does not always guarantee the compatibility of measures with the law. What states have learned from the past, might be useful

for the current combat against terrorism in Europe, although hope remains that current measures are taken in the light of human rights, the rule of law and democracy.

To answer the question which counter-terrorism measures are currently taken against Salafist related terrorist threats, this study will continue with a case study of four Western European states, three of which have had past experience with terrorism. Belgium, France, Germany and the United Kingdom are interesting cases in the light of history, they have high numbers of Salafists in their countries and they have had to deal with recent terrorist attacks on their territories. Besides, the aforementioned established case-law concerning the Kalifatstaat and Hizb Ut-Tahrir give context to the counter-terrorism measures currently taken in the light of rule of law and human rights.

2) Council of Europe

“The protection of human rights has been presented as an obstacle to effective counter-terrorism work when, in fact, it is essential to preventing and decreasing the incidence of terror around the world.”⁷⁹

In 1978 the Committee of Ministers of the Council of Europe declared that “the prevention and suppression of terrorism is indispensable to the maintenance of the democratic structure of member states” (Declaration on Terrorism, 1978, p. 1). Following on that, the Council of Europe have developed a variety of legal instruments, with the aim to strengthen the fight against terrorism in the light of respect for human rights and the rule of law. Most noteworthy are the Convention on the Prevention of Terrorism and its Additional Protocol (2005), which criminalizes preparatory crimes besides acts of terrorism, and the 1977 Convention on the Suppression of Terrorism, which facilitated the extradition of terrorist suspects and cooperation between member states.

Besides several other Conventions relevant for the topic of terrorism and counter-terrorism, the Council of Europe Committee of Ministers in 2015 made a declaration concerning violent extremism and radicalization leading to terrorism, aiming at better cooperation, countering radicalization and criminalizing those that perpetrate or prepare terrorist acts (Council of Europe Committee of Ministers, 2015). Moreover, the Committee of Ministers of the Council

⁷⁹ Commissioner for Human Rights (Positions on counter-terrorism and human rights protection, 2015, p. 3)

of Europe adopted (not legally binding) guidelines on human rights and the fight against terrorism, which prohibit arbitrariness in the States' measures and emphasize the necessity of legal protection following article 6, right to a fair trial, for terrorist suspects.

The ECtHR has established extensive case-law on counter-terrorism measures “necessary in a democratic society”. As a result, we learn that a state can refuse full access to personal information stored by the authorities if there is a legitimate fear that that would undermine the secret services' efforts in combating terrorism⁸⁰; and that the authorities' monitoring and interception of communications without preliminary provision of information to the individuals concerned is justified under exceptional cases⁸¹. Besides, the dissolution of a political party in Spain with linkages to the ETA was decided to be justified with regard to Spain's history with terrorism and the party leaders' acts and speeches which pursued a social model which was in contradiction with the concept of a “democratic society”⁸².

To find to which extent national legislations have been adapted to the Council of Europe framework and the ECHR and subsequent ECtHR case-law, four states' counter-terrorism measures are looked more deeply into. This study will take only national measures into regard, hence excluding international efforts of cooperation, since the four countries are all member states of the Council of Europe and thus adapt by the framework as outlined above.

a. Belgium

*“Nous ne choisirons pas entre le droit à la sécurité et les libertés fondamentales. Nous voulons l'un et l'autre, nous voulons l'un pour l'autre !”*⁸³

There are several reasons for the choice of Belgium as one of the cases to be discussed. Firstly, although Belgium does not have the extensive past experience with terrorism and organized terrorist groups like Germany, the United Kingdom and France have, it has been the target of many recent Jihadi terrorist attacks. Secondly, Belgium has the highest number of foreign fighters per capita, with recent numbers estimating 451 individuals who have travelled abroad

⁸⁰ *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, ECHR 2006-VII

⁸¹ *Klass and Others v. Germany*, 6 September 1978 (hereinafter: *Klass v Germany*)

⁸² *Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, ECHR 2009

⁸³ Translated: “We will not choose between the right to safety and the fundamental freedoms. We want the one and the other, we want safety to secure our fundamental freedoms!” Speech by Belgian Prime Minister Charles Michel, soon after the Paris attacks of November 2015 (Belgian Parliamentary Assembly, 2015, p. 11).

to join the terrorist fight in Syria or Iraq. Thirdly, the country is at the epicenter of attacks also because of their participation in the International Coalition against IS, for which they provide maritime and aerial support. Therefore the counter-terrorism approach as applied by the government in the light of the recent attacks can provide valuable insights into the compatibility of counter-terrorism measures with the European legal framework concerning human rights and the rule of law.

The Belgian government defines its counter-terrorism strategy as 'holistic and coordinated' (Koninkrijk België, sd). Prevention, legal prosecution and rehabilitation form the main pillars, thus leading to close cooperation and coordination of local and federal police, ministries, intelligence services and municipalities. Most concretely, a hard counter-terrorism approach is applied with soft measures included but not enforced. The government has allocated an additional 400 million euro for the implementation of new measures for the year 2016, above the yet existing budgetary frame.

Concrete measures are, *inter alia*, the provisional deduction of identity cards of foreign terrorist fighters as soon as an individual forms a threat to the public order or security; the establishment of specific data banks on terrorism and foreign terrorist fighters specifically; and extension of the Criminal code with the criminal offence of moving abroad for terroristic purposes. Besides, recruiting, education and provoking terrorism have recently become criminal prosecutable acts (Belgian government, 2016). Moreover, foreign terrorist fighters are detained right after their return on the Belgian territories; all imams present in Belgium after November 2015 will be screened and consequently potentially arrested or extradited; and unofficial or not (yet) officially recognized associations and prayer's places in which *jihad* is spread, will be dissolved (Belgian Parliamentary Assembly, 2015, p. 6) (Belgian Government, 2015).

The Belgian Prime Minister furthermore called for the concentration on potential perpetrators of terrorist activities in their combat. Through the extension of legal instruments, new personnel and new instruments, the intelligence services should become able to quickly trace such individuals. Through a system of contradiction, the services will acquire the capability of electronically supervising all suspected individuals and hence take action once suspected activities are recorded (Belgian Parliamentary Assembly, 2015).

In terms of soft counter-terrorism measures, the government pursues mainly de-radicalization methods. It has recognized that not all those individuals pursuing societal and constitutional

changes, form a threat the democratic society. But those radicalized groups or individuals advocating the use of violence or constituting a threat to the society can fall within the legal scope of criminal prosecution. Hence the Belgian government focuses strongly on the prevention of radicalization to prevent the violent extremism and terrorism. Thereto local taskforces are established and the number of criminal offences included in the Criminal Act has increased. Moreover, the government has adopted various Action Plans which promote the development of de-radicalization projects, such as socio-economic initiatives aimed at the strengthening of the identity of youth; reducing and eventually eliminating the basis for radicalization and augment social cohesion. However, these plans are not enforced, nor concretely developed, and thus transmitted to local governments and municipalities to implement.

Compatibility with ECHR

Three measures are potentially problematic in the light of their compatibility with the legal framework as set out before. The direct detention of returned foreign terrorist fighters, the screening, detention or extradition of imams⁸⁴, the screening of all potential terrorist perpetrators and the dissolution of organizations advocating *jihad* can form a violation of several articles of the ECHR⁸⁵.

Firstly, on the direct detention of returned foreign terrorist fighters the Belgian Prime Minister in his speech (see footnote 83) did not go into further details, neither has the government expanded about the exact conditions under which detention will take place. Hence it depends on the safeguards whether this measure might violate the ECHR. With the law of 20 July 2015, article 140 was introduced in the Criminal Code, which criminalizes the travelling to Syria or Iraq with the aim of perpetrating a terroristic act. Every returnee will be arrested immediately and presented before an investigating judge, who consequently decides on the detention.

The ECtHR has established extensive case law concerning detention on the reasonable suspicion of a terrorist act. Three conditions should be met in order to determine the legality of

⁸⁴ “[...] een onmiddellijke en algemene screening van alle predikers die aanwezig zijn op ons grondgebied”, translated into “[...] a instant and general screening of all preachers which are present on our territory”, as stated by Belgian Prime Minister Charles Michel (Belgian Parliamentary Assembly, 2015, p. 6).

⁸⁵ “De vrijheid van eredienst is een grondwettelijk recht, maar gebedsplaatsen kunnen geen ruimte worden voor de verspreiding van het jihadisme. Zulke niet-erkende en vaak clandestiene gebedsplaatsen moeten worden ontmanteld”, translated into “freedom of religion is a fundamental right, but places of prayer cannot become spaces for the spread of jihadism. Such unrecognized and often clandestine places must be dismantled”, Belgian Prime Minister Charles Michel (Belgian Parliamentary Assembly, 2015, p. 6).

detention. Firstly, the terrorist act must be prescribed by law⁸⁶. In the Belgian example, it becomes clear that article 140 of the Criminal Code criminalizes the travelling abroad for the purpose of terrorism, therefore the first condition is met. Secondly, the purpose of detention must be to bring the detainee before a competent court, requiring due diligence by the detaining authority at the trial. This condition is met by the Belgian authorities through their established procedures of bringing the returned terrorist fighter for an investigating judge. The third condition requires sufficient reasonable suspicion to detain a person, which for the purpose of proportionality requires objective justification⁸⁷. The Belgian government has established the so-called Foreign Terrorist Fighters Databank, through which a multiple of services and governmental authorities have access to intelligence about individuals who have travelled, are willing to travel or currently are abroad (Belgian Parliamentary Assembly, 2017). This could satisfy the third criteria. Therefore, most probably the hard counter-terrorism measure regarding immediate detention after the return of foreign terrorist fighters is compatible with the ECtHR. However, the intelligence gathering for the purposes of the databank might be discriminatory, as the databank includes data of individuals who ‘might have the intention’ to travel abroad, and even of those for who the services have certain indications that they ‘might be willing to’ travel abroad, which most probably covers an enormous scope consisting almost solemnly of Muslims (Wolters Kluwer, 2016).

The second potentially conflict measure is the screening of all imams present in Belgium, including their arrest or extradition if becomes clear that they spread hate or advocate violence. In *Klass v. Germany*, the ECtHR accepted “the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications” which could be, under exceptional conditions, necessary in a democratic society, in the interests of national security and/or for the prevention of disorder or crime⁸⁸. The ECtHR thus recognized a margin of appreciation for the states when adopting domestic legislation on this topic, but this cannot form an unlimited discretion to subject persons to secret surveillance. Depending on the scope, nature and duration of the possible measures, as well as the grounds required for ordering such measures, the authorities carrying them out and the kind of remedy provided for, all influence the legitimacy of the interference. But most importantly, it has also asserted that any

⁸⁶ E.g. *Loukanov v. Bulgaria*, no. 21915/93, 20 March 1997

⁸⁷ *Fox, Campbell and Hartley v. The United Kingdom*, 30 August 1990; *Doorson v. The Netherlands*, 26 March 1996

⁸⁸ *Klass v. Germany*, §48

‘exploratory’ or ‘general surveillance’ would be contrary to the right to private and family life as enshrined in article 8 ECHR (de Frías, 2012). Depending on the specific execution of the measure to ‘screen all imams’, this could be a violation to art. 8 as it is a general principle against all imams, without distinguishing between, for example, the specific legal school, the mosque or the ideology pursued by the imams.

The third potentially conflicting measure is the dissolution of all places of prayer⁸⁹ which spread jihadism. Interestingly, the Belgian Member of Parliament Philippe Pivin submitted a question to the minister of Justice, requesting more information regarding the number of places of prayer and cultural institutions that had been dismantled since January 2015, and the religions the controls and investigations were concentrated on. The minister of Justice, however, did not answer the questions. As this study has outlined many times before, the interpretation of *jihad* can vary strongly among individuals. The Belgian government, with this measure, generalizes without any nuance, the *jihad* into a concept contrary to the European Convention and the values of human rights, the democratic society and the rule of law. However, in the light of ECtHR-case law, there is a legitimate basis for this measure. As the ECtHR decided in *Hizb Ut-Tahrir v. Germany*, pursuing or advocating for a *jihad* constitutes “a call to take violent action with the intention of causing physical destruction and banishment”⁹⁰. Following this line of reasoning, the Belgian government can indeed make the case that the dissolution of religious associations which ‘spread the *jihad*’ constitute a danger to the Convention and its values and interference is therefore legitimized.

b. France

“Celui qui combat le monstre doit veiller à ne pas le devenir lui-même.”⁹¹

France’s counter-terrorism strategy is based on a number of principles which are taken in the context of respect for human rights and fundamental freedoms. Denying linkages between religion and terrorism, it advocates strongly for integration by fighting the extremist drift of religions. Besides, it fights ideologies which are inspired by hate and violence. The five main pillars on which their approach is based, are: prevention; information (by intelligence); repression; coordination; and international cooperation (French Ministry of Interior, l’UCLAT,

⁸⁹ Translated from French: ‘*lieux de prières*’

⁹⁰ *Hizb Ut-Tahrir v. Germany*, §16

⁹¹ Translated: “*the one fighting the monster must prevent becoming it himself*” Minister of Interior quoting Nietzsche concerning France’s counter-terrorism strategy (French Ministry of Interior, l’UCLAT, 2011, p. 309)

2011). Currently these pillars must be viewed within the context of the state of emergency (*'état d'urgence'*), which was declared following the November 2015 attack in Paris, and due to expire in November 2017. The state of emergency legitimizes France's derogation from the Convention and its State obligations, under article 15 (*'derogation in time of emergency'*) of the ECHR.

A legal framework concerning the prosecution of terrorists already existed before 2015. The French Penal Code and the Anti-Terrorism Act set out a set of offences liable to increased penalties, such as activities "in connection with an individual or collective undertaking, the purpose of which is seriously to disturb public order through intimidation or terror" (French Government, 2013), or participating in a terrorist training camp outside the French territories even without committing any misdeeds in France. Concerning radicalization, the French strategy focuses on countering radicalization through judicial control. Individuals violating the law, e.g. through the incitement to violence or racial hatred, are liable for criminal prosecuting, but France does not concentrate on individuals supporting a particular position or ideology – as in their view this would be contrary to the French conception of freedom of conscience and expression, being a strict division of state and religion (*'laïcité'*).

The then French president François Hollande declared a set of measures in his statement to the joint session of Parliament in Versailles on 16 November 2015, following the terrorist attacks in Paris and near the *Stade de France* which killed 129 people. Firstly, he stated that France is in war against jihadist terrorism⁹². As a result, the government stepped up its operations in Syria through airstrikes and increased its support to the International Coalition. Secondly, he declared the immediate reestablishment of border controls and the installment of a state of emergency, including a renewal bill to the state of emergency which was later approved by the French Parliament, hence expanding the ability to carry out police searches throughout the country and place suspects under house arrest. Furthermore he pledged for reintroducing an approach which would legalize exceptional measures for a certain period under the state of emergency, through a revision of the Constitution.

Specific measures announced include the stripping of French nationality of individuals found guilty of a terrorist act or other acts against a country's fundamental interests, if this person has

⁹² Translated from French: "*Nous sommes dans une guerre contre le terrorisme djihadiste qui menace le monde entier et pas seulement la France*" (Présidence de la République, 2015, p. 2).

another nationality; and the prohibition of dual nationals from returning to France if they constitute a terrorist threat, unless they agree to close monitoring by authorities (Présidence de la République, 2015). Furthermore, the investigation services and special anti-terrorist judges and prosecutors are offered new resources, through for example, the ability to have recourse to the whole range of intelligence techniques as far as it is legally possible. Magistrates should gain access to the most modern technology and investigation methods, and penalties for arm trafficking will be increased. The government has also gained more legitimization in the dismantling of groups that have involved, facilitated or incited acts that constitute a serious breach of public order, and the French ministry of Interior can employ “all measures” to block websites that glorify or incite terrorism.

On May 26, 2016, the French Senate approved a law aimed at strengthening the police and judicial branches’ authority to counter terrorism, such as through the extension of police officers’ authority to hold terrorist suspects up to four hours without providing them access to a lawyer; as well as additional intelligence and communications interception.

Concerning soft counter-terrorism measures, the country has instituted the ‘*Stop-Djihadisme*’ campaign, which aims at countering Islamic extremism in the French society by giving French citizens the tools to spot and prevent radicalization and opening 12 de-radicalization centers throughout the country. Besides, in the French school system new measures should prevent radicalization and promote secular, republic values, and in prisons new measures address jihadist networks and radicalization measures, of which one experiment was quite controversial. This short-lived experiment segregated groups of suspected extremist prisoners from the rest of the prison population, but was cancelled due to a lack of success as concerns emerged that it only deepened radicalization networks.

Compatibility with ECHR

At first glance, the announcements of President Hollande seem to take good care of human rights and fundamental freedoms, as he repeats continuously that the counter-terrorism measures will be taken within the national and international legal framework. Besides, France has derogated from the ECHR due to the state of emergency, which leads to a wider mandate to take measures which might be potentially inflicting on most Convention articles. However, there are a number of concerns.

The first concern is a result of the new law extending the police's authority to hold terrorist suspects up to four hours without providing them legal assistance. The ECtHR has not specifically considered such cases, but has had the opportunity to reflect upon comparable measures and reflect on this point. It has underlined the gravity of the lack of legal assistance at the first stage (de Frías, 2012). The ECtHR has remarked that "article 6 [right to a fair trial] will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing⁹³." It remains certain that Convention rights cannot be impaired because of the gravity of the offence, terrorism offences included (de Frías, 2012). Whether this measure potentially poses an interference to the rights as laid down in the Convention, depends on the reasonability and whether the detainee has further been limited in its right to a fair hearing. Thus so far, this safeguards can possibly be found in the new French law. However, with over 400 terror suspects being arrested in 2016 alone, the police and counter-terrorism forces might interpret the law extraordinarily broad.

The second concern raised is the result of the government's capability to lay down restrictions on the freedom of assembly and association under the state of emergency. To start with, the French government both has the duty to protect its citizens by taking the necessary measures, but it must also ensure that a state of emergency does not become the norm and that restrictions on fundamental freedoms are lifted as soon as possible. In a report published by Amnesty International, authorities are claimed to have resorted to the use of emergency powers for wider purposes by imposing a general ban on public assemblies for two weeks after the November 2015 attacks (when many demonstrations were planned for the world climate conference COP 21 in Paris at that same time) and imposing 639 individual measures preventing people from participating in public assemblies (organized against the reform of labor laws), thus strongly limiting many individuals who are not linked to acts of terrorism in their right to freedom of assembly (Amnesty International, 2017). It can easily be argued that the restrictions were contrary to the limitations as allowed for in article 11, as there was a doubtful legitimate aim, with unnecessary or disproportionate measures taken to the purported aim of maintaining public

⁹³ *John Murray v. the United Kingdom*, 8 February 1996, §63

order. Hence, even under the state of derogation of the Convention, the French measures can potentially be inflicting on the freedom of assembly and association.

c. Germany

“Wir müssen sehr darauf achten, dass Dinge nicht gesellschaftsfähig werden, die nicht gesellschaftsfähig sein dürfen.”⁹⁴

Germany has a long history with terrorism and counter-terrorism. From the RAF to the Jihadi Salafist terrorist attacks in 2016, the country has become a target for international terrorism. Since 9/11, the government has prevented more attacks from, among other groups, the ‘Sauerlandgruppe’ in 2007 and the so-called ‘Düsseldorfer Zelle’ in 2011. As early as 2014, the German Federal Criminal Police warned for Islamist terror attacks, which constituted the main threat to the German society. Based on a strategy of five pillars, the federal government (‘*Bundesregierung*’) protect its citizens against terrorism. The five pillars are: destroying terrorist structures through investigations; prevention and de-radicalization; prevention of crime through improvement of critical infrastructures; follow-up after attacks; and European and international cooperation (Bundesministerium des Innern, 2017).

In the light of Islamist terrorism, the German *Bundesamt für Verfassungsschutz*, the domestic intelligence service, has prohibited several Islamist organizations between 1990 and 2015. Among them are local branches of IS (‘*Islamischer Staat*’) and Hizb Ut-Tahrir, but also the group which brought its case to the ECtHR, Kalifatstaat. Most organizations are forbidden on the grounds of their stance against the constitutional order and the idea of international understanding (‘*Gedanken der Völkerverändigung*’), but also for the “denial and trivialization of the Holocaust in a nation-disarming manner, [and the] spread of anti-Semitic/anti-Western propaganda”⁹⁵.

Since 2001, the government improved its counter-terrorism capabilities by a set of measures, of which one is the establishment of the Joint Counter-Terrorism Centre (GTAZ, ‘*Gemeinsames Terrorismusabwehrzentrum*’), which identifies potential Islamist terrorists and prioritizes de-radicalization efforts. Besides, in the first of two anti-terrorism packages adopted after 9/11, the

⁹⁴ Translated: “*We have to make sure that socially unacceptable things do not become socially acceptable*”, stated Chancellor Angela Merkel about xenophobia and hate speech (Merkel, 2016).

⁹⁵ Translated from German: “*Leugnung and Verharmlosung des Holocausts in volksverhetzender Weis, Verbreitung antisemitischer/antiwestlicher Propaganda*” (Bundesamt für Verfassungsschutz, 2016).

immunity of religious groups and charities from investigation or surveillance was revoked. It also enabled the prosecution of extremists living on German territories who belong to foreign terrorist organizations. The second package improved cooperation of intelligence and law enforcement agencies on federal and state levels (Miko & Froehlich, 2004). In 2007 the Joint Internet Centre (GIZ, '*Gemeinsames Internetzentrum*') was established to counter cyber threats and monitor Islamist networks, as well as to gather information to identify terrorist activities and analyze specific trends. Since 2014 a general ban on IS is upheld in Germany, to counter its propaganda both online and in public demonstrations.

More concrete, the German counter-terrorism strategy focuses both on hard and soft counter-terrorism measures. Since December 2015, Germany knows a new special police unit that focuses on dealing with terrorism, with the capability of doing day-to-day operations such as large-scale, sustained manhunts. Following the Charlie Hebdo attacks of January 2015, the Chancellor announced a nine-point plan to prevent similar attacks on German soil, which was later approved as new counter-terrorism legislation. The new rules criminalize the act of travelling abroad with the intent to receive terrorist training, and create a national identity card and passport restrictions on foreign fighters (Gesley, 2015). Besides, Merkel announced a minimum retention of Internet and phone data, and Minister of the Interior Thomas de Maiziere proposed a new law to revoke citizenship of dual national foreign terrorist fighters.

From the soft counter-terrorism approach, the German authorities focus much on the prevention of homegrown radicalization through several programs. Working together with NGOs, the programs support community-based initiatives, as well as the launch of counseling services. Furthermore, the German government seek to promote democracy and diversity with the aim of strengthening the prevention of extremism. The promotion of democracy, in their view, takes place in the form of further integration both among cultures and in society; through the enhancement of people's power of judgment; in participation in democratic processes; and through political education. The approach is also focused on opposing different forms of extremism and group-related hate, as expressed in opinions and prejudice, discrimination, marginalization and violence.

Compatibility with ECHR

The German approach as outlined in statements, documents and online information does not mention the compatibility of their measures with human rights and fundamental freedoms as

much as the French government does. However, it becomes clear from the legal framework as set out previously and the other state cases, that the measures are probably not severely inflicting on the Convention rights.

A potential critical measure can be the mandate of the newly established police unit which is tasked with large-scale manhunts. In this light, the case law of the ECtHR concerning home searches is deemed relevant, as it has set out a number of safeguards for the prevention of interferences with the right to private and family life. Thus, before or after the search (which needs to be authorized beforehand), a warrant, drawn up in accordance with the relevant legal provisions, needs to be produced, in which the object and scope of the search are limited. Hence the legitimacy of doing house searches and manhunts is limited through the provision of a definite period of time and the clear boundaries it must provide for⁹⁶.

The dissolution of the many Islamist organizations is most probably not inflicting on the Convention rights as the ECtHR has considered the case of *Kalifatstaat v. Germany* inadmissible, agreeing with the German courts that the organization's leader had made statements contrary to the Convention's values of the democratic society and human rights. Furthermore, in *Hizb Ut-Tahrir v. Germany*, the ECtHR considered article 17 (prohibition of abuse of rights) applicable for the anti-Semitic statements the group's leaders had publicly made. Of course, depending on the facts and circumstances in each case, the legitimacy of the prohibition might be pulled into doubt, but the ECtHR's case law makes clear that there is little chance of finding a violation on this topic.

d. United Kingdom

*"[...] and if human rights laws stop us from doing it, we will change those laws so we can do it."*⁹⁷

The United Kingdom has an extremely long history of terrorism concerning IRA. As a result, in 2003 it introduced CONTEST, the main counter-terrorism strategy utilizing four work streams: Prevent, Pursue, Protect and Prepare. However, only recently Prime Minister Theresa May announced a new set of measures focused on the deportation of foreign terror suspects and the extension of existing laws that restrict the freedom of British suspects. Most remarkable is

⁹⁶ *Imakayeva v. Russia*, no. 7615/02, §187-189, ECHR 2006-XIII (extracts).

⁹⁷ United Kingdom Prime Minister Theresa May on proposed measures aimed at strengthening terrorism prevention and investigation measures (May, 2017)

her note that human rights would not stand in the way of executing her plans, once she would be re-elected. This extreme stance follows on an amendment to the Immigration Bill she proposed in her function as Secretary of State in 2014, with which she tried to authorize the deprivation of the citizenship of naturalized Brits even if that would make them stateless. Although the UK parliament passed the amendment, ultimately it was rejected by the UK House of Lords (Harvey, 2014).

Notwithstanding Theresa May's past as Secretary of State, the UK's counter-terrorism approach is yet longtime established. The strategy CONTEST is renewed three times, still applicable today, as it was considered a successful strategy since there had not been any high casualty terrorist attacks on British soil since 2005. Pursue focuses on stopping terrorist attacks through investigation and disruption, Protect on strengthening the protective security to stop terrorist attacks, Prepare on mitigating the impact of a terrorist act and recovering afterwards as soon as possible, and Prevent on intervening before individuals become terrorists or begin to support terrorism (Barrett D. , 2016) (HM Government, 2016). In the context of Pursue, the Counter-Terrorism and Security Act 2015 was passed which imposed temporary restrictions on individuals suspected of travelling abroad for terrorist motives; introduced new powers to police officers to seize travel documents and temporarily retain travel documents to disrupt immediate travel where there is reasonable suspicion of the individuals (wanting to) engaging in terrorism-related activity; and enabled the temporary exclusion from the United Kingdom on the ground of 'not conducive to the public goods' (HM Government, 2016) (HM Government, 2015).

Investigative and intelligence capabilities of police and governmental authorities have been expanded both in the light of Pursue and Prevent. For Prevent, also local governments; criminal justice bodies (e.g. prisons); education bodies (including schools and universities) and health and social care bodies are engaged in the prevention of terrorism and extremism. There have been some successes, mainly on the area of integration of Muslims, but the strategy is strongly criticized for its heavy focus on radicalization among Muslims. Concretely the measure entails that, for example, high school teachers are required to warn their high school directors and subsequently the authorities, in case they suspect radicalization among (one of) their pupils. Therefore all staff of the abovementioned institutions need to understand what radicalization entails and why people might be vulnerable to it. However, there is lack of consensus among policy makers and researchers on the causes of radicalization, both in general and among Muslims. Consequently, there is a danger of public sector workers heavily scrutinizing and

misidentifying individuals, bringing them into dishonor and embarrassment and eventually undermining any attempts to counter-radicalize (Barrett D. , 2016).

Apart from the CONTEST strategy, Prime Minister May after the London Bridge attacks in June 2017, announced a new package of measures to keep track of potential terrorists. Mainly focused on terrorist prevention and investigation, the plans attempt to restore a more restrictive regime of control orders. The new measures include a potential derogation under the ECHR through the installment of a state of emergency, to amend existing human rights safeguards. She announced that she wanted to simplify the procedures and possibilities of deportation of foreign terror suspects; heavier aggravated sentences for minor, but terrorist-related offences; and stricter restriction of the freedom and the movements of terrorist suspects when there is not enough evidence for criminal prosecution (Travis, 2017).

Compatibility with ECHR

While CONTEST is regarded as a successful measure to counter terrorism, concerns can be raised concerning the compatibility of Prevent with the ECHR. Under article 9, everyone has the right to freedom of thought, conscience and religion, and together with article 14, the government is bound to make non-discriminatory laws and policies. With public service workers controlling radicalization, mainly based on Islamic religious ideas, among individuals close to them, the United Kingdom might interfere with the freedom of religion. First of all, 'radicalization' is not further defined by the UK government nor the ECtHR, hence the public officers have a wide margin of interpretation and implementation of their duty. Besides, not all radicalized individuals, irrelevant if they are politically- or religiously inspired, will pursue their ideals with the use of terror methods. Lastly, individuals who are deterred from radicalization will voluntarily change their beliefs, as they will be subject of increased control by governmental authorities (Barrett D. , 2016). For these three reasons the Prevent strategy is potentially contentious in the light of article 9.

Furthermore, an argument can be made that Prevent is discriminatory under article 14, as it aims especially upon de-radicalization among Muslims. Hence Muslims are disproportionately subject of increased control resulting from the measure. Article 14 includes the requirement that a treatment must not be capable of justification, which in the case of Prevent potentially could be 'national security' or 'the democratic society', but then the question rises whether Prevent is proportionate to the aim pursued.

Besides the existing counter-terrorism strategy, a human rights claim is imaginable with Prime Minister May's planned changes. It must be noted, however, that her statements are in a preliminary phase, as they are not (yet) passed by the UK Parliament and House of Lords. Tackling human rights to more efficiently combat counter-terrorism through announcing a state of emergency is a controversial interpretation of the state's authorities under article 15, derogation in time of emergency. This article affords governments to, in exceptional circumstances, derogate in a temporary, limited and supervised manner from their obligations under the Convention. Only in time of war or other public emergency threatening the life of the nation, a government can invoke the state of emergency. This latter situation is explained by the ECtHR as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed"⁹⁸. In response to the threat posed by the IRA, the United Kingdom has previously invoked the state of emergency, which was considered not to be in doubt with the public emergency threatening the life of the nation⁹⁹. Besides, 'temporary' within this meaning is not limited to a strict amount of time but can also follow the aftermath of terrorist attacks, even if they did not take place on the territories of the state concerned¹⁰⁰.

The measures taken during the state of emergency must be strictly necessary as ordinary laws would not have been sufficient to meet the danger caused by the public emergency; they must be used for the purpose they were aimed at; they must be a genuine response to an emergency situation and they must be proportionate to the aims pursued. Besides, they must not be inconsistent with other obligations under international law. Most importantly, even during a state of emergency, certain rights cannot be derogated from. One such an absolute right is the prohibition of torture as enshrined in article 3, which also included inhuman or degrading treatment or punishment. Furthermore, article 7, no punishment without law also forms an exception to the derogation measures. The ECtHR judged that, following from the object and purpose of the article, states must at all times provide effective safeguards against arbitrary prosecution, conviction or punishment¹⁰¹.

The announcement to restrict the freedom and the movements of terror suspects even if there is not enough evidence to prosecute them, as well as the facilitation of deportation of terror

⁹⁸ *Lawless v. Ireland*, §28

⁹⁹ *Brannigan and McBride v. The United Kingdom*, 26 May 1993

¹⁰⁰ *A. and Others v. The United Kingdom* [GC], no. 3455/05, ECHR 2009

¹⁰¹ *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, ECHR 2001-II

suspects can potentially constitute tensions with the derogation clause and absolute rights contained in the ECHR. However, it must be underscored that these plans formed part of announcements following a terrorist attack, only a few days before national elections would take place in the United Kingdom. Whether the government will stick to the plans, and the legislative forces will indeed pass the legislation, is only to be seen.

3) Counter-terrorism measures and the ECHR

The case study leads to the conclusion that especially hard counter-terrorism measures are applied in the combat against terrorism. While most countries emphasize the compatibility of these measures with human rights and international documents, some of the strategies are potentially inflicting on the Convention rights. The states mentioned above seek to find the right balance between the safety of their citizens and the guaranteeing of human rights for all individuals. However, with public opinion increasingly mentioning Jihadist terrorism as the greatest threat to democracies, the states are under pressure to either preserve the nature of the ECHR and European values, or potentially violating some rights to set efficient policies. Their justification might be that some measures are ‘necessary in a democratic society’ or for the ‘maintenance of public order and national security’, hence letting it to individuals to bring the case to courts and eventually to the judges to decide upon them.

Clearly, counter-terrorism measures, whether they are direct or indirect, are neither mutually exclusive nor exhaustive. Moreover, there is not one successful approach which is applicable on all terrorist threats. Depending on the roots of terrorism, a strategy should be adapted to the case concerned. As Boaz Ganor described in its *Terrorism Equation*: counter-terrorism measures will be effective only if states seek to both eliminate the terrorists’ motivations and their capabilities of using violence.

Counter-terrorism and human rights are extensively discussed by the ECtHR. Many cases concerning deportation, right to a fair trial, freedom of assembly and derogation in times of emergency have reached Strasbourg. Again, depending on the circumstances, the measures taken and the justification thereof, counter-terrorism can be compatible or incompatible with the Convention. However, the paradox in all of the above is that certain political leaders and prominent public figures call for the ripping down of human rights in the fight against terrorism, whereas human rights are most fundamentally meant to protect citizens against the state. By

enlarging the state's capabilities of taking measures which are potentially inflicting on certain rights and contrary to democratic values, authorities seek to prevent the break-down of the democratic society. On the contrary, strengthening democracy, human rights and the rule of law will lead to more lasting results concerning the safety of society and prevention of terrorism.

IV. Conclusion

1) The threefold paradox concerning Salafism in Europe, the ECtHR-case law and counter-terrorism measures

Is Salafism dangerous? Following the most recent jihadist attacks, many European citizens and policy-makers would immediately say ‘yes’. The ECtHR has adopted a slightly more moderate, but still very limiting approach towards Salafists and other Islamic fundamentalists which might undermine the Convention’s ideals. But is that justified, and does it not lead to discriminatory jurisprudence and policies? This study researched the legal tradition behind Salafism, the ECtHR-case law on (violent) extremism and the recently taken counter-terrorism measures of four Council of Europe Member States. By conducting research through Arabic and Western literature, the ECtHR-case law on Islamic fundamentalism and policy documents of Belgium, France, Germany and the UK, this study has identified three paradoxes in the Salafist ideology, the ECtHR-case law and the four states’ measures.

First, within Salafism the main paradox is that the ideology is based on the exclusion of all other interpretations of the Quran and *hadith*, but at the same time Salafists are strongly divided about the correct adaptation of the Quran and *hadith* in daily life. It must be emphasized that there is not one Islam, nor is there one Islamic law or one Salafism. A fundamental lesson of this study is that it would be impossible to generalize Islam or Salafism. There is huge variety among legal interpreters, influential thinkers and Muslim scholars about the precise interpretation of the *Shari’a*. Consequently, Islamic law differs strongly among Muslim countries. Besides, there is a huge variability among Muslims as a result of the many legal schools: four Sunni, two Shi’a and several more doctrines have prescribed rules and interpretations, and hence most Muslims follow one of these schools. For Sunni Muslims, however, it must be noted that the four schools are not mutually excluding each other.

Concerning Salafism, it is most noteworthy that the Salafists seek to address the decline of Muslim society relative to the West. The lives of the Prophet and its closest companions are strictly adhered to. It strives to restore a “pure” form of Islam through moral re-education of the Muslim community, a literal reading of the Quran and *hadith* and a rejection of religious and modern reforms. But the theocratic movement, although pursuing the same ideals, is strongly divided by internal polemics and theological disputes and conflicts. Hence the distinction is made between non-violent and violent Salafists, non-political and political Salafists and

individual or ideal-enforcing Salafists. Three types are given: purist, politico and jihadi Salafists. Hence, the legal tradition behind Salafism is based on *Shari'a*, but from a conservative perspective. The exact implementation of legal rules depends on the type of Salafist one adheres to.

The variability of *Shari'a* and the Salafist interpretation thereof have not been as clearly outlined by the ECtHR, which leads to the second identifiable paradox of this study. Clearly, the ECtHR and States find themselves in a clash between the guaranteeing of fundamental freedoms, such as the freedoms of religion, expression and assembly, and the protection of the democratic society. This is reflected in four cases, *Kalifatstaat v. Germany*; *Hizb Ut-Tahrir v. Germany*; *Kasymakhunov and Saybatalov v. Russia*; and *Refah Partisi (The Welfare Party) and Others v. Turkey*. But, according to this study, the ECtHR has dealt with 'extremist claims' by generalizing the motivations and several ideologies, as well as the goals pursued and methods thereto, of the many existing fundamental Muslim groups, thus leading to what seems a lack of nuance in the lives and practices of ordinary Muslims. One smaller counter-argument, however, could be that non-violent Muslims might only in exceptional circumstances lead to ECtHR cases, but then still the ECtHR the *Refah Partisi* decision applies on all those Muslims who might feel the incentive to initiate *Shari'a*.

The relatively strong position of the ECtHR comes about as follows. First, by stating that the pursuit of a worldwide Islamic regime based on *Shari'a* law is incompatible with the Convention's fundamental democratic principles, the ECtHR has generalized *Shari'a* into 'one Islamic law'. Second, by indirectly stating that *jihad* is incompatible with the Convention, the ECtHR has not explained its interpretation of *jihad*, but might in the future be confronted with cases which could make clear that the ECtHR has paid insufficient attention to the fact that there is no common understanding of what *jihad* entails among Muslims. Third, the ECtHR declared that any system based on *Shari'a* diverges from respect for democracy and human rights, as *Shari'a* cannot likewise protect and guarantee certain fundamental freedoms – and thus appeared to show insufficient attention to the idea of legal pluralism. However, almost every Muslim follows one of the legal schools which are based on a certain interpretation of *Shari'a*. Therefore, future cases might challenge the ECtHR to sustain a more nuanced discriminatory perspective on Muslims and a more thorough interpretation of Salafism.

Not only the ECtHR, but also Member States of the Council of Europe are challenged by the phenomenon of Salafist claims to the freedoms of religion, expression and association, at one

hand, and extremist use of violence at the other hand. States Parties to the ECHR and the ECtHR, they decided to adopt various counter-terrorism strategies and approaches to counter the (violent) fundamentalist threats they and the ECtHR identified as necessarily connected with Jihadist Salafism. Both hard and soft measures are currently taken, thus focusing on a wide range of aspects of terrorism: not only do the four countries use law enforcement and strengthening of legislation to seek the protection of their citizens, also do they use de-radicalization tactics. Upon analysis of historical state reactions to terrorist threats, this study has argued that a combination of measures will, in the long range, appear to be more effective, and moreover more in line with the promotion of democracy.

However, these long-term measures do not lead to clear results very quickly. Hence the four states easily converge to hard measures which might be inflicting on human rights. The third paradox becomes clear. Whereas the counter-terrorism measures are taken to protect the democratic society and human rights from the threat of terrorism, they are in itself potentially damaging these same human rights and fundamental principles. Certain political leaders and prominent public figures proposed measures which would rip-off human rights, whereas these fundamental values are originally meant to protect citizens against the state.

The research question for this study was **“to what extent might the legal tradition behind Salafism offer critical insight in the legitimacy of the recently developed ECtHR-case law on (violent) extremism and in the recently taken counter-terrorism measures, in the light of the ECHR and its principles of the rule of law and democratic society which imply cultural and legal freedoms for all?”** An answer, based on all of the above, is consequently formulated. The three paradoxes regarding Salafism, the ECtHR and counter-terrorism, seem to reflect the existing tension in society. On the one hand, the current, real terrorist threat ask for a direct, hard approach in countering extremism, but on the other hand all individuals in society should be protected against the state through the ECHR. The legal tradition behind Salafism, being a conservative, universalistic and theocratic interpretation of *Shari'a* with a non-generalizable division of implementation of these rules among Salafists, makes clear that the ECtHR risks the development of a discriminatory approach towards (violent) extremism because of a potentially too generalist approach to Salafism. It also demonstrates the risk certain counter-terrorism measures pose to the most fundamental values and freedoms of today's European societies, based on the ECHR.

Based on the analyses and the outcomes of this study, the hypothesis of this study is therefore confirmed. The democratic society and rule of law principles as established in the ECHR are under pressure from both the universalistic, theocratic pretensions of Salafist at one hand, and the counter-terrorism measures taken by countries as a result of the threat of Salafist-inspired terrorism at the other hand. Besides, the ECtHR has taken a uniform approach in their case-law concerning *Shari'a* and religion extremism, thereby ignoring and limiting all other Islamic legal schools.

For the rest

This study was aimed at providing an overview of the legal tradition behind Salafism and the legal framework as developed by the ECHR and subsequent judgments, as well as the stance of four Western countries regarding Jihadist Salafism. The results are hoped to contribute from an interdisciplinary angle to the debate on Salafism in Europe, the legitimacy of the judgments of the ECtHR on (violent) Islamic fundamentalist claims, and on fair and adequate counter-terrorism measures which are recently taken.

In the light of the many terrorist attacks which have occurred in recent years, the outcomes of this study seem relevant and significant. Finding a balance between individual's rights and the protection of society is a permanent challenge for current policy-makers, legal professionals and academic scholars. But finding a concrete solution for all the challenges the West is currently facing due to terrorism, would be impossible. Generally speaking, this study leads to the analysis that the ECtHR and policy-makers would do well to distinguish well according to the situation, the circumstances, the background, whether or not the Salafist ideology is involved and any possible other motivations of terrorists. Consequently, cases and policy-making should be considered differently both by ECtHR judges and policy-makers.

Thereby it should be noted that this study is also limited. As researcher with a background in political science, the historical, religious and legal analysis was a complete new field to discover. The interdisciplinary approach to Salafism in Europe provides new insights, but leaves room for an approach focused on either one of the three topics in order to get a more thorough insight in the matter at hand. Therefore it is hoped that this study provides a solid base to continue research into further developments.

There is an unlimited number of interesting field for further research, as this topic is increasingly relevant both for the academic world, policy-makers and legal professions. Some

examples are yet mentioned in the introduction, as explanation of the narrow scope this study as adopted.

As a concluding statement to all of the above, a last emphasis is at its place. Safeguarding human rights for all, means protecting human rights for all. With nuance, with thorough background information and analyses and without prejudices, both society and individuals can be protected - not only against the state, but also against terror threats coming from different-minded individuals. The extensive legal and political framework the West has developed, is ultimately able to overcome the challenge that Jihadi Salafists currently pose, but individual willingness lays on its basis.

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