

**LEGAL RESPONSES TO 'TERRORISTIC SPEECH': A CRITICAL EVALUATION OF
THE LAW IN TURKEY IN LIGHT OF REGIONAL AND INTERNATIONAL STANDARDS**

Ilyas Firat Cengiz

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UEA Law School

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Abstract

Much scholarly attention has focused on the incremental extension of criminal liability for 'terroristic speech' (reflecting the widely acknowledged preventive turn in criminal law). This thesis examines the case law of Turkey's Yargıtay (Court of Cassation) and Constitutional Court on 'terroristic speech' in the light of regional (the European Court of Human Rights), and international (Human Rights Committee and CERD) standards. While this corpus of human rights law has obtained some positive traction in Turkey (resulting, for example, in the passage of a number of progressive Constitutional amendments), it is argued that the modern day regulation of 'terroristic speech' resembles in many ways the now outmoded offence of 'sedition' for silencing political dissent. It must of-course be recognized that Turkey has experienced a protracted conflict, and that recent 'terror' attacks in European capital cities have reinvigorated the international 'War on Terror'. At a deeper level, however, this observation evidences a troubling state of affairs, for, even in this 'human rights era', the imposition of far-reaching restrictions on speech continues seemingly without contradiction. Indeed, in many cases, the relevant criminal law offences, especially those pertaining to indirect incitement, were themselves been introduced at the behest of international instruments such as the UN Security Council Resolution 1624 (2005); the Council of Europe Convention on the Prevention of Terrorism, 2005; and the European Union Framework Decision on Combating Terrorism, 2008. It is argued that the regulation of 'terroristic speech' epitomizes the state-centricity of human rights norms; (a phenomenon which Leigh and Lustgarten colourfully describe as assigning 'the safekeeping of children in a school playground to a pit-bull terrier'). Moreover, it also reflects the fundamental inability of the international community to agree upon a definition of 'terrorism'. The thesis thus draws on recent scholarship (Stampnitzky) to chart the 'invention' of 'terrorism' as a fundamentally political term involving moral judgment. It is argued that the infusion of this political concept into legal reasoning is inherently problematic. The binary nature of 'terrorism' belies the more spectral nature of 'political violence', and it is the latter which ought to inform a more nuanced judicial response to 'terroristic speech'.

Table of Contents

Abstract.....	2
Table of Contents	3
Acknowledgements	6
CHAPTER 1: INTRODUCTION.....	7
1.1) Background and Motivation	7
1.2) Methodology	14
1.3) Thesis Outline	16
CHAPTER 2: ‘TERRORISTIC SPEECH’ IN CONTEXT	18
2.1) Introduction.....	18
2.2) Impact of Ill-Defined Basis of 'Political Violence' and 'Terrorism' on the Right to Freedom of Expression.....	21
2.2.1) Political Violence	22
2.2.2) Terrorism	23
2.2.3) Definitional Dilemmas: ‘Terrorism’ and ‘Terroristic Speech’ in International Law..	26
2.3) Legal Responses to ‘Terroristic Speech’ and their ‘historical evolution’	32
2.3.1) Pathological Period and ‘Terroristic Speech’	33
2.3.1.1) Pathologies of two World Wars and the Cold War.....	33
2.3.1.2) The pathology of the ‘War on Terror’	35
2.3.2) Offences in relation to ‘Terroristic Speech’	36
2.3.2.1) Sedition, Treason and Espionage.....	37
2.3.2.2) Offences related to 'Terroristic Speech': Direct and Indirect Incitement	40
2.3.3) Elements of these Offences.....	44
2.3.3.1) Actus Reus.....	44
2.3.3.2) Mens Rea of Speaker.....	46
2.3.3.3) Content of Expression and Context of Expression.....	47
2.4) Rationales against Restricting 'Terroristic Speech'	48
2.5) Conclusion	51
CHAPTER 3: DOCTRINAL PRINCIPLES APPLIED TO ‘TERRORISTIC SPEECH’ UNDER THE RIGHT TO FREEDOM OF EXPRESSION BY TURKISH JURISPRUDENCE, ECtHR AND UN HUMAN RIGHTS COMMITTEE	53
3.1) Introduction.....	53
3.2) The Right to Freedom of Expression	55
3.2.1) The Right to Freedom of Press	57
3.3) The Doctrinal Principles under the Scope of the Right to Freedom of Expression.....	59
3.3.1) Prescribed by law	61

3.3.2) Legitimate Aims	64
3.3.3) Democratic Necessity.....	65
3.3.4) Proportionality.....	68
3.4) The Concepts Diminishing the Protection of Freedom of Expression.....	71
3.4.1) The Doctrine of Margin of Appreciation	71
3.4.2) The Principle of Militant Democracy.....	73
3.5) Conclusion	79
CHAPTER 4: TURKEY’S HIGH COURTS RESPONSE TO ‘TERRORISTIC SPEECH’	81
4.1) Introduction.....	81
4.2) Turkey's Legal Response to ‘Terroristic Speech’	82
4.2.1) Expressions that Advocate Political Violence	86
4.2.1.1) Incitement to Hatred and Animosity, Causing Political Violence.....	90
4.2.2) Expression that Advocates Terrorism	94
4.2.2.1) Disclosure and Publication of ‘Terrorist’ - related Materials	98
4.2.2.2) Propaganda for Terrorism.....	101
4.2.2.3) Praising of ‘Terrorism’	103
4.3) Elements to Determine whether Expression is 'Terroristic Speech'.....	106
4.3.1) Mens Rea	106
4.3.2) Actus Reus.....	109
4.3.2.1) The Audience (Publicity)	111
4.3.2.2) The Evidential Basis for Prosecution of Expression, and the Courts’ Evaluation of the Content and Context of Expression.....	112
4.4) Conclusion	115
CHAPTER 5: THE STRASBOURG COURT’S RESPONSE TO ‘TERRORISTIC SPEECH’	118
5.1) Introduction.....	118
5.2) The European Court’s Response to ‘Terroristic Speech’	120
5.2.1) Expressions that Advocate Political Violence	124
5.2.2) Expressions that Advocate Terrorism	129
5.2.2.1) Response to ‘Terroristic Speech’ after the incidents of 9/11 (Indirect incitement)	137
5.3) The Elements that Required by the European Court in Terms of ‘Terroristic Speech’	140
5.3.1) The Content of Expression	141
5.3.2) the Context of Expression	144
5.3.2.1) Audience-Publicity.....	145
5.3.2.2) The Probability of Harm	146
5.3.3) Mens Rea of the Speaker	147

5.4) Conclusion	147
CHAPTER 6: INTERNATIONAL HUMAN RIGHTS LAW’S RESPONSE TO ‘TERRORISTIC SPEECH’..	150
6.1) Introduction	150
6.2) The UN Human Rights System's Response to ‘Terroristic Speech’	152
6.2.1) Expressions that Advocate Political Violence	155
6.2.2) Incitement to Hatred or Violence/Racial Violence:	162
6.2.3) Expressions that Advocate Terrorism	167
6.3) The Elements Required by the Committee in Terms of ‘Terroristic Speech’	170
6.3.1) Actus Reus.....	171
6.3.1.1) Evaluation of Content & Context of Expression	172
6.3.1.2) Publicity.....	174
6.3.1.3) The Probability of Harm	175
6.3.2) Mens Rea	176
6.4) Conclusion	177
CHAPTER 7: CONCLUSION	179
BIBLIOGRAPHY.....	189
Books	189
Articles.....	192
LIST OF CASES:.....	201
Cases from Turkey:	201
ECtHR Cases:	204
UN Human Rights Committee and The Committee on the Elimination of Racial Discrimination Communications.....	207
Other Relevant Cases:	210
The List of Key Legislations.....	210

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CHAPTER 1: INTRODUCTION

1.1) Background and Motivation

Sweepingly broad and deeply troubling restrictions have been imposed on freedom of expression in Turkey in recent years; largely, on account of ‘terrorism’. The relationship between the right to freedom of expression and the prevention of political violence and ‘terrorism’ in Turkey has been a predominantly disquieting one. Turkey’s historical background and current political-legal conditions have played a crucial role in defining the scope of freedom of expression. The last five decades of military ‘guardianship’, were secured with military coups d’état in 1960, 1971, 1980 and 1997, and military’s bureaucratic allies restricted discussion of ethnic identity, religion, and history outside the narrow bounds of secular nationalism.¹ In 1997, in the military intervention often called the ‘post-modern coup’, the governing party was forced by the military’s efforts, supported by leading media outlets, to withdraw from the democratically elected government.² This was a military intervention in Turkish democracy which undermined the exercise of the right to freedom of expression. Generally, the Turkish Constitution and domestic law (particularly here, the Turkish Criminal Code (TPC) and the Law to Fight Terrorism (TMK)) have been used as a tool to regenerate the ideology of the state.³ These military coups d’état have pushed the legal system to be defensive of and protectionist towards the ‘unalterable core’ of the Constitution through the constitutional and criminal law.⁴ Even two decades after the last military intervention, the TMK and TPK still contain numerous provisions that allow sweepingly broad restrictions, arbitrary enforcement and the censorship of critical and dissenting views. There are numerous prosecutions of journalists, writers, editors, publishers, translators, civil/political rights activists, lawyers, elected officials and students for their dissenting expression.⁵ There are a vast number of laws under which expression can be prosecuted, especially regarding criticism of the armed forces and critical speech regarding the Kurdish issue in the last two decades.⁶

It is argued in this thesis that the absence of an internationally agreed definition of ‘terrorism’ is highly significant. This has led to human rights abuses, here in particular an over-inclusive

¹ Markus Thiel, ‘The ‘Militant Democracy’ Principle in Modern Democracies’ (Ashgate, 2009) 263; See further, Kemal Karpat, *Kısa Türkiye Tarihi: 1800-2012* (Timaş Yayınları, 2016) 187-242

² Freedom House, *Democracy in Crisis: Corruption, Media, and Power in Turkey*, (November 2013) p.3

³ See for instance, Derya Bayir, ‘Representation of the ‘Kurds’ by the Turkish Judiciary’ (2013) 35 *Human rights Quarterly* 116-142, 137

⁴ Thiel (n. 1) 264

⁵ ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 11-13; See further; Human Rights Council Working Group on the Universal Periodic Review, Twenty-first session 19–30 January 2015 (A/HRC/WG.6/21/TUR/3) paras 46, 50, and 70

⁶ Amnesty International, 104TH Session of the Human Rights Committee – Pre-Sessional Meeting on Turkey (22 December 2011) p.4

range of restrictions on freedom of expression.⁷ National authorities may resort to the deliberate misuse of ‘terrorism’ in particular situations regardless of whether they are confining themselves to actually countering ‘terrorism’.⁸ Walter argues that ‘terrorism’ is a deeply subjective concept involving an assessment of the motives and intentions of perpetrators.⁹ Its scope and limits are changeable and unstable depending both on historical and political contexts, and on the personal values and beliefs of the individuals who define it. It is thus a complicated and subjective term rather than a neutral, technical term for a specific form of violence.¹⁰ For that reason, prosecuting ‘terrorism’ related offences may impose broad restrictions on civil and political rights, because, ‘terrorism’ is a label relying on political context and political decisions.¹¹ The definition of ‘terrorism’, thus, plays a crucial role in defining the extent of the right to freedom of expression.

The TMK and TPC have numerous articles (especially article 6 and 7 of the TMK and articles 220 of the TPC) with broad and vague definitions of ‘terrorism’, ‘organised crime’, and ‘propaganda’, which have enabled authorities to impose extensive restrictions on freedom of expression.¹² Furthermore, there are also articles 215 (on praising a crime or criminal), 216 (on inciting hostility within the society or humiliating the society), 217 (on provoking the society to not abide by the law), 299 (on insulting the president), 213-222 (those pertaining to protection of public order), 300 (the denigration of the Turkish flag or anything carrying its replica and the national anthem), 318 (the alienation of the people from the army) and 226 (obscenity); which have likewise led to many prosecutions for expressing non-violent opinions.¹³ Moreover, articles 285 (violating the confidentiality of an investigation), and 288 (trying to influence the course of a trial) of TPC have limited coverage of major political trials in the press and media.¹⁴ TCK article 301 criminalises the ‘public denigration of Turkishness’, ‘the State of the Turkish Republic, the Turkish Grand National Assembly and the Government of the Republic of Turkey or the judicial organs of the state’. This article is notorious for its application against numerous journalists and writers. Article 301 has provided a legal ground for public scrutiny ever since its enactment in 2005. In its original form, it led to hundreds of prosecutions, scores of them

⁷ See Further, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, para 27

⁸ Ibid

⁹ Christian Walter, 'Defining Terrorism in National and International Law' 6-8, to be published in Christian Walter, Silja Vöneky, Volker Röben, Frank Schorkopf (Eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2003) https://www.unodc.org/tldb/bibliography/Biblio_Int_humanitarian_law_Walter_2003.pdf accessed 19.07.1014

¹⁰ R. English, *Terrorism; How to Respond* (OUP, 2009) 19

¹¹ R. Jacson, L. Jarvis, J. Gunning, and M. Smyth (Eds), *Terrorism: A Critical Introduction* (New York, Palgrave Macmillan, 2011) 15; see also Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355,

¹² Human Rights Council, Working Group on the Universal Periodic Review, Twenty-first session 19–30 January 2015 (A/HRC/WG.6/21/TUR/3) para 8

¹³ Freedom House, *Turkey in Transit Democratization in Turkey*, (2008) p.16-17

¹⁴ Media Freedom is Part of the Solution to the Kurdish Issues: Turkey October 2015, Reporters Without Borders for Freedom of Information, p.23

against writers, journalists and publishers.¹⁵ The sheer breadth and frequency of prosecutions on individuals is posing a threat to the principle of freedom of expression.¹⁶ A number of human rights defenders and activists have also been prosecuted under specious charges of such as “publicly insulting religious values” under article 216 of the Penal Code.¹⁷ Admittedly, there have been judicial reform packages endorsed between 2010 and 2014 which aim at widening the space for freedom of expression. Yet in Turkey, in the last decade, restrictions on freedom of expression have increased; particularly noticeable have been new bans on the media, free speech and social media.¹⁸ The internet law, for instance, has become another restrictive instrument on freedom of expression, leading to an increase in broad measures to block or remove online content. There are no official statistics on blocking, but according to ‘Engelliweb.com’, an independent tracking site, from 2007 to 11 June 2014, an estimated 48,537 websites have been blocked since the introduction of Law No. 5651 on ‘Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts’.¹⁹ Many news sites and social platforms, such as YouTube and Twitter have been blocked at different stages in the period under review.²⁰ Turkish authorities lifted a ban on Twitter and later on YouTube following constitutional court rulings.²¹

The vague wording of the TPC and TMK has allowed national authorities to prosecute legitimate expression without showing any causal link between violent acts and expression.²² Failure to seek a causal link between expression and violent acts by the legal and administrative authorities has narrowed down the opportunity for freedom of expression in Turkey. This situation is exacerbated by the lack of methodological rigour on the part of the authorities (and particularly the courts) when assessing restrictions on speech, and attempting to differentiate between ‘terroristic speech’ and legitimate expression. For instance, in 2011, investigative journalists Ahmet Şık and Nedim Şener were among 14 people arrested during the criminal investigation against OdaTV, a news portal known for their dissenting views. This website was

¹⁵ International PEN, International Publishers Association and Index on Censorship (NGOs in Consultative Status with ECOSOC): Contribution to the 8th session of the Working Group of the Universal Periodic Review Submission on Turkey (9 November 2009) p.3

¹⁶ See further, Amnesty International, Turkey: Article 301: How the Law on "Denigrating Turkishness" is an Insult to Free Expression, 3 January 2006, EUR 44/003/2006, available at: <http://www.refworld.org/docid/44c611504.html> [accessed 11 August 2016]

¹⁷ Joint NGO Submission to the UN Universal Periodic Review (CIVICUS and hCa) 21st Session of the UPR Working Group (15 June 2014) 3.6

¹⁸ Universal Periodic Review – 21st Session CSW – Stakeholder Submission Turkey (June 2014) 3

¹⁹ ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 61

²⁰ YOUTUBE and Twitter were blocked few times in 2007-2015 by both court decision or the BTK (Information and Communication Technologies authority). See further; <http://bianet.org/archives/search?utf8=%E2%9C%93&q=youtube&sec=bianet> (Accessed on 03.09.2016)

²¹ See further; Constitutional Court (App no: 2014/4705) 29/5/2014, Constitutional Court (App no: 2014/3986) 2/4/2014

²² ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 31

accused of being the ‘media arm’ of illegal organisation ‘Ergenekon’²³, and were accused of ‘knowingly and willingly aiding and abetting an illegal organisation’ (TCK 220/7) and of ‘membership of an armed organisation’ (TCK 314).²⁴ Again, in 2011, there were a series of coordinated operations called ‘the ‘KCK’²⁵ Press operation’, in which 46 journalists working for Kurdish media outlets were arrested for their alleged membership of ‘KCK’.²⁶ In January 2016, three Turkish academics were arrested on charges of ‘terrorism’ propaganda on the basis that they had signed a declaration and read it in a press meeting which accuses the Turkish government of carrying out “deliberate massacre and deportation of Kurdish and other peoples in the region”.²⁷ Dissenting views on controversial political issues and criticism of public officials and institutions have been frequently targeted with criminal prosecutions through the TPC and TMK.²⁸ Human Rights Watch (HRW) has extensively reported arbitrary and abusive ‘terrorism’ trials of individuals who are mainly political activists, journalists, lawyers, and students. HRW also added that it is mainly activities like joining protests, being a member of a pro-Kurdish associations, and journalism which were being prosecuted by the authorities in Turkey.²⁹ I regard these restrictions – which are surely premised on a highly attenuated causal relationship between the speech concerned and any violent act – as demonstrating the troublingly precarious level of protection afforded to freedom of expression in present-day Turkey.

In addition to this, most international human rights NGOs agree that Turkey is a place where a high number of journalists are jailed or fined due to their professional activities.³⁰ In recent

²³ Ergenekon was the name given to an alleged clandestine, secularist ultra-nationalist organization in Turkey with possible ties to members of the country's military and security forces.

²⁴ ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 35; see also, A special report by the Committee to Protect Journalists, the Committee to Protect Journalists, Turkey’s Press Freedom Crisis The Dark Days of Jailing Journalists and Criminalizing Dissent (October 2012) p.12

²⁵ KCK is considered as an umbrella organization of PKK, an affiliated terrorist organization of PKK. PKK organizes its activities in the urban and rural areas as well as abroad through this new structure. KCK, as an umbrella terrorist organization, which aims to put pressure on non-governmental organizations, political parties, local administrators and religious leaders in east and south-east of Turkey.

²⁶ ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 36

²⁷ See, for example; those were among a group of more than 1,000 scholars who in January 2016 signed a declaration denouncing military operations against the PKK. <http://turkishmonitor.com/3-turkish-academics-arrested-over-terror-propaganda-charges-1438/>

<http://www.hurriyetdailynews.com/three-academics-arrested-on-charges-of-terror-propaganda.aspx?pageID=238&nID=96517&NewsCatID=509> See the text of the petition here; <http://bianet.org/english/human-rights/170978-academics-we-will-not-be-a-party-to-this-crime>

²⁸ Submission to the UN Universal Periodic Review of the Republic of Turkey for consideration by the Office of the UN High Commissioner for Human Rights for the 21st session of the UPR Working Group in 2015, para 5

²⁹ Human Rights Watch, Turkey’s Human Rights Rollback Recommendations for Reform, (2014) p.14

³⁰ ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 14

years, especially after the ‘Gezi Park protests’³¹ (2013), scores of media workers were unjustly dismissed or forced to quit in retaliation for their reporting.³² An increasing number of restrictions on freedom of expression have been imposed, inhibiting freedom of the press, internet and television content. A number of television stations which had transmitted live coverage of the Gezi Park protests were warned, by The Radio and Television Supreme Council (RTÜK), that they were “violating the principle of objective broadcasting” and fined them for “inciting violence”.³³ Recently, after the failed military coup on July 15, 2016,³⁴ 16 TV channels, 3 news agencies, 45 newspapers and 23 radio stations were closed down by governmental decree, which is declared only in time of state of emergency, because these media outlets belonged to or were associated with ‘Fettullahçı Terör Örgütü (FETÖ/PDY) – Fettulahist Terrorist Organisation’ which constituted threat to national security.³⁵

It should of course be recognized that governments must put in place measures aimed at preventing violent attacks, and corresponding threats to international and national peace, stability and security. Indeed, States have a positive obligation (deriving in part from their obligations to ensure the effective protection of rights such as life and property) to take pre-emptive action to forestall terrorist activities.³⁶ To this limited extent, efforts to eradicate

³¹ A wave of demonstrations and riot in Turkey began on 28 May 2013, initially to contest the urban development plan for Istanbul's Taksim Gezi Park. There was no centralised leadership beyond the small assembly that organized the original environmental protest. The sit-in at Taksim Gezi Park was restored after police withdrew from Taksim Square on 1 June, and developed into an Occupy-like camp, with thousands of protesters in tents, organising a library, medical center, food distribution, and their own media. After the Gezi Park camp was cleared by riot police on 15 June, protesters began to meet in other parks all around Turkey and organised public forums to discuss ways forward for the protests. Social media played a key part in the protests. Turkish Prime Minister Recep Tayyip Erdoğan dismissed the protesters as "a few looters" on 2 June. Police suppressed the protests with tear gas and water cannons. 3.5 million people are estimated to have taken an active part in almost 5,000 demonstrations across Turkey connected with the original Gezi Park protest. 11 people were killed and more than 8,000 were injured.

³² Joint NGO Submission to the UN Universal Periodic Review (CIVICUS and hCa) 21st Session of the UPR Working Group (15 June 2014) 4.9

³³ European Commission, “Turkey 2013 Progress Report” 16 October 2013 http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf Accessed on 25 August 2016, p.52

³⁴ On 15 July 2016, a coup d'état was attempted in Turkey. The attempt was carried out by an organised faction within the Turkish Armed Forces that called themselves the ‘Peace at Home Council’. They attempted to seize control of several key places in Ankara, Istanbul, and elsewhere, but failed to do so after forces loyal to the state defeated them. Turkish people took over the streets and stood against the coup plotters. 265 people were killed and 1440 people were wounded by the plotters. Berktaş argues that this coup attempt “was spearheaded by an ominously significant number of divisional or brigadier (one-star and two-star) generals belonging to the Gulenist congregation, and imbued with a cultic belief in its founder, Fethullah Gulen.” (Halil Berktaş, ‘What if the attempted coup in Turkey had succeeded?’ <http://serbestiyet.com/yazarlar/halil-berktay/what-if-the-attempted-coup-in-turkey-had-succeeded-710217>)

³⁵ Governmental Decree, Karar No: KHK/668, Sayı: 29783 2. Mükerrer (27 July 2016) p.61-3

³⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: Framework principles for securing the human rights of victims of terrorism* (A/HRC/20/14) 4 June 2012 at 29; Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain: (E/CN.4/1999/64) 29 January 1999 at 20

‘terrorism’ – potentially including ‘terroristic speech’,³⁷ may be regarded as being in pursuit of a justified goal. Many ‘terrorist’ constitute serious human rights violations, especially the right to life, liberty and security, as well as the full range of civil and political, and economic, social and cultural rights, due to their effect, scale or intensity.³⁸ Indeed, ‘criminalisation of incitement to violence’ can also be justified in order to deny proponents of ‘terrorism’ the ‘oxygen of publicity’.³⁹ As this thesis will argue, however, the potential for such ‘positive obligations’ to be given an unduly expansive interpretation pointedly illustrates the paradox of ‘state centrality’ at the heart of human rights law.

Political violence and ‘terrorism’ have been one of the long lasting and major problems challenging Turkey’s political, legal, economic and security matters. The majority of the terrorist incidents in the 1970s were carried out by leftist and rightist groups, and Kurdish armed extremists also contributed to the spiralling of political violence, particularly during the 1980s and 1990s.⁴⁰ Ideological battles between leftist and rightist groups turned into armed clashes in the 1970s.⁴¹ The Kurdish Worker’s Party (PKK) was responsible for the escalation of violence in Eastern and South-eastern Turkey.⁴² The PKK has involved in drugs, arson and human trafficking and had been responsible for the deaths of 40,000 people all of whom were members of the security forces, civilians, civil servants (including teachers), medical doctors and nurses.⁴³ In 2016 alone, over 500 members of the security forces and 300 civilians were killed by PKK attacks (including suicide bomb attacks).⁴⁴ It is crucial, therefore, to identify to what extent expressive acts (propaganda, praising, indoctrination or justification) played a role in this violent context. For instance, Watts argues, that there are important organisational differences between the PKK and pro-Kurdish political institutions, even though most of their members have close personal relationships with the PKK and support it ideologically.⁴⁵

³⁷ For an explanation of the use the term ‘terroristic speech’ in this thesis, see the section on ‘Methodology’ below. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: Framework principles for securing the human rights of victims of terrorism* (A/HRC/20/14) 4 June 2012 at 19; see for instance, ECHR, *Osman v. The United Kingdom* (App no: 87/1997/871/1083), paras. 115-116

³⁸ Ben Saul, *Defining ‘Terrorism’ to Protect Human Rights*. D. Staines, ed., *Interrogating the War on Terror: Interdisciplinary Perspective*, (Cambridge Scholars Publishing, UK, 2007) 191-2

³⁹ Martin Scheinin, “Limits to freedom of expression: lessons from counter-terrorism” in Tarlach McGonagle and Yvonne Donders (Ed.), *The UN and Freedom of Expression* (CUP: 2015) 428

⁴⁰ Sabri Sayari, ‘Political Violence and Terrorism in Turkey, 1976–80 A Retrospective Analysis’, (2010) 22/2 *Terrorism and Political Violence*, 198-215, 203

⁴¹ *Ibid*, 201

⁴² See further; Andrew Mango, *Turkey and the War on Terror: For Forty Years We Fought Alone* (London: Routledge, 2005) 31-57

⁴³ Human Rights Council Fifteenth Session Agenda item 6 Report of the Working Group on the Universal Periodic Review on Turkey (A/HRC/15/13) 17 June 2010 para 63

⁴⁴ See further; <http://www.internethaber.com/tsk-1-yillik-pkk-bilancosunu-acikladi-1595693h.htm>; <http://www.sabah.com.tr/gundem/2016/03/29/terorun-bilancosu>

⁴⁵ Nicole F. Watts, ‘Activists in Office: Pro-Kurdish Contentious Politics in Turkey’ (2006) 5/2 *Ethnopolitics* 125-144, 127

Turkey again encountered intense violent attacks after the civil war started in Syria and Iraq when many new armed groups appeared. Some of these groups such as Al-Qaida,⁴⁶ and ISIS (DAESH)⁴⁷ have also been active in Turkey committing suicide bombing attacks among civilians and launching rockets at Turkish cities near the Syrian border. The PKK is also one of the players in the Syrian conflict causing Turkey security problems through the Democratic Union Party (PYD) which is its branch in Syria.⁴⁸ The threat of violent 'terrorist' attack poses a serious and growing danger to Turkey, damaging the country's social and economic development and its citizens' freedom to enjoy their human rights. For these reasons, Turkey must endeavour to take affective, but narrowly-targeted measures in accordance with its obligations under international law.⁴⁹ Turkey must avoid broad sweep of restrictions on the right to freedom of expression because of threat of 'terrorism'. Seeking a causal link between expression and act of terrorism gives a strong position for Turkish courts to stop criminalising broad range of expression.

Turkey signed the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), where the right to freedom of expression is enshrined. The European Union granted full membership candidacy status to Turkey in 1999, which was a political turning point leading the country to progress. Since then Turkey has invested in the European Union guidelines and recommendations via constitutional amendments and reform packages on human rights, especially on freedom of expression. Turkey's human rights commitments under ECHR and ICCPR have resulted in progressive developments in domestic free speech jurisprudence. Here, not only have a number of progressive Constitutional amendments been passed (seemingly conferring greater protection on freedom of speech), but the doctrinal principles that structure the reasoning of both the Strasbourg court and the UN Human Rights Committee, and the Committee on the Elimination of Racial Discrimination (CERD) have also been imported, to some degree, into the reasoning of the domestic courts.⁵⁰ These amendments aim at expanding the scope and the extent of right to security of person, freedom of opinion and expression, privacy of individual life, freedom of association, and right to participate in political life.⁵¹ As a consequence of one these

⁴⁶ The al-Nusra Front, or Jabhat al-Nusra sometimes called al-Qaeda in Syria or al-Qaeda in the Levant.

⁴⁷ The self-proclaimed "Islamic State" is a militant movement that has conquered territory in western Iraq and eastern Syria. It is also called Daesh.

⁴⁸ This is a left-wing Kurdish political party established in 2003 in northern Syria. The PYD is a member organisations of the Kurdistan Communities Union (KCK). It considers jailed PKK and KCK founder Abdullah Öcalan as its ideological leader and Democratic Confederalism its ideology. It incorporates into the United Kurdish Community in Western Kurdistan (KCK – Rojava) with its own organisational identity.

⁴⁹ Security Council Resolution 1624 (2005) (emphasis added)

⁵⁰ Human Rights Council Working Group on the Universal Periodic Review Eighth session Geneva, (3-14 May 2010) National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 (A/HRC/WG.6/8/TUR/1) para 15; See further, H. Keller, and A. Stone Sweet, A Europe of Rights: The Impact of the ECHR on National Legal Systems (OUP: 2008)

⁵¹ Human Rights Council Working Group on the Universal Periodic Review Eighth session Geneva, (3-14 May 2010) National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 (A/HRC/WG.6/8/TUR/1) para 15

amendments, it is now possible for an individual to lodge a complaint concerning a violation of Convention rights with the Constitutional Court, following a milestone Constitutional amendment in 2010 (which came into force in 2012). This has, at a minimum, served to enhance the rigour with which restrictions on speech are scrutinized at the national level.⁵² In overarching terms of ‘terrorism’ and political violence, however, a contradiction emerges in which human rights norms appear to pull in opposite directions. States can, apparently without contradiction, ratify human rights treaties protecting speech; whilst at the same time rely on ‘anti-terror’ laws to impose far-reaching restrictions upon it. This contradiction ultimately stems from the state-centricity of human rights law.⁵³ It is always an issue of critical importance to find a fine tune balance between national security problems (terrorism) and the right to freedom of expression, in order to achieve a democratic society and to apply the principles of freedom of expression in a political-legal system.

In this thesis, particular attention is given to the impact of Turkey’s anti-terrorism regime on the freedom of expression of individuals, journalists, academics and politicians, with consideration of the right to freedom of expression under the ECHR and ICCPR. The thesis evaluates the extent to which Turkey can be said to satisfy its obligations under these treaties to protect freedom of expression in the context of Turkey’s fight against ‘terrorism’.

1.2) Methodology

The term ‘terroristic speech’⁵⁴ is used here as an umbrella term which captures not only speech that might be regarded as direct incitement to acts of ‘terrorism’ but also indirect incitement (including ‘propaganda’, ‘incitement’, ‘call for violence’, ‘glorification’, ‘apology’ and ‘praising’) and indeed other offences (such as incitement to hatred or animosity) which might be used to impose criminal liability on speech that, in the State’s view, encourages or otherwise relates to ‘terrorism’.⁵⁵ Acts of terrorism are broadly defined in the criminal law. This extends criminal liability beyond the broadly defined terrorist offences to include inchoate forms.⁵⁶ ‘Terroristic speech’ thus embraces a wide range of seemingly discrete offences, differentiated primarily by

⁵² H. A. Özhan, ‘Application of Decisions of European Court of Human Rights in Contracting Parties’, (2001) 6 *Liberal Thought*, p.51.

⁵³ As David Kennedy has argued: ‘Although the human rights vocabulary expresses relentless suspicion of the State, by structuring emancipation as a relationship between an individual right holder and the State, human rights places the State at the centre of the emancipatory promise.’ See, D Kennedy, ‘The international human rights movement: part of the problem?’ *EHRLR* (2001) 245, at 255-256.

⁵⁴ Similar use can be seen in other academic papers, for example, Michael Hamilton, ‘The Misrule of Law? “Terrorist Speech”, Human Rights and the Legal Construction of Risk’, in P. Bard, (ed.) *The Rule of Law and Terrorism* (HVG-ORAC: 2015), 151-174; Laura Donohue, ‘Terrorist Speech and the Future of Free Expression’, (2005) 27 *Cardozo Law Review*, 233-341

⁵⁵ See, for example, Shawn Marie Boyne, ‘Free Speech, Terrorism, and European Security: Defining and Defending the Political Community’, (2010) 30/2 *Pace Law Review* 417-483

⁵⁶ Craig Forcese & Kent Roach, ‘Criminalizing Terrorism Babble: Canada’s Dubious New Terrorist Crime’, (2015) 53/1 *Albert Law Review* 35-84, 53

the active verb (e.g. disseminating; supporting; propagating; apologizing for; advocating; encouraging; promoting; defending; glorifying; venerating; provoking; inciting, praising etc.). This term covers expression which may fall within the bounds of 'hate speech', 'incitement to hatred or animosity' or other discriminatory expression, to limited extent in which the courts may use them to criminalise expression related to terrorism.⁵⁷ In addition to this, while analysing three different jurisprudences in this thesis, giving to very limited and particular scope to 'terroristic speech' does not provide inclusive approach to cover all the relevant offences given in these legal systems.⁵⁸ For that reasons, this term provides a pragmatic and convenient shorthand reference in this thesis for all sorts of expressions which may directly or indirectly incite acts of terrorism.

This thesis takes an exclusively doctrinal approach. Its focus is on case law analyses of Turkey's Yargıtay and Constitutional Court, of the European Court of Human Rights, of the UN Human Rights Committee and the UN Committee on the UN Elimination of Racial Discrimination (CERD). The thesis also incorporates and evaluates various observations, legislative discussions, reports, comments and solutions that have been generated by legislators, courts, authorities, and academics. While primarily legal in origin, the thesis draws on inter-disciplinary work from the fields of politics and political theory, 'terrorism' studies and sociology. In consideration of these primary and secondary sources, this thesis offers its own analysis, inference and suggestions, which renders it an original doctoral thesis.

In broad terms, the thesis contains an original comparative assessment of the interplay between on one hand the right to freedom of expression (specifically 'terroristic speech' and its echo (sedition) from the past), and on the other the national security narrative under three related legal regimes. These regimes are national, regional and international: the Turkish Constitution, the European Convention, the International Covenant (ICCPR and ICERD) respectively. This involved combing through these three jurisdictions' 'internet databases'⁵⁹

⁵⁷ In Turkey, for instance, domestic courts used article 216 (incitement to hatred and animosity) to prosecute individuals on the basis that their expression incites others to further acts of terrorism. Thus, such expression fits into the 'terroristic speech' category.

⁵⁸ For instance, Hupf defines "terroristic speech" as speech falling under the Homeland Security Act's definition of "terrorism" - a) any activity that involves an act that i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and ii) is a violation of the criminal laws of the United States or any State or other subdivision of the United States; and b) appears to be intended i) to intimidate or coerce a civilian population, ii) to influence the policy of a government by intimidation or coercion, or iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping. 6 U.S.C. §101(16) (Supp. III 2009). See in, Robert Hupf. ""Step Into the Game": Assessing the Interactive Nature of Virtual Reality Video Games Through the Context of "Terroristic Speech"" ExpressO (2014) Available at: http://works.bepress.com/robert_hupf/3/ (accessed on 22.09.1016)

⁵⁹ Turkey's Constitutional Court and Yargıtay case law database:

<http://www.anayasa.gov.tr/icsayfalar/kararlar/kbb.html> (official)

<http://emsal.yargitay.gov.tr/VeriBankasilstemciWeb/> (official); there are also unofficial databases:

<http://www.hukukturk.com/ictihat> <http://legalbank.net/mahkeme-kararlari>

<http://www.kazanci.com/kho2/ibb/giris.htm>

The European Court cases from the Council of Europe's HUDOC database; Human Rights Bodies Jurisprudence: UN Office of the High Commissioner for Human Rights' database; <http://juris.ohchr.org/> (official), There are two

searching for all freedom of expression cases, and given the focus of the thesis, limited to those which related specifically to 'sedition' and 'terroristic speech'. The selection of case-law for analysis and discussion was thus made after searching specific terms (such as 'terror', 'terrorism', 'violence' or 'political violence' and linking each to 'freedom of expression' or 'freedom of speech' or 'free speech') under the categories of article 10 of the Convention; article 19 and 20 of the ICCPR, article 4 of CERD, and article 29 of the Turkish Constitution, by using the databases. In Yargıtay's case law, I searched by using those specific terms in relation to the specific offences of 'sedition' and 'terroristic speech' under the Turkish Criminal Code and the Law to Fight Terrorism. Yargıtay differs from the other courts because it is a court of last instance, for reviewing judgments of both criminal and civil courts as well as supervising the evidentiary findings of facts used in first instance courts. As a form of double-checking, the unofficial 'internet databases' were utilised, and each result was checked to see if it matched the parameters of relevance established for the official court reports. This was especially important for the case law of both Yargıtay and of the Committee. The case law of the Constitutional Court and Yargıtay was critical here to underpin the main argument in the thesis demonstrating that modern-day offences relating to 'terroristic speech' bear a striking resemblance to the older offences of 'sedition' and 'treason' so as to be able to analyse them critically in the light of regional and international standards.

1.3) Thesis Outline

This thesis is divided into parts and chapters each of which seeks to analyse Turkey's High Courts' legal responses to 'terroristic speech' in the light of regional (the ECtHR) and international (the Human Rights Committee) standards. In the light of the background and motivation above, the discussion chapters aim to determine potential answers to the thesis question. In this sense, the second chapter will provide background information for the analysis in the following chapters on the case laws of the Turkish 'High Courts', the ECtHR and UN Human Rights Committee. In this chapter, the terms of 'political violence' and 'terrorism' will be closely examined in order to understand the definitional problem underlying modern-day offences of 'terroristic speech'. It will also be demonstrated that there is a close resemblance between 'terroristic speech' and 'sedition' because 'terrorism' is a form of 'political violence' and carries political nature. This resemblance is shown to rely on both the similarities and differences between the elements of these offences (namely, the mens rea, the actus reus, the weight placed on the content and context of expression). It will conclude by suggesting that rationales (self-fulfilment, truth, pluralist democracy, and tolerance) for the right to freedom of expression which may, on occasion, be important philosophical reasons for protecting 'terroristic speech'. The third chapter will explore the doctrinal principles relied upon within these different national and supra-national legal systems. It also provides a comparative overview of how these principles have impacted upon the protection of the right to freedom

amore unofficial case law databases that provide access to communications; <http://www.ccprcentre.org/> and Netherlands Institute of Human Rights (<http://sim.rebo.uu.nl/en/>)

of expression in these three systems. This chapter will also explore some concepts which allow courts to diminish the protection of freedom of expression.

In the next three chapters, case law analysis of Turkey's Yargitay and the Constitutional Court (chapter 4), the ECtHR (chapter 5) and the Human Rights Committee (chapter 6) will be conducted through selected cases by using the methodology specified above. In these chapters, the first sections will analyse the courts' response to freedom of expression issues where speakers have been convicted due to their purported connection with 'terrorism' or 'political violence' under 'sedition law' or 'anti-terrorism' law. These sections will analyse these jurisprudences' responses to expressions advocating 'political violence' and 'terrorism' separately, in order to capture a chronological perspective on how Turkey and Regional-International Human Rights instruments have responded to 'terroristic speech'. In the second sections of these chapters, further analyse the elements of these offences fall upon 'sedition' and 'terroristic speech', including actus reus, content and context of expression, publicity and audience exposure, probability of specific harm, and mens rea of the speaker. The analysis of these elements is important to know how these jurisprudences sought to differentiate legitimate political expression from 'seditious' and 'terroristic expression'. While the ECtHR has provided a well-facilitated evidential doctrine, the Human Rights Committee and Turkey's Courts have failed to generate a well-structured methodological rigour. Each of these elements will be evaluated separately under these sections. Lastly, chapter 7 brings all the findings of the previous chapters together, and evaluates Turkey's High Courts response to 'terroristic speech' in the light of the ECtHR's and Human Rights Committee's response to the same.

CHAPTER 2: 'TERRORISTIC SPEECH' IN CONTEXT

2.1) Introduction

Much scholarly attention has focused on the incremental extension of criminal liability for 'terroristic speech'. Critics have properly focused on overbroad statutory provisions that impose sweeping restrictions on freedom of expression.¹ It is argued in this thesis that not only do such enactments reflect the widely-acknowledged preventive turn in criminal law,² but that this preventive turn is itself underwritten by positive obligations imposed by human rights law. In the realm of freedom of speech, these obligations most obviously derive from UN Security Council Resolution 1624 (2005); Article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism, and the Council of the European Union Framework Decision on Combating Terrorism of November 28, 2008.³ In short, the thesis argues that widely-framed anticipatory restrictions on freedom of speech have been introduced ostensibly in satisfaction of States' positive obligations to protect others from the threat of terrorism.

It will be demonstrated that modern-day offences relating to 'terroristic speech' bear a striking resemblance to older (and in some jurisdictions, now archaic) offences of 'sedition' and 'treason'. The second chapter thus traces the historical evolution of offences that impose criminal liability for 'terroristic speech', identifying how these are both similar to, and different from, offences falling within the category of 'sedition'. The second chapter also sets out two further foundational arguments on which the thesis rests: (1) the implications of the failure to define 'terrorism' upon the protection of speech; and (2) the philosophical argument against restricting 'terroristic speech' (particularly speech that is vulnerable to restriction under broadly-framed offences that give primacy to the constitutional identity of the State). These two foundational arguments are summarized briefly in turn below.

In order to clarify 'terrorism' as the basis for restricting freedom of speech, political violence as its actual root should be discussed. Political violence reflects some very similar features to terrorism, such as its being hard to define, having unstable boundaries, and having a political nature. In this regard, even before the terrorism era, certain specific forms and modes of expression have always been treated as a source of evil and a recourse to violence by states in particular periods, referring to political violence such as rebellion, revolution etc. The legal

¹ Offences such as sedition, treason, praising, propaganda, encouragement, etc.

² See Further; J McCulloch, and D Wilson, *Pre-crime: Pre-emption, precaution and the future* (Routledge: 2015); Lucia Zedner, 'Pre-Crime and Post-Criminology?' (2007)11(2) *Theoretical Criminology* 261; Jude McCulloch and Sharon Pickering, 'Pre-crime and counter-terrorism: imagining future crime in the 'war on terror'', (2009) 49 *Brit. J. Criminology* 628

³ For example, M. Hamilton, 'The Misrule of Law? "Terrorist Speech"', *Human Rights and the Legal Construction of Risk*, in P. Bard, (ed.) *The Rule of Law and Terrorism* (HVG-ORAC: 2015), 151-174, 162.

pedigree of the speech-related offences upon which this thesis focuses (i.e. their close resemblance to the historical offence of 'sedition') points to a deeper-level problem concerning the invocation of 'terrorism' as the basis for restricting freedom of speech. In the past, perceived risks to the integrity and security of the State have emerged in the form of discrete ideological '-isms' (such as 'communism' and 'national socialism'). Today, however, these have been supplanted by more amorphous and all-encompassing '-isms' – 'fundamentalism', 'radicalism' and 'extremism'.

This thesis is premised on the argument that the reinvention of archaic offences of sedition during the modern 'human rights era', can be traced to the underlying failure to narrowly define the nature of the risk posed. This, at root, mirrors the fundamental inability of the international community to agree upon a definition of 'terrorism'. Indeed, the paradigm of 'terrorism' is used as a pejorative term and a delegitimizing tool by those in power:⁴ 'terrorism' has been used as a rhetorical instrument by State actors to deny the possible legitimacy, not only of particular acts of politically motivated violence, but also of a wide spectrum of 'terroristic speech' that challenges a State's constitutional identity.⁵ This lack of attention to the definition of 'terrorism' has contributed to clear deficits in the level of constitutional scrutiny afforded to restrictions on speech. Human rights law, in turn, has been emasculated – failing to reign in the excesses of terrorism-related offences that stand to seriously erode constitutional speech protections. States have been able to draw upon the seemingly unassailable counter-terrorism narrative (itself, grounded in inter-State consensus) that strong measures must be taken to combat international 'terrorism'. On this basis, the conclusions of the thesis focus less on the development and entrenchment of human rights norms (which are inherently compromised because of their state-centricity), and emphasize instead the critical importance of precise and narrowly-drawn definitions in criminal law. By examining the specific elements of different criminal law offences, it is possible to assess the degree to which modern-day offences related to 'terroristic speech' resemble, or differ from, 'sedition' and 'treason'. The elements of these offences also play a key role in producing narrowly-drawn definitions for these offences in criminal law, which may in turn determine the extent to which freedom of expression is likely to be protected. In particular, the thesis points to the importance of incorporating the requirements of 'intent' – which, as Leslie Kendrick has recently argued, helps provide 'breathing space' for protected speech.⁶ In contrast, having vague, broadly-defined and unclear criminal law offences which impose strict liability (irrespective of a speaker's intention) in domestic criminal and anti-terror laws constitutes contradictions which ought to be

⁴ Richards Anthony, 'Conceptualizing Terrorism' (2014) 37/3 *Studies in Conflict & Terrorism* 213, 216. See also, Reuven Young, 'Defining Terrorism: The Evaluation of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29 *Boston College International and Comparative Law Review* 27

⁵ L. Stampnitzky, *Disciplining Terror: How 'Experts' Invented Terrorism* (CUP: 2013); Martin Scheinin, 'Politically Motivated Violence and Acts of Terror: Conceptual and Legal Issues' (The International Council on Human Rights Policy: Eight Annual International Council Meeting: 'Terrorism and Human Rights: Discussing Politically Motivated Violence', Lahore, 2005) para 20.

⁶ L., Kendrick, 'Speech, Intent, and the Chilling Effect' 54 *William & Mary Law Rev* 1633-1691 (2012-13),

incompatible with States' human rights commitments. These also play a crucial role in deciding whether modern-day offences related to 'terroristic speech' resemble, or differ from, 'sedition'/'treason'.

Former special rapporteur on the promotion and protection of human rights and fundamental freedoms Martin Scheinin, noted that there is the need for laws to adhere to the principle of legal certainty and to be clearly and precisely drawn while countering terrorism.⁷ The law which restrict the right to freedom of expression, must be precisely prescribed by law in Turkey. The thesis adopts as a benchmark, the model offence of incitement to terrorism proposed by the (then) UN Special Rapporteur on Counter-Terrorism and Human Rights, Martin Scheinin in December 2010.⁸

'It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.'

This model definition provides a useful measure against which to assess the offences contained in the Turkish Penal Code ('TPC') and the Law on the Fight against Terrorism ('TMK') – and more broadly, to think about how criminal law provisions which purport to address harms arising from 'terroristic speech' might most appropriately be drafted. In this regard, definitional imprecision is a recurring theme in the thesis.

This chapter aims to provide background information for the analysis, in the following chapters, of the case laws of the Turkish 'High Courts',⁹ the European Court of Human Rights (ECtHR) and UN Human Rights Committee. Furthermore, this chapter consists of three sections: Section 2.2

⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, para 45-47

⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 22 December 2010, A/HRC/16/51.; Human Rights Watch, *Protesting as a Terrorist Offense The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey*, (November 2010) p.62

⁹ The Turkish Constitutional Court was established by the 1961 Constitution of Turkey. The composition, powers and structure of the Court were changed considerably and the right to individual application to the Constitutional Court was introduced by constitutional amendments in 2010. With the actual implementation of the individual application started from 23 September 2012, the constitutional review has been implemented against any infringements of rights caused by persons or institutions exerting public authority.

Yargıtay: The Supreme Court unifies judgements and supervises the evidentiary of facts of the crimes by evaluating the decisions of first instance courts. This Court is divided into civil law and criminal law chambers (hukuk ve ceza daireleri). There are 21 civil law and 21 criminal law chambers. Most of the cases subjected to this research were examined by the Criminal Chambers of the Supreme Court of Appeal hereinafter "YCD", (most of the relevant cases being evaluated by the 9th Criminal Law Chamber (hereinafter Y (9) C.D)) and the Supreme Court of Appeal Assembly of Criminal Chambers hereinafter "YCGK". On 12.6.2016, the 9th Criminal Law Chamber's assigned position was transferred to the 16th Criminal Law Chamber. Thereafter, relevant judgements on 'terroristic speech' are to be given by this chamber.

examines the related concepts of 'political violence' and 'terrorism' in order to understand the definitional problem underlying modern-day offences of 'terroristic speech'. Section 2.3 observes that political dissent has faced extraordinary challenges during particular historical epochs, and drawing on the argument made by Vincent Blasi,¹⁰ proposed that the courts' approach to restrictions on speech should therefore be informed and guided by the 'pathological perspective' – a perspective which takes full account of the threat to freedom of speech in 'the worst of times'. This section also argues that contemporary offences relating to 'terroristic speech' bear a striking resemblance to older offences of 'sedition' and 'treason'; identifying both the similarities and differences between the elements of these offences (namely, the mens rea, the actus reus, the weight placed on the content of expression and relative significance afforded to the context of expression). Section 2.4 emphasizes that there may, on occasion, be important philosophical reasons for protecting 'terroristic speech'. Chapter 2 thus concludes by overviewing the rationales commonly relied upon to protect freedom of expression (self-fulfilment, truth, pluralist democracy, and tolerance), suggesting that these rationales hold equally true in relation to some categories of what might be classified as 'terroristic speech'.

2.2) Impact of Ill-Defined Basis of 'Political Violence' and 'Terrorism' on the Right to Freedom of Expression

Perceived risks to the integrity and security of the State have often emerged in the form of political violence. As discussed below, some forms of 'political violence' have come to be regarded and labelled – often arbitrarily – as 'terrorism'; in other words, 'terrorism' exists as a sub-category, carved out of the wider category of 'political violence'. Both concepts share an essential core in that they are aimed, subjectively, at the overthrow or destruction of the existing political order.¹¹ At this basic level, it can be said that both 'political violence' and 'terrorism' are threat to the creation of a stable, peaceful and democratic order.¹² However, when such risks are believed to emanate from the spoken word, reliance on 'terrorism' as a basis for justifying and explaining restrictions on freedom of speech, becomes deeply problematic. To demonstrate this further, the following section examines the nature of 'political violence' and 'terrorism' in order to highlight the deeper-level definitional problem of 'terrorism'. The failure to precisely define 'terrorism' has enabled it to be used to provide a justificatory narrative for the creation of sweeping and over-inclusive restrictions on freedom of expression.

¹⁰ V. Blasi, 'The Pathological Perspective and the First Amendment' 85(4) Columbia Law Review 449-514 (April 1985).

¹¹ Anthony (n. 4) 219

¹² Martha Crenshaw (Ed.), *Terrorism, Legitimacy and Power: The Consequences of Political Power* (Wesleyan University Press, 1983) 52

2.2.1) Political Violence

The term 'political violence' is generally used to refer to attacks occurring within a political community against the incumbent political authorities by competing political groups, where the violence aims at challenging specific policies or the structures of political power.¹³ Political violence threatens the political system of a state in two main ways: firstly, it confronts the monopoly of force imputed to the state in political theory, and secondly, it interferes with normal and routine political processes.¹⁴ 'Political violence' however, is a difficult concept to classify and to analyse because, it is capable of subsuming the actions of individuals and collectives with widely varying motivations and psychological influences.¹⁵

An act of political violence has two overlapping levels: one that is intended to achieve a specific physical result, and the other, generally claimed by perpetrators, intended to convey a message about the political system¹⁶ and related constitutional and policy issues.¹⁷ The concept of 'political violence' thus embraces acts of revolution, guerrilla wars, coups d'états, rebellions, riots and similar attempts to bring about fundamental socio-political change through violent means.¹⁸ Wilkinson defines political violence as the infliction, or threat of infliction, of physical injury or damage in order to achieve one's political will, which is committed either deliberately or which occurs unintentionally during political conflict.¹⁹ The basic condition for the perpetration of political violence is often thought to be discontent arising from perceptions of relative deprivation.²⁰ The extent of political violence is, in turn, determined by the intensity of political discontent.²¹

Furthermore, the types of violence used may differ based on the political purposes served. The following classification developed by Wilkinson can be used to explain different types of political violence by their general aims: 1) 'inter-communal violence' aims to defend (or extend) group interests in conflict with enemy ethnic or religious groups; 2) 'remonstrative violence' purports to persuade governments to remedy grievances by expressing anger through violent protest; 3) 'praetorian violence' (which is more severe) uses coercion in order to change a government's leadership and policy; 4) 'repression' seeks to subjugate genuine or potential opposition and dissent, 5) 'resistance' is aimed at opposition to, and prevention of, a government establishing authority and executing its laws, 6) 'terroristic violence' aims to compromise political will by systematically using murders and destruction or by threatening

¹³ Ted Robert Gurr, *Why Men Rebel* (Princeton University Press (New Jersey, 1971) 4

¹⁴ *Ibid.* Monopoly of physical coercion is the distinctive feature of the state. For example, Max Weber identifies that "the right of physical violence is assigned to all other associations or individuals only to the extent permitted by the state; it is supposed to be the exclusive source of the 'right' to use violence."

¹⁵ Paul Wilkinson, *Terrorism and the Liberal State* (The Macmillan Press, 1977) 31

¹⁶ Gerald Priestland, *The Future of Violence* (Hamish Hamilton, London, 1974) 6

¹⁷ Wilkinson (n. 15)

¹⁸ Gurr (n. 13)

¹⁹ Wilkinson (n. 15)

²⁰ Gurr (n. 13) 13

²¹ *Ibid* 14

murderer or distractions, 7) 'revolution' and 'counter-revolution' seek to overthrow the existing political system, to replace it with a new regime, and so any kind of violence to be used, and finally, 8) 'war' is designed to achieve political gains through military victory against an enemy.²² The main issue here is the legitimacy of these typologies, which may differ according to the political context, and those who define it. Thus perceived risks to the integrity and security of the State that emerged in the form of discrete ideological '-isms', such as 'communism' and 'national socialism', were considered as a source of revolution, counter-revolution, repression, or war.

Societies might experience some forms of political violence and not others,²³ but Wilkinson's typology importantly demonstrates that 'terrorism' can be understood as just one form of political violence (out of many) that can emerge in a given polity.²⁴ However, as the following section reveals, history tells us that perceived risks to the integrity and security of the State have often been attributed to ideological '-isms' (such as 'socialism' or 'communism'), and while these might be viewed as having resorted to 'remonstrative violence' or acts of 'resistance', their proponents have, during particular historical epochs, also been labelled as 'terrorists'. As such, the typology raises a key question about who defines particular manifestations of violence. The following section argues that the power to define one's opponent as a 'terrorist' has increasingly, in the latter part of the twentieth century, become a means of detracting legitimacy from oppositional or dissenting groups. This suggests a shift in the way that 'terrorism' is understood – no longer as merely one type of political violence, but rather as conceptually distinct on account of its international character and moral repugnance.

2.2.2) Terrorism

'Terrorism' was broadly studied, at least until the early 1970s, as a sub-category of 'political violence', capable of being committed by both state and non-state actors alike. The phenomenon of 'terrorism' was thus regarded as one type of 'political violence' amongst others (including war, insurgency, repression, and revolution), and was neither defined principally in moral terms, nor singled out from other forms of political violence for moralistic condemnation.²⁵ Acts of 'terrorism' were generally reported descriptively, simply, for example, as 'bombings', 'assassinations', 'armed assault', 'kidnappings', and 'hijackings'.²⁶ It is important to point out that in the 1960s and 1970s, Western states and their allies were struggling with anti-colonial movements, as well as with left wing guerrilla groups and revolutionary

²² Wilkinson (n. 15) 33

²³ Ibid

²⁴ Ibid 34

²⁵ Stampnitzky (n. 5) 63. Such acts were found to comprise ninety-five percent of all incidents categorized as 'terrorist'.

²⁶ Brian M. Jenkins, 'International Terrorism: The Other World War' in Charles W. Kegley (Ed), *The New Global Terrorism: Characteristics, Causes, Controls* (Pearson Education, 2003) 23

insurgencies in different parts of the world.²⁷ These included 'communist terrorism' in the Malayan insurgency, the Front de Liberation in Algeria, and the Palestine Liberation Organisation during the Cold War era.²⁸ Brian Jenkins argues that 'terrorism' has evolved since the late 1960s when rural guerrilla movements in Latin America, inspired by Fidel Castro and leftist revolutionaries, paid more attention to moving their combat activities to cities.²⁹ Rural guerrillas might win battles that nobody receives any news about, but when acts of violence occurred in a major city it became more newsworthy on national and international levels.³⁰ This concerted shift to urban settings was accompanied by another tactic intended to capture media attention – the targeting of foreigners such as diplomats rather than locals, and sensational action such as the hijacking of airlines and seizing of hostages (for instance, by the Palestinian group 'Black September' during the Munich Olympics in 1972).³¹ Radical students also adopted terroristic tactics after turning away from mass protest in Europe, the US and Japan in the 1960s.³² As such, some have explained the evolution of the concept of 'terrorism' since the 1970s primarily in terms of the extreme nature of the attacks involved, and the fact that these are predominantly of an international character.³³ As Brian Jenkins argues, international terrorism consists of incidents that have clear international consequences: such as the striking of targets abroad, attacking victims because of their connection to a foreign country, or attacking international commercial lines.³⁴

This way of understanding the shift in 'terrorism' discourse is underpinned by an emphasis on 'globalisation' and related advances in communication technologies (thereby enabling greater access to explosives and weapons, and enhancing mobility for those seeking to engage in 'terrorist' activity).³⁵ These developments have also allowed groups to have a decentralised organisational structure with a horizontal network rather than a hierarchy.³⁶ This purported shift was most obviously witnessed in the events of 11 September 2001, and the ensuing international reaction.³⁷ The 9/11 attacks were planned abroad, committed by foreigners, supported by outsiders, the victims were from different countries and its influence was worldwide. They combined elements of 'religious terrorism', 'right-wing extremism', 'low intensity conflict', 'weapons of mass destruction', driven by religious, millennial, or even nihilistic motivation (in contrast, for example, with political nationalism, or Marxist

²⁷ Bruce Hoffman, 'The confluence of international and domestic trends in terrorism' (1997) 9/2 *Terrorism and Political Violence* 1, 1

²⁸ R. Jackson, L. Jarvis, J. Gunning, and M. Smyth (Eds), *Terrorism: A Critical Introduction* (New York, Palgrave Macmillan, 2011) p.10

²⁹ Brian M. Jenkins, *New Modes of Conflict* (The Rand Corporation, 1983) 8

³⁰ *Ibid*

³¹ *Ibid* 9

³² *Ibid*

³³ Hoffman (n.27), See also, Stampnitzky (n. 5) 26

³⁴ Jenkins (n.26) 18

³⁵ Marta Crenshaw, *Explaining Terrorism: Causes, Processes and Consequences* (Routledge, 2011) 65

³⁶ *Ibid* 62

³⁷ *Ibid* 9

motivations).³⁸ The attacks of 9/11 prepared the ground for national and international authorities to declare a 'war on terror'.³⁹

Whereas traditional national terrorist groups such as IRA, ETA, LTTE, and PKK had limited goals of bringing about radical change in one particular state or region, the agenda of religiously motivated 'terrorist' organisations such as Al Qaeda was to change the whole international system, premised on a hatred for (and rejection of) Western and especially American values, culture, and civilization.⁴⁰ For this reason, the US government stated that the 'war on terror' is against an ideology rather than an organised entity.⁴¹

However, 'terrorism' is today simply a neutral, descriptive term reserved for dramatic attacks of an international character motivated by zealous extremism with no adequate explanation and it is often highly selective term used primarily by domestic actors. There is an alternative explanation for the growth of the term 'terrorism'. Stampnitzky argues that so-called terrorism 'experts' sought to replace the discourse of 'political violence' with the concept of 'terrorism'. The concept of 'terrorism' was largely a response to perceived threats to the domestic US population. It was a term 'quietly' invented by the US executive branch specifically, the Cabinet Committee to Combat Terrorism.⁴² It was then introduced in congressional hearings, which took place in a more public venue.⁴³ Indeed, Stampnitzky illustrates how the US government spent a huge effort by sponsoring, funding and bringing together such experts and policy makers to foster the growth of terrorism 'expertise'.⁴⁴ Stampnitzky argues that the emergence of modern-day 'terrorism' was a process of redefining political violence by 'terrorism experts' as a category which implicitly entailed a moral evaluation, and for which the conclusion was one of inherent 'evil'.⁴⁵ 'Terrorism', therefore, exists as a framework for explaining incidents which are deemed by those in power to involve illegitimate and unacceptable political violence.⁴⁶

Other scholars have similarly noted that 'terrorism' is 'often used in a careless and pejorative way for rhetorical reasons'.⁴⁷ Walter, for example, argues that 'terrorism' is a deeply subjective

³⁸ Stampnitzky (n.5) 152

³⁹ Walter Enders and Todd Sandler, 'After 9/11: Is It All Different Now?' (2005) 49/2 *The Journal of Conflict Resolution* 259, 261

⁴⁰ Paul Wilkinson, *Terrorism versus Democracy: The Liberal State Response*, (3th. Ed. Routledge, 2011) 8, see also Paul Wilkinson, *Liberal State Response to Terrorism and Their Limits*, in Andrea Bianchi and Alexis Keller (Eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing, 2008) 77. Also, Crenshaw, (n. 35) 54

⁴¹ Crenshaw, (n. 35) 62

⁴² Stampnitzky (n. 5) 66-67

⁴³ *Ibid*

⁴⁴ In 1976, the US Department of State funded a quarter-million-dollar program of research and analysis of terrorism. 29 terrorism conferences were held with 591 participants in between 1972-1978, see in Stampnitzky (n. 5) 27, 29, 31

⁴⁵ Stampnitzky (n. 5) 66-67

⁴⁶ *Ibid* 4, 8

⁴⁷ Crenshaw, (n. 35) 206

concept involving an assessment of the motives and intentions of perpetrators.⁴⁸ As such, its scope and limits are changeable and unstable depending both on historical and political contexts, and on the personal values and beliefs of the individuals who define it. It is thus a complicated and subjective term rather than a neutral, technical term for a specific form of violence.⁴⁹ In some senses, this understanding verifies the famous cliché, ‘one person's terrorist is another person's freedom fighter’.⁵⁰ ‘Terrorism’ is a label that relies on political context – and what constitutes ‘terrorism’ is essentially a political decision.⁵¹

In conclusion, the shift to ‘terrorism’ is not only a linguistic transformation but also a rhetorical achievement.⁵² The term, as it is used today, implies moral characterisations of the enemy (depriving them of legitimacy)⁵³ rather than a neutral definition of a method or motivation. The process of defining speech as ‘terroristic’ – just as proscribing an organisation as ‘terrorist’ – is thus a political, rather than juridical process.⁵⁴ Legal responses to ‘terroristic speech’ (including, for example, the enactment of offences of the apology/glorification of terrorism) can thus be viewed as instruments within the global ‘war on terror’. If Justice Holmes’ famous aphorism that “every idea is an incitement” is to be accepted, it is crucial to further determine which incitements are truly dangerous and deserving of criminalisation.⁵⁵ The philosophical difficulties of arriving at a universally accepted definition of ‘terrorism’ in relation to international law are explored further in the following section.

2.2.3) Definitional Dilemmas: ‘Terrorism’ and ‘Terroristic Speech’ in International Law

The absence of an internationally agreed definition of terrorism has allowed states to penalise a wide range of political dissent.⁵⁶ In the last two decades, the UN, European Union, and the Council of Europe have developed counter-terrorism policies that have not only required the member states to introduce measures against ‘terrorism’, but have also encouraged states to take action against speech that might be thought to foster or to encourage ‘terrorism’ or to support it. The concept of ‘terrorism’, therefore, has had a significant negative impact on the level of protection afforded to the right to freedom of expression – despite the lack of an objective and rigorous definition. The question arises; why is there no internationally agreed

⁴⁸ Christian Walter, 'Defining Terrorism in National and International Law' 6-8, to be published in Christian Walter, Silja Vöneky, Volker Röben, Frank Schorkopf (Eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2004) https://www.unodc.org/tldb/bibliography/Biblio_Int_humanitarian_law_Walter_2003.pdf accessed 19.07.1014

⁴⁹ R. English, *Terrorism; How to Respond* (OUP, 2009) 19

⁵⁰ Alex P. Schmid, *The Routledge Handbook of Terrorism Research*, (New York, 2011) p. 42.

⁵¹ Jacson, Jarvis, Gunning, and Smyth (Eds), (n. 28) 15; see also Jenny Hocking, ‘Counter-Terrorism and the Criminalisation of Politics: Australia’s New Security Powers of Detention, Proscription and Control’ (2003) 49 *Australian Journal of Politics and History* 355,

⁵² Stampnitzky (n. 5) 25

⁵³ Crenshaw (n. 35) 2

⁵⁴ Hocking (n. 51). Also, E. Herman, ‘Terrorism: Misrepresentations of Power’, in D. Brown and D. Merrill, eds, *Violent Persuasion: The Politics and Imagery of Terrorism* (Seattle : Bay Press, 1993) 47

⁵⁵ *Gitlow v. People*, 268 U.S. 652, HOLMES, J., Dissenting Opinion para 673

⁵⁶ Ian Cram, *Terror and the War on Dissent: Freedom of Expression in the Age of Al-Qaeda* (Springer, Berlin, 2009) 38

definition of 'terrorism' in international law? In large part, this is because of political differences between states which would mean that any consensus-based definition would likely be diluted and exception-ridden, and would only give rise to further disputes in the international arena.⁵⁷

To resolve such issues, it is necessary to look at the right of self-determination. The principle of self-determination of the people (as enshrined in Articles 1(2)⁵⁸ and 55⁵⁹ of the Charter of the United Nations, and Article 1⁶⁰ of the two International Covenants (on Civil and Political Rights, and on Economic, Social and Cultural Rights) and references in the preamble of the Universal Declaration of Human Rights to the possibility of 'rebellion against tyranny and oppression'), create a dilemma about whether violent acts committed in the name of 'self-determination' or 'rebellion' should be excluded from the category of 'terrorism'. Yet, none of those instruments explicitly specifies whether (a) force may be used to achieve self-determination, or (b) what kinds of force may be used by those fighting for it. If there is no consensus on which use of force is included under self-determination, then any use of force by such movements may be criminalized as terrorism.⁶¹ It might be argued, for instance, that these provisions could be interpreted to uphold the legitimacy of violent struggle against colonial and racist regimes, or other forms of alien domination and foreign occupation (in particular the struggles of national liberation movements). Indeed, the United Nations has arguably failed to define 'terrorism' precisely because some nations have insisted that freedom fighting, anti-colonial uprisings, or similar kinds of violence should not fall within the scope of the definition of terrorism.⁶²

⁵⁷ Walter (n. 48) 12, see also in, Geoffrey Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 *Ohio Northern University Law Review* 97, 97

⁵⁸ General Assembly, Measures to eliminate international terrorism; A/RES/46/51, 67th plenary meeting, 9 December 1991, Charter of the United Nations: The Purpose of the United Nations are: 2) "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;"

⁵⁹ Article 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

⁶⁰ Article 1: "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

⁶¹ Ben Saul, 'Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law' (October 29, 2008) 25 *Australian Yearbook of International Law*, 177-226, 185

⁶² Alex Schmid, *Terrorism—The Definitional Problem*, (2004) 26 *Case W. Res. J. INT'L L.* 375, 386, see also Sudha Setty, 'What's in a Name? How Nations Define Terrorism Ten Years After 9/11' (2011) 33/1 *U. Pa. J. Int'l L.* 1, 9

The first challenge in this regard appeared when the United Nations responded by objecting to the killing of Israeli athletes at the Munich Olympics in September 1972, and earlier attacks at an Israeli airport and on a Soviet diplomat in New York.⁶³ In the 1970s, Cold War politics enabled the UN General Assembly to reach an agreement on the definition and causes of terrorism.⁶⁴ The dispute between socialist states and western powers, and the ideological divide between developed and developing States on the use of force made defining terrorism more difficult.⁶⁵ For that reason, China and the Arab and African States believed that a US led conference adopting a treaty called ‘the Prevention and Punishment of Certain Acts of International Terrorism’ was an attempt to criminalize self-determination movements.⁶⁶ Another key definitional issue regarding what would constitute ‘terrorism’ in the Draft Convention concerned whether the convention should exclude the activities of the ‘parties’ (as proposed by the Organisation of the Islamic Conference) rather than those of the ‘armed forces’ during armed conflict.⁶⁷ This means that the wording of ‘parties’ aims to exempt groups such as the Palestine Liberation Organisation, Hamas, Islamic Jihad and Hezbollah.⁶⁸ Even the Council of Europe, which could be regarded as a more homogenous and harmonious organisation than the UN General Assembly, has failed to reach a definitional consensus in the context of the European Convention for the Suppression of Terrorism.⁶⁹

Such dilemmas also remain among scholars who have generated a number of definitions of ‘terrorism’. Schmid and Youngman have identified over one hundred definitions of terrorism, which they obtained in a survey of leading academics in the field. The most frequently used words occurring (their statistical appearance) in these definitions are: *“violence and force (appeared in 83.5% of definitions), political (65%), fear, terror (51%), threat (47%), psychological effects and anticipated reactions (41.5%), discrepancy between the targets and the victims (37.5%), intentional, planned, systematic, organized action (32%).”*⁷⁰ Here in this thesis, one of these definitions is accepted as a valid definition because this definition includes the most frequently referred to elements of terrorism listed above namely, it is systematically organised, characterized by extreme violence, underpinned by political goals or demands, and capable of causing fear and terror. This means that Wilkinson’s definition of terrorism: *“the systematic use*

⁶³ A Sofaer, ‘Terrorism and the Law’ (1986) 64/5 Foreign Affairs 901-922, 903-4

⁶⁴ Saul (n.61) 200

⁶⁵ See Further, Ben Saul, ‘Attempts to Define ‘Terrorism’ in International Law’ (2008) 52 Netherlands International Law Review, 57, 71

⁶⁶ John F. Murphy, ‘Defining International Terrorism: A Way Out of the Quagmire’ (1989) 19 IYBHR 13, 17

⁶⁷ See in, Ben Saul, ‘Defining Terrorism: A Conceptual Minefield’, (Sydney Law School Legal Studies Research Paper No. 15/84, 2015) 1-14, 6

⁶⁸ S. von Schorlemer, ‘Human Rights: Substantive and Institutional Implications of the War on Terror’ (2003) 14 European Journal of International Law 265, 272

⁶⁹ Eur. Consult., European Convention for the Suppression of Terrorism Explanatory Report, ETS No. 090, ¶ 14 (1977), available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/090.htm>. see in Reuven Young, Defining Terrorism: The Evaluation of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation, (2006) 29 Boston College International and Comparative Law Review 23, 41

⁷⁰ Alex P. Schmid, and Albert J. Jongman, Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, And Literature (London, Transaction Publishers, 2005) 5

of murder and destruction, and the threat of murder and destruction in order to terrorize individuals, groups, communities or governments into conceding to the terrorists' political demands",⁷¹ fits into such definition. The emphasis in Wilkinson's definition on the centrality to 'terrorism' of 'political demands' is similar to the emphasis placed by the former UN Special Rapporteur on Counter-Terrorism and Human Rights, Martin Scheinin, on the motivation of actors to advance a political, religious or ideological cause (rather than purely the use of extreme violence and force).⁷²

However, as Brian Jenkins argues, "a rough consensus on the meaning of terrorism is emerging without any international agreement on the precise definition."⁷³ Indeed, rather than agreeing a general definition of 'terrorism' deduced from core, commonly accepted principles, attempts to reach a definition in international law have instead largely followed what Golder and Williams describe as a 'specific' or 'inductive' model.⁷⁴ In other words, international conventions have focused on its multiple manifestations, merely identifying certain activities as examples of 'terrorism'.⁷⁵ The UN, for example, has obliged member states to take appropriate law enforcement measures against specific incidents and types of terroristic act, set forth under a wide range of 'Conventions and Resolutions'.⁷⁶ Likewise, the EU Council Framework Decision on Combating Terrorism listed 'terrorist' offences as falling within very broadly framed categories attacks on life and physical integrity; extensive destruction of property, infrastructures or information systems; or threatening to commit any of these acts.⁷⁷

⁷¹ Wilkinson (n. 15) 50-51

⁷² Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism (A/HRC/16/51) 22 December 2010 at 27

⁷³ Brian M. Jenkins, The Problems of Defining Terrorism, in Martha Crenshaw & John Pimlott (Eds.) *Encyclopaedia of World Terrorism* (Sharpe, 1997) 12, 18

⁷⁴ Ben Golder and George Williams, 'What is 'Terrorism'? Problems of Legal Definition' (2004) 27/2 *University of NSW Law Journal* 270, 273

⁷⁵ *Ibid*

⁷⁶ These Conventions can be listed as: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted in New York on 14 December 1973, the International Convention against the Taking of Hostages, adopted in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988 and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991. See also, 'Measures to eliminate international terrorism', UN General Assembly, A/RES/46/51, 67th plenary meeting, 9 December 1991

⁷⁷ Council Framework Decision of 13 June 2002 on combating terrorism Article 1(1)- the List of Terrorist Offences: "(a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental

While the aim and nature of these conventions are clearly the product of a broad consensus about the need to take action against 'terrorism',⁷⁸ these Conventions were enacted through political negotiation and compromise rather than being derived from principle.⁷⁹ In this way, international law has sidestepped the lack of a comprehensive and agreed general definition of 'terrorism',⁸⁰ and its conceptual boundaries thus remain difficult to draw.⁸¹

Furthermore, and particularly relevant to this thesis, a number of regional and international conventions include provisions urging states to take action against 'terroristic speech'. For example, UN Security Council Resolution 1624 (2005) repudiated 'attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts'. Article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism, and the Council of the European Union Framework Decision on Combating Terrorism (discussed further in chapter 5) expressly provides that State Parties should 'adopt such measures as may be necessary to prevent public provocation to commit a terrorist offence'. It defines 'public provocation' as "*the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed*". In Article 3, the Council of the European Union Framework Decision on Combating Terrorism (2008) adopted the same definition of 'public provocation to commit a terrorist offence', and emphasized the importance of reducing 'the dissemination of those materials which might incite persons to commit terrorist attacks', noting that UN SC Res 1624 should be interpreted to provide 'a basis for the criminalisation of incitement to terrorist acts and recruitment, including through the Internet.' Notwithstanding, Greene argues that 'intention to incite the commission of a terrorist offence', by relying upon highly subjective and political term 'terrorism' in the criminal law poses an inherent risk that freedom of expression will be seriously eroded.⁸²

shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h)"

⁷⁸ Young (n. 69) 33

⁷⁹ Ibid

⁸⁰ Setty (n. 62) 8

⁸¹ J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism' (2006) 19 *Leiden J of International Law* 69, 76

⁸² Alan Greene, 'The Quest for a Satisfactory Definition of Terrorism: R v Gul' (2014) 77(5) *Modern Law Review* 780, 793

Indeed, definitions of 'terrorism' also often suffer from vague and unclear conceptual boundaries in national laws. For instance, as highlighted in the case of *R. v. Gul*,⁸³ the definition of 'terrorism' in the UK Terrorism Act 2000 consists of three components:

*I) "use or threat of action", inside or outside the UK, where that action consists of, inter alia, "serious violence", "serious damage to property", or creating a serious risk to public safety or health... II) the use or threat must be "designed to influence the government [of the UK or any other country] or an [IGO] or to intimidate the public" ... III) the use or threat is "made for the purpose of advancing a political, religious, racial or ideological cause" ..."*⁸⁴

The UK Supreme Court noted that the definition of terrorism "was indeed intended to be wide", given its disparate forms and in order to be able to interpret it for "good reasons" in the legal and political context,⁸⁵ (noting the inevitable changes in the political regimes in other countries, and by extension, in the UK's foreign policy and international relations).⁸⁶ Clearly, this definition allows consideration to be given to the political circumstances of the time,⁸⁷ (for example, to the events of 9/11 or the bombings in London, Madrid and Istanbul).⁸⁸ The problematic aspect of this definition, however, is the sheer breadth of its scope – whereby damaging property or creating a remote threat to public safety in order to seek to 'influence' a government in the pursuit of a political cause (which is surely a legitimate goal) could result in an individual being prosecuted for 'terrorism' offences. To emphasize, therefore, the point is that no matter how speech-related offences (such as 'provocation' or 'glorification') are qualified by requirements of 'intention' or 'imminent danger', if the underlying definition of 'terrorism' is so broad, then the 'intention' and 'danger' limbs will much more readily be satisfied. The flexibility that this definition affords also enables the authorities to selectively prosecute some cases as 'terrorism' cases, but to prosecute others as 'mere' acts of criminality.

In conclusion, 'terrorism' is a highly malleable concept, determined on the basis of social, political or legal judgments rather than being assessed against an internationally accepted

⁸³ *R v. Gul* [2013] UKSC 64 at 21; the background of the case is: At the warrant search of the house, videos on the computer uploaded onto various websites, including the YouTube website were founded. "These videos included ones that showed (i) attacks by members of Al-Qaeda, the Taliban, and other proscribed groups on military targets in Chechnya, and on the Coalition forces in Iraq and in Afghanistan, (ii) the use of improvised explosive devices ("IEDs") against Coalition forces, (iii) excerpts from "martyrdom videos", and (iv) clips of attacks on civilians, including the 9/11 attack on New York. These videos were accompanied by commentaries praising the bravery, and martyrdom, of those carrying out the attacks, and encouraging others to emulate them." The prosecution was based on the premise that these videos amounted to terrorist speech. (see this at 2)

⁸⁴ *R v. Gul* [2013] UKSC at 27

⁸⁵ *Ibid* at 38

⁸⁶ *Ibid* at 30

⁸⁷ Daphne Barak-Erez and David Scharia, 'Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law' (2011) 2 *Harvard National Security Journal* 1, 20

⁸⁸ David Banisar, *Speaking of Terror: A Survey of the Effects of Counter-Terrorism Legislation on Freedom of The Media in Europe* (2009) 7/3 *International Journal of Civil Society Law* 33, 50

standard or benchmark.⁸⁹ As such, the concept of terrorism can be used as a tool by the states to suppress political dissent (and to claim some level of legitimacy in doing so) and leads to broader restrictions on expression at both the national and international levels.⁹⁰ As later chapters in this thesis demonstrate, such definitional hurdles underlie the vague and unclear legal offences that have been introduced to criminalize ‘terroristic speech’.⁹¹ Ironically, as noted at the outset of this chapter, this has occurred at the behest of international human rights law and the positive obligations which it has imposed on States.

2.3) Legal Responses to ‘Terroristic Speech’ and their ‘historical evolution’

Political crimes are frequently fixed and defined by state elites who feel threatened by perceived political dangers, whether from political opponents, or foreign rivals.⁹² Head argues that such crimes are designed to prevent and to punish any conduct regarded as a threat to the tranquillity of the existing political and economic order.⁹³ In different historical eras, specific forms of expression have been considered as a threat to national security or to the existence of the state. Such speech has been criminalised under the guise of an offence such as ‘sedition’, and even ‘treason’. These offences are the forerunners to more recent offences that seek to criminalize the provocation of ‘terrorism’ (including ‘praising’ and ‘glorifying’). All, however, were enacted and enforced in times of national crisis and used to restrain political dissent.⁹⁴

As Sorial notes, the most serious threats to liberty (including the right to freedom of expression) tend to occur during certain identifiable historical periods.⁹⁵ Vincent Blasi regarded such periods as sharing certain ‘pathologies’ – specifically, “*the existence of certain dynamics that radically increase the likelihood that people who had unorthodox views will be punished for what they say or believe*”.⁹⁶ Examples of such ‘unorthodox views’ have included conscientious objection against war, and advocacy of particular political ideals (whether left-wing or right-wing, communist or fascist). Each has been treated as a threat to the very existence and functioning of the state, and thus in itself as endangering national security. Blasi argues that courts, in response, should adopt a ‘pathological perspective’ to preserve core constitutional norms and values: ‘fragile’ speech protections should be interpreted in a way that recognizes the pathologies of the political climate.⁹⁷ In particular, courts should be sceptical of the claims

⁸⁹ Jean-Marc Sorel, 'Some Question about the Definition of Terrorism and the Fight against its Financing' (2003) 14 EJIL 365, 370

⁹⁰ Banisar (n. 88) 50

⁹¹ Golder and Williams (n. 74) 272

⁹² Michael Head, *Crimes against the State from Treason to Terrorism* (Ashgate, 2011) 21

⁹³ Ibid 26

⁹⁴ Sarah Sorial, *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism* (Routledge, 2013) 14; Geoffrey Palmer, 'Political Speech and Sedition' (2008-2009) 11-12 Yearbook of New Zealand Jurisprudence, 36, 46

⁹⁵ Sorial (n. 94) 14, see also Head (n.92) 274

⁹⁶ Blasi (n. 10) 450

⁹⁷ Ibid 457

of government officials, and show a willingness to entertain and closely examine the arguments of litigants. It is instructive to briefly illustrate the nature of the offences enacted during pathological periods, in particular, to the elements of these offences (such as the mens rea, the likelihood of the proscribed harms materializing, the relevance of the specific content of the expression made, and the weight placed upon the context of expression). Doing so also helps to demonstrate the resemblance between the historical offence of ‘sedition’ and its more recent incarnations in the laws concerning provocation to ‘terrorism’.

2.3.1) Pathological Period and ‘Terroristic Speech’

The political atmosphere during periods of international conflict, domestic national crises, or (more recently) the ‘War on Terror’ has led States to criminalise particular types of expression.⁹⁸ In such periods, certain forms of political expression have simply not been tolerated, but have instead been viewed as inherently predisposed to agitation or violent uprising. The criminalization of such speech relies on the rationale of state security, since “*all governments invoke raison d’état to suppress speech*”.⁹⁹ Moreover, laws in relation to the self-preservation of the state impose the ‘greatest’ punishment upon any conduct deemed to threaten the state (notwithstanding a state’s public commitment to values such as liberty and democracy).¹⁰⁰ In the modern liberal democratic state – known nominally at least, as ‘the era of human rights’ – the relevant laws have been broadly defined so as to limit political expression to an excessive degree.¹⁰¹ Indeed, there is much overlap between now-outmoded offences relating to ‘sedition’ and ‘treason’ and those, more recently, relating to ‘terroristic speech’.¹⁰²

2.3.1.1) Pathologies of two World Wars and the Cold War

During both World Wars, and the protracted Cold War periods that followed political expression that challenged State policies underlying the ‘war effort’ was often criminalised in the name of sedition, espionage, and even treason.¹⁰³ The first important legal response to note occurred during World War I, with prosecutions in the United States under the Espionage Act of 1917.¹⁰⁴ Dissent that questioned the conduct and morality of the war could be considered as seditious (potentially subverting the war effort) and even treasonous (if it had the result of strengthening the enemy).¹⁰⁵

The US experience regarding interferences with the right to freedom of expression was based on perceived consequences of anarchist, pacifist (anti-war rhetoric) and communist views in

⁹⁸ Cram (n. 56) 74-76

⁹⁹ Susanne Baer, Violence: Dilemmas of Democracy and Law, in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), Freedom of Speech and Incitement Against Democracy (Kluwer, 2000) 63. See also, Richard Abel, Speech and Respect (Sweet & Maxwell, 1994) 39

¹⁰⁰ Head (n.92) 5

¹⁰¹ Cram (n. 56) 74-7684

¹⁰² Head (n.92) 275

¹⁰³ US Espionage Act 1917, US the Sedition Act 1798

¹⁰⁴ Larry Alexander, Incitement and Freedom of Speech, in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), Freedom of Speech and Incitement Against Democracy (Kluwer, 2000) 102, see also Stefan Sottiaux, Terrorism and the Limitation of Rights The ECHR and the US Constitution (Hart Publishing, 2008) 82

¹⁰⁵ Geoffrey R. Stone, ‘Free Speech and National Security’ (2009) 84 Ind. L. J. 939, 940

the periods of WWI, WWII and the Cold War.¹⁰⁶ Dissent that questioned the conduct and morality of a war was considered as seditious and treason by way of strengthening the enemy pole.¹⁰⁷ In these times, perceived threat was felt as quite real by the legal and political authorities.¹⁰⁸ During these periods, evaluation of US restrictions on political expression to prevent violent challenge suggested that Alien and Sedition Acts were used to suspend habeas corpus, and Espionage and Sedition Acts were used to silence the Red Scare.¹⁰⁹ By these, the US governments not only challenged those engaged in political violence, but also interfered with political opponents.¹¹⁰ During the War periods, and the two so-called 'Red Scares' (in 1919-1920, following the Russian Revolution, and the period of 'McCarthyism' between 1947-1957, respectively),¹¹¹ the Espionage and Sedition Acts were used to silence political detractors.¹¹² Interferences with the right to freedom of expression were justified on the basis of the perceived threat to the State – believed by the legal and political authorities to be both real and serious.¹¹³ Through these laws, the US authorities not only challenged those who threatened to engage in acts of violence, but also interfered with those who espoused anarchist, pacifist (anti-war) and communist views.¹¹⁴ Many states enacted criminal statutes against communism, preventing both expression and association which might have promoted, or otherwise assisted, communism.

Communism continued to be perceived as a serious national security threat throughout the Cold War period, and thus much of the Twentieth century. As had occurred during the inter-war period, prosecutions of those who espoused communist (or socialist) ideals continued during the McCarthy period. The US Supreme Court noted that espousing Marxist-Leninist doctrine could be regarded as advocating a Communist form of government in an existing democratic state, thereby implying the use of force and violence.¹¹⁵ For instance, the members and leaders of communist associations were convicted on the basis of tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten

¹⁰⁶ Frederick Lawrence, *Violence-Conducive Speech: Punishable Verbal Assault or Protected Political Speech?* in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), *Freedom of Speech and Incitement Against Democracy* (Kluwer, 2000) 12; see also these cases: *Schenck v. United States*, 249 U.S. 47, (1919), *Frohwerk v. United States*, 249 U.S. 204, (1919), *Debs v. United States*, 249 U.S. 211, 212-14 (1919), *Abrams v. United States*, 250 U.S. 616, 616-18, 619-20 (1919). *Gitlow v. New York*, 268 U.S. 652, (1925). *Whitney v. California*, 274 U.S. 357(1927). *Dennis v. United States*, 341 U.S. 494 (1951). *Yates v. United States* 354 U.S. 298, (1957), *Noto v. United States* 367 U.S. 290, (1961).

¹⁰⁷ Stone (n. 105)

¹⁰⁸ Lawrence (n.106)

¹⁰⁹ Laura K. Donohue, 'Terrorist Speech and the Future of Free Expression', (2005) 27/1 *Cordozo Law Review*, 233, 239

¹¹⁰ *Ibid*

¹¹¹ Sottiaux (n. 104) 83

¹¹² Donohue (n. 109) 239

¹¹³ Lawrence (n.106)

¹¹⁴ *Ibid*; see also these cases: *Schenck v. United States*, 249 U.S. 47, (1919), *Frohwerk v. United States*, 249 U.S. 204, (1919), *Debs v. United States*, 249 U.S. 211, 212-14 (1919), *Abrams v. United States*, 250 U.S. 616, 616-18, 619-20 (1919). *Gitlow v. New York*, 268 U.S. 652, (1925). *Whitney v. California*, 274 U.S. 357(1927). *Dennis v. United States*, 341 U.S. 494 (1951). *Yates v. United States* 354 U.S. 298, (1957), *Noto v. United States* 367 U.S. 290, (1961).

¹¹⁵ *Dennis v. United States*, 341 U.S. 494 (1951) at 498

to overthrow by unlawful means,¹¹⁶ or on the basis of teaching and advocacy of the overthrow of the Government by force and violence.¹¹⁷

Both the UDHR (adopted by the UN General Assembly on 10 December 1948) and the ECHR (drafted in 1950 by the newly founded Council of Europe) were adopted in response to the fear and mass destruction of World War II. Interestingly, however, the very same impulse that led to the adoption of these landmark declarations of human rights, also provided sovereign democratic states with a powerful argument to impose restrictions on certain forms of speech: the trauma of the war gave rise to an intense anxiety that the ideological conditions that had enabled totalitarianism in pre-war Europe to flourish should not be allowed to become re-established.¹¹⁸ As such, the concept of 'militant democracy' (which describes a democratic order capable of defending itself) began to emerge, particularly in post-war Germany.¹¹⁹ This concept provides a preventative tool, justifying recourse to strict measures to penalize individuals or groups that aim to undermine the democratic system,¹²⁰ (and thereby starving non-democratic ideals of oxygen and preventing them from taking hold).¹²¹ As such, a state may protect the foundation of its political order by prohibiting certain types of expression, and by banning political parties that seek to undermine societal order.¹²² Indeed, it may be that the concept of 'militant democracy' which emerged in response to totalitarianism in Europe¹²³ will become reinvigorated as a means of responding to groups associated with fundamentalist interpretations of 'Islam',¹²⁴ 'Jihadism',¹²⁵ and organisations such as Al-Qaida and ISIS (DAESH).¹²⁶

2.3.1.2) The pathology of the 'War on Terror'

Political violence intended to instil fear and intimidate populations is not a new phenomenon. Nonetheless, the frequent use of the term 'terrorism' in both legal and political discourse is a relatively recent development.¹²⁷ Starting from the 1970s, the concept of 'terrorism' (as

¹¹⁶ *Whitney v California*, 274 US 357 (1927) at 371

¹¹⁷ *Dennis v. United States*, 341 U.S. 494 (1951) at 503

¹¹⁸ Hitler and his followers blatantly and cynically exploited the political freedoms they enjoyed under the Weimer constitution to gain absolute power. They openly and repeatedly expressed their aim to overthrow the Weimer Republic. See in, Dieter Oberndorfer, *Germany's 'Militant Democracy': An Attempt to Fight Incitement against Democracy and Freedom of Speech Through Constitutional Provisions: History and Overall Record*, in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), *Freedom of Speech and Incitement Against Democracy* (Kluwer, 2000) 236, 243

¹¹⁹ The rise of another totalitarian system after 1945 on the shattered remains of a young democracy, as occurred with Weimer Republic, should have been prevented. Baer (n. 98) 33

¹²⁰ Oberndorfer (n. 118) 243

¹²¹ *Refah Partisi (The Welfare Party) and Others v. Turkey* (App nos. 41340/98, 41342/98, 41343/98 and 41344/98) 13 February 2003

¹²² Shawn Marie Boyne, *the Criminalization of Speech in an Age of Terror* (June 12, 2009) 5 <<http://ssrn.com/abstract=1418496> or <http://dx.doi.org/10.2139/ssrn.1418496>> accessed 15 March 2014

¹²³ *Communist Party of Germany, Reimann and Fisch v. Germany* (App no. 250/57), 17 August, 1957

¹²⁴ *Refah Partisi (The Welfare Party) and Others v. Turkey* (App nos. 41340/98, 41342/98, 41343/98 and 41344/98) 13 February 2003

¹²⁵ The al-Nusra Front, or Jabhat al-Nusra sometimes called al-Qaeda in Syria or al-Qaeda in the Levant.

¹²⁶ The self-proclaimed "Islamic State" is a militant movement that has conquered territory in western Iraq and eastern Syria. It is also called Daesh.

¹²⁷ Golder and Williams (n. 74) 270

critiqued above) has been used to describe a primary threat to States and their national security. The concept has been widely deployed in political debate, and is referred to extensively in national and international politics and law.¹²⁸ It is suggested here that the rhetorical deployment of the concept of 'terrorism' – epitomized by the declaration of the 'War on Terror' – has shifted 'terrorism' centre-stage and thus created a pathological environment which parallels those of previous eras. The incidents of 9/11, the attacks in Madrid, and Istanbul in 2004, and in London on 7 July 2005, led the US, the Council of Europe, the EU and the UN to develop a regional and worldwide response against terrorism,¹²⁹ – one which included the criminalisation of 'direct and indirect incitement to terrorism'.¹³⁰ Indeed, these events, viewed alongside the most recent attacks in Paris, Ankara, Istanbul and Brussels in 2016, have resulted in the present day being described as 'the age of terror' which reflects how 'terrorism' is presented as the pre-eminent threat to both national security, and world peace and order.¹³¹

In this regard, national courts (particularly for the purposes of this thesis, the Turkish courts) the ECtHR and the UN Human Rights Committee have encountered expression related to organisations such as the IRA, ETA, PKK, RAF and Al-Qaida and their political wings. For example, the British government's ban on the voice of representatives of Sinn Féin, (the political wing of the IRA) and several other Irish republican and loyalist groups from being broadcast on television and radio, was upheld by the European Commission in the 1980s.¹³² In recent decades, Turkey has been challenged in many cases regarding 'terrorist' related expressions.

2.3.2) Offences in relation to 'Terroristic Speech'

Certain criminal offences were typically used during these pathological periods. Firstly, offences such as 'sedition', treason, and espionage were applied in the aftermath of both of the First and Second World Wars and during the Cold War. Secondly, offences related to 'terroristic speech' have been enacted as an instrument in the 'War on Terror'. The wording of these offences, and their specific elements – (a) the actus reus; (b) the mens rea; and (c) the 'content' and 'context' of expression will be evaluated and compared in the following sections.

¹²⁸ Ibid

¹²⁹ Shawn Marie Boyne, 'Free Speech, Terrorism, and European Security: Defining and Defending the Political Community' (2010) 30 Pace L. Rev. 417, 447

¹³⁰ Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences, OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities (Vienna, 19-20 October 2006) p.5

¹³¹ Golder and Williams (n. 74)

¹³² McLaughlin v. UK (Application No. 18759/91) EComHR Inadmissibility Decision 9 May 1994; Adams and Benn v. UK (Application Nos. 28979/95 and 30343/96) EComHR Inadmissibility Decision 13 January 1997; Brind and Others v UK (Application No. 18714/91) EComHR Inadmissibility Decision 9 May 1994; Purcell and others v Ireland (Application No. 15404/89) EComHR Inadmissibility Decision 16 April 1991

2.3.2.1) Sedition, Treason and Espionage

Judicial bodies have traditionally regarded the crimes of treason, sedition and espionage as political offences,¹³³ and they have the common objective of imperilling the interests of the state.¹³⁴ They are directed against the political and social organisation of the state rather than affecting the private rights of individuals.¹³⁵ Moreover, while some countries do not use these formal titles ('sedition', 'treason') to describe such offences in criminal law, for example in Turkey, there is no crime of 'sedition' but there are a number of other offences that serve precisely the same function of insulating the state from the expression of critical views. In chapter 4, therefore, the offences under the Turkish Penal Code are analysed bearing in mind their close conceptual (and instrumental) similarity to the offence of 'sedition' in other jurisdictions.

For the purposes of this thesis, the crime of 'espionage' can be quickly set aside. Although it is an offence under which dissenters have sometimes been charged, it generally refers to clandestine activity conducted by an individual on behalf of a foreign government, for the purpose of obtaining secret information regarding another State's national defence.¹³⁶ As such, it is not centrally relevant to the focus of this research, which examines restrictions on public expression. On the other hand, 'sedition', discussed further below and 'treason', are both relevant to the present study. These two crimes are conceptually related because, like treasonous activity, seditious expression both aim at inciting opposition against a government.¹³⁷ However, while there might not always be a clear bright line between the two,¹³⁸ in practice, there remain important distinctions between them. For instance, while 'treason' requires the existence of an overt act directed towards the execution of the treasonable intent, sedition can be made out if some "word, deed or writing" is calculated to incite persons to public disorder such as riot or rebellion.¹³⁹ In other words, 'sedition' encompasses the mere expression of supposedly dangerous ideas,¹⁴⁰ and can be constituted merely through the preliminary step of writing or speaking words, irrespective of whether or not acts of rebellion actually occur.¹⁴¹ Sedition thus usually discontinues when treason begins.¹⁴²

¹³³ Manual R. Garcia-Mora, *Treason, Sedition and Espionage as Political Offences under the Law of Extradition* (1964) 26 *University of Pittsburgh Law Review* 65, 65

¹³⁴ *Ibid*

¹³⁵ *In re Giovanni Gatti*, France, Court of Appeal of Grenoble (Chambre des Mises en Accusation), January 13, 1947, [1947] *Ann. Dig.* 145 (No. 70), (1951); as quoted in Garcia-Mora (n. 133) 87

¹³⁶ Roland J Stanger (Ed), Falk, *Foreword to Essays on Espionage and International Law* (Stanger ed. 1962); see also Garcia-Mora (n. 133) 79

¹³⁷ Head (n. 92) 150

¹³⁸ Garcia-Mora (n. 133) 75

¹³⁹ *State v. Shepherd*, 177 Mo. 205, 222, 76 S.W. 79, 84 (1903), as quoted in Perkins, *Criminal Law* 380 n. 91 (1957), quoted in Garcia-Mora (n. 133) 75

¹⁴⁰ Head (n. 92) 147

¹⁴¹ The Supreme Court of Arizona, adopting the definition of sedition found in 3 *Bouvier, LAW Dictionary* 3033: "Sedition is 'the raising of commotions and disturbances in the State; it is a revolt against legitimate authority.'" *Arizona Publishing Co. v. Harris*, 20 Ariz. 446, 448, 181 Pac. 373, 375 (1919). as quoted in Garcia-Mora (n. 133) 75

¹⁴² Garcia-Mora (n. 133) 75

In the light of these distinctions, this research concentrates on sedition due to its focus on "words, deeds or writings" designed to incite others to rebel against a government. Roger Douglas argues sedition has been used throughout history to "*punish people for what they think (or what they are thought to think) rather than on the basis of the degree to which their activities actually pose a threat or danger to public order.*"¹⁴³ Indeed, sedition laws have been used to curtail a wide range of expression ranging from satirical comment and mere criticism of authority, to incitement to violent uprising.¹⁴⁴ As Garcia-Mora observed, in principle, the statutes are directed against seditious acts and practices, but in practice, words, beliefs and opinions are likely to be restricted.¹⁴⁵ 'Sedition' is thus a comprehensive term embracing any practices deemed to disturb the tranquillity of the state or to be aimed at turning individuals against the government.¹⁴⁶ Sedition laws have lent themselves too readily to disproportionate interference with the right to freedom of expression and association,¹⁴⁷ and have been used to silence any political opponents, not only those advocating violence.¹⁴⁸ In this regard, the very existence of the crime of sedition creates a chilling effect, and undermines constitutional guarantees of the freedoms of speech and of the press.¹⁴⁹ In this regard, the crime of sedition may be very broad, and likely punish beliefs and opinions may violate the constitutional right to freedoms of speech and of the press.¹⁵⁰ As the Australian Law Reform Commission noted, the use of sedition laws has evolved based on the changing political climate and the degree of citizen support for the existing state system, which relies on the relationship between action, idea, association and responsibility.¹⁵¹

Sedition originated in the UK under the Statute of Treasons of 1352.¹⁵² The offence of seditious libel was first created in 1606 by the infamous Star Chamber decision in *de Libellis Famosis*, and it has a long history of the cruel repression of political dissent by intolerant and intransigent regimes.¹⁵³ The law of seditious conspiracy in the UK criminalised expression that was regarded as "inconsistent with the peace and good government of the country."¹⁵⁴ It originally covered

¹⁴³ Roger Douglas 'The Ambiguity of Sedition: The Trials of William Fordon Burns' (2004) 9 Australian Journal of Legal History 227, 248

¹⁴⁴ The Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Report 104, 2006) para 2.5

¹⁴⁵ Garcia-Mora (n. 133) 77

¹⁴⁶ David Williams, *Keeping the Peace: The Police and Public Order* (London: Hutchinson, 1967), Chapter 8, 'Incitement and Sedition', 197-8

¹⁴⁷ *Ibid* 203

¹⁴⁸ Donohue (n. 109) 250

¹⁴⁹ Garcia-Mora (n. 133) 77

¹⁵⁰ *Ibid*

¹⁵¹ The Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Report 104, 2006), para 2.6

¹⁵² Global Campaign for Free Expression Article 19, *Memorandum on the Malaysian Sedition Act 1948* (London, July 2003) 6

¹⁵³ *Ibid*

¹⁵⁴ Donohue (n. 109) 263

any attacks on any institutions of the state.¹⁵⁵ Under the Royal Proclamation against seditious writings issued by the Government in 1792,¹⁵⁶ for instance, Thomas Paine in England was prosecuted in 1792 for publishing 'Rights of Man' in defence of the French Revolution.¹⁵⁷ Sedition was used to protect not only the Crown or Parliament from unwanted criticism, but also to protect England's social and economic hierarchy.¹⁵⁸

Notwithstanding these historical origins, the enactment of sedition laws was not limited to the UK but was a characteristic of many common law jurisdictions. These laws were used even to punish speech critical of the established order, far short of exhortations to the use of force or violence,¹⁵⁹ and the prosecution of political dissent in Australia continued after World War I, and throughout the Cold War period.¹⁶⁰ Similarly, in the US, members of socialist and communist associations who were critical of the American involvement in WWI,¹⁶¹ and who used "disloyal, scurrilous and abusive language" *with intention "to incite, provoke and encourage resistance to the United States in said war"*¹⁶² were convicted under the Espionage Act 1917 (and the Sedition Act 1918 which amended and extended the reach of the 1917 Act). As noted previously, the US Supreme Court held that the advocacy of Communism by proponents of Marxist-Leninist doctrine could legitimately be regarded as implying the overthrow of an existing democratic government through violent revolution.¹⁶³

Critics have argued that the offence of 'sedition' is outdated, and serves no purpose within a pluralist democracy – and indeed, that the offence itself is undemocratic because it silences minority-dissenting opinion.¹⁶⁴ Democracy necessarily entails public debate and public participation in political and societal issues, as well as the toleration of dissenting views. Thus, guarantees of the right to freedom of expression play a significant role in maintaining liberal democracy.¹⁶⁵ Sedition laws in Australia, the United Kingdom and New Zealand have been criticised for being too broad in scope and for imposing unjustifiable limits on the right to freedom of expression.¹⁶⁶ After the end of the Second World War, the rise of liberal democracies in some ways mitigated reliance upon the offences of treason and sedition (in accordance with the protections contained in Article 10 of the European Convention on Human

¹⁵⁵ R. v. Burns (1886) 16 Cox CC 355, as quoted in David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, Second Ed. 2002) 897

¹⁵⁶ Head (n. 92) 27

¹⁵⁷ Ibid 2

¹⁵⁸ Donohue (n. 109) 262

¹⁵⁹ The Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Report 104, 2006), para 2.7

¹⁶⁰ See specifically for Australia: Head (n. 92) 170

¹⁶¹ *Schenck v. United States*, 249 US 47 (1919) at 49

¹⁶² *Abrams v. United States*, 250 U.S. 616 (1919) at 617

¹⁶³ *Dennis v. United States*, 341 U.S. 494 (1951) at 498, 503

¹⁶⁴ Global Campaign for Free Expression Article 19, *Memorandum on the Malaysian Sedition Act 1948* (London, July 2003) p.6; For instance, the offence of sedition remains as an offence in the UK yet has not been used for more than fifty years.

¹⁶⁵ Donohue (n. 109) 237

¹⁶⁶ Sorial (n. 94) 2; Palmer, (n. 94) 49-51

Rights.¹⁶⁷ This is because, sedition as a concept is incompatible with the underlying premises of modern democracy and it has been repealed or became unusable in many legal systems.¹⁶⁸

However, while the decreasing reliance upon the offences of 'sedition' is welcome since it arguably leads to greater protection for freedom of expression,¹⁶⁹ very similar broad restrictions on the freedom of speech have been retained under anti-terrorism laws. Indeed, sedition and anti-terrorism laws are sometimes coterminous. As the Australian Government stated, sedition is just as relevant as it ever was in the counter-terrorist context, which means the Australian federal sedition law was extended to cover the urging of resistance to Australian military operations as part of anti-terrorism legislation.¹⁷⁰ Furthermore, as Head stated, there has been a tendency to rely on sedition and seditious conspiracy provisions in cases relating to the 'war on terrorism'.¹⁷¹ As such, sedition has in many ways continued its existence either alongside, or subsumed within, anti-terrorism and related criminal code provisions. As Sorial notes, while anti-terrorism laws are not sedition laws per se, they have similar aims and objectives to traditional sedition laws.¹⁷² Consequently, there remains restraint on political dissent and a wide range of criminalisation measures on public - political expression. It is argued here that the offence of 'sedition' is thus critical to understanding the recent prosecution of 'political crimes' against the state and its institutions. As with 'sedition', the substantive calculations involved in bringing a prosecution for 'terroristic speech' are political, not legal.¹⁷³

2.3.2.2) Offences related to 'Terroristic Speech': Direct and Indirect Incitement

The enactment of new laws targeting the crime of expressive advocacy of 'terrorism' can be viewed as a substitute for the crime of 'sedition'. As Sorial noted, sedition statutes have been modernised under the guise of counter-terrorism measures, resulting in the enactment of a wide variety of 'offences', including religiously-motivated advocacy of violence, or glorification of 'terrorism'.¹⁷⁴ Counter-terrorism laws and prosecutions were considered as the foremost measures against expression or conduct threatening the interest of the state itself.¹⁷⁵ Acts of terrorism are invariably motivated by a political, ideological or religious purpose to undermine, disturb or change the existing political order.¹⁷⁶ Having said that, legislating against this has

¹⁶⁷ Donohue (n. 109) 237

¹⁶⁸ Global Campaign for Free Expression Article 19, Memorandum on the Malaysian Sedition Act 1948 (London, July 2003) p.1; see also New Zealand Law Commission Reforming the Law of Sedition (NZLC R96, Wellington, 2007)

¹⁶⁹ Donohue (n. 109) 339; see also, Laurence W Maher, *The Use and Abuse of Sedition*, (1992) 14 SydLR, 287, 291-2

¹⁷⁰ Australian Law Reform Commission, *Review of Sedition Laws* (10 April 2006) at 2.48

¹⁷¹ Head (n. 92) 147

¹⁷² Sorial (n. 94) 13; see also, Head (n. 92) 181

¹⁷³ In Israel, "the working paper included a section dealing with incitement, intended to replace sedition as an offence in the Panel Law." See in Kremnitzer M. and Ghanayim K., (Eds) 'Incitement, Not Sedition' in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), *Freedom of Speech and Incitement Against Democracy* (Kluwer, 2000) 147

¹⁷⁴ Head (n. 92) 1

¹⁷⁵ Sarah Sorial, 'Can Saying Something Make it so? The Nature of Sedition Harm' (2010) 29 *Law and Philosophy*, 273, 275

¹⁷⁶ Head (n. 92) 181

¹⁷⁷ Ibid

caused the right to freedom of expression to be perverted or eroded, in particular by the concept that `praising` or `glorifying` terrorism with its broad and vague meaning, is an offence in the context of anti-terrorism legislation.¹⁷⁷

In order to respect the right to freedom of expression, Martin Scheinin the former Special Rapporteur on Counter-Terrorism and Human Rights, has suggested a model definition of incitement to terrorism. He refers to conduct that causes an objective danger of terrorist offences being committed whether or not “expressly” advocating a terrorist offence.¹⁷⁸ This does not reduce the requirement to prove both an objective danger that a terrorist act will be committed, and a subjective intention to incite.¹⁷⁹ The advocacy must be directed at a non-specific and general audience rather than being private communication.¹⁸⁰ Through this approach, the person who incites ‘terrorism’ is regarded as the ‘spiritual father’ of the criminal acts.¹⁸¹ Incitement is a tool for the mobilization of actual perpetrators (here, of ‘terrorism’).¹⁸²

Incitement to terrorism is mainly categorised under two subheadings I) direct incitement, and II) indirect incitement. Direct incitement is understood “as a direct call to engage in terrorism, with intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”¹⁸³ However, indirect incitement or apology is defined as expressions “presenting a terrorist offence as necessary and justified”,¹⁸⁴ and “the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding of terrorist organisations or other similar behaviour”.¹⁸⁵ The criminalisation of indirect incitement to terrorist acts is a questionable subject due to the predictable risk of criminalising merely dissenting expression.¹⁸⁶ The most significant challenge is posed by the creation of a new offence of indirect incitement (apology,

¹⁷⁷ Ibid, See Further, Martin Scheinin, “Limits to freedom of expression: lessons from counter-terrorism” in Tarlach McGonagle and Yvonne Donders (Ed.), *The UN and Freedom of Expression* (CUP: 2015) 437-441

¹⁷⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practices in countering terrorism; (A/HRC/16/51) 22 December 2010 at 30

¹⁷⁹ Ibid

¹⁸⁰ Yael Ronen, ‘Incitement to Terrorist Acts under International Law’ (2010) 23 *Leiden Journal of International Law* 645, 666

¹⁸¹ Kremnitzer M. and Ghanayim K., ‘Incitement, Not Sedition’ in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), *Freedom of Speech and Incitement Against Democracy* (Kluwer, 2000) 162

¹⁸² Report of the Secretary-General, A/60/825 (27 April 2006) paras, 22, 23 see also Ronen (n. 180) 649

¹⁸³ Report of the Secretary-General, *The Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* (A/63/337 28 August 2008) para 61

¹⁸⁴ Explanatory Report on Council of Europe Convention on the Prevention of Terrorism (adopted by the Committee of Ministers, 925th Meeting, Council of Europe) CM (2005) 34, para. 98; see also Committee of Experts on Terrorism, ‘Apologie du terrorisme’ and ‘incitement to terrorism’: Analytical Report (3rd meeting, Strasbourg, 6–8 July 2004), CODEXTER (2004). P.12

¹⁸⁵ Explanatory Report on Council of Europe Convention on the Prevention of Terrorism (adopted by the Committee of Ministers, 925th Meeting, Council of Europe) CM (2005) 34, para. 95

¹⁸⁶ OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities, Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences, (Vienna, 19-20 October 2006) 9

and glorification) to terrorism.¹⁸⁷ For that reason, the new offence of incitement can be problematic because it is an even more draconian imposition upon freedom of political expression than seditious libel.¹⁸⁸

Clearly articles 19 and 20 ICCPR, and article 10 ECHR allow for proportionate restrictions to be imposed on speech where doing so is necessary to protect public order or national security (amongst other aims – see further Chapter 3). In this way, these provisions themselves safeguard the right of every person to be free from the threat of violence.¹⁸⁹ Nonetheless, the need specifically to criminalise incitement to terrorism has been given additional emphasis in international law.¹⁹⁰ As noted previously in this chapter, UNSC Resolution 1624 (2005), the Council of Europe Convention on the Prevention of Terrorism (2005) and the European Union Framework Decision on Combating Terrorism (2008) are the primary sources of international law in this regard. These international initiatives have demonstrated something of a consensus regarding the need to respond to incitement to terrorism,¹⁹¹ premised on the idea that 'terroristic speech' creates "*an environment and psychological climate conducive to criminal activity*".¹⁹² Resolution 1624 calls upon all states to prohibit and prevent incitement to commit terrorist acts,¹⁹³ and aims to prevent the inciters from winning the hearts and minds of their targeted audiences.¹⁹⁴ States are thus under an obligation to confront not only the physical manifestations of 'terrorism', but also its purported causes.¹⁹⁵ In other words, states have a positive obligation (also deriving from their obligations to ensure the effective protection of other rights such as life and property) to take pre-emptive action to forestall terrorist activities,¹⁹⁶ and this includes preventing 'terroristic speech'.¹⁹⁷

¹⁸⁷ Banisar (n. 88) 50

¹⁸⁸ Cram (n. 56) 84

¹⁸⁹ Jean-Paul Laborde and Michael DeFeo, 'Problems and Prospects of Implementing UN Action against Terrorism' (2006) 4/5 J Int Criminal Justice 1087, 1092 (emphasis added)

¹⁹⁰ OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities, Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences (Vienna, 19-20 October 2006) 9

¹⁹¹ Daphne Barak-Erez and David Scharia, 'Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law' (2011) 2 Harvard National Security Journal 1, 21

¹⁹² M. Kremnitzer and K. Ghanayim, 'Incitement, Not Sedition' in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), Freedom of Speech and Incitement Against Democracy (Kluwer, 2000) 197

¹⁹³ UN Security Council Resolution 1624 (2005) p.3

¹⁹⁴ Ronen (n. 180) 22

¹⁹⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: Framework principles for securing the human rights of victims of terrorism* (A/HRC/20/14) 4 June 2012 at 29

¹⁹⁶ Ibid; see also Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain: (E/CN.4/1999/64) 29 January 1999 at 20

¹⁹⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: Framework principles for securing the human rights of victims of terrorism* (A/HRC/20/14) 4 June 2012 at 19; see for instance, ECHR, Osman v. The United Kingdom (App no: 87/1997/871/1083), paras. 115-116

Returning to the distinction between direct and indirect incitement, it might at first appear that UNSC Res 1624 favours only the criminalisation of direct incitement and not the criminalisation of indirect incitement, the breadth of which concept risks arbitrary interference with freedom of speech. It was emphasized that incitement to terrorism on the one hand, and glorification or apologia of terrorism on the other, are two quite different notions.¹⁹⁸ It is, however, unclear whether the Resolution extends to indirect incitement or not.¹⁹⁹ Ian Cram properly notes that Resolution 1624, in its Preamble, refers to the need to repudiate “*attempts at the justification of or glorification (apologie) of terrorist acts that may incite further acts*”.²⁰⁰ Evidently, the Resolution does therefore provide some basis for states to criminalise indirect incitement,²⁰¹ even though, as Eric De Brabandere argues, the Resolution does not suggest to prohibit criminalising glorification and apology of terrorism.²⁰² Similar to Cram, Yael Ronen argues that the Preamble to Resolution 1624 allows criminalisation of indirect incitement.²⁰³

At the same time, the European instruments unambiguously urge States to introduce prohibitions of both direct and indirect incitement.²⁰⁴ Restrictions on incitement in the Council of Europe Convention covers “*the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour*” and “*making available of a message to the public advocating terrorist offences*”.²⁰⁵ Yael Ronen suggests that criminalisation of indirect incitement might be tolerated in the European system due to the existence of internal (European) consensus.²⁰⁶ As noted above, however, such criminal law paves the way for the selective and arbitrary restriction of speech.²⁰⁷ Indeed, ‘indirect incitement’ more closely resembles the concept of ‘sedition’ since it relies on a lower threshold of the likelihood of harm (see further, the discussion of ‘actus reus’ below).

A further notable difference between the UN and European instruments is that while UNSC Resolution 1624 urges the criminalisation of advocacy of ‘terrorist acts’, the CoE Convention on the Prevention of Terrorism speaks of public provocation to commit a ‘terrorist offence’. The

¹⁹⁸ Report of the Secretary-General, The Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (A/63/337 28 August 2008) paras 61-62

¹⁹⁹ Ben Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28/3 UNSW Law Journal 868, 870

²⁰⁰ UNSC Resolution 1624 (2005)

²⁰¹ Cram (n. 56) 40

²⁰² Eric De Brabandere, ‘The Regulation of Incitement to Terrorism in International Law’ In: Hennebel, L. & Tigroudja, H. (Eds.), *Balancing Liberty and Security: The Human Rights Pendulum* 221, 233. (Nijmegen: Wolf Legal Publishers, 2012), <http://ssrn.com/abstract=1992987> accessed 17.06.2014

²⁰³ Ronen (n. 180) 663

²⁰⁴ Article 5 of the Council of Europe Convention on the Prevention of Terrorism 2005, Explanatory Report on Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, para 96

²⁰⁵ Explanatory Report on Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, paras 95, 96

²⁰⁶ Yaël Ronen, *Incitement to Terrorism in International Law*, in Alan Baker, *Incitement to Terror and Violence: New Challenges, New Responses*. (the Jerusalem Centre for Public Affairs and the Konrad-Adenauer-Stiftung, 2011) 144

²⁰⁷ Ibid

word 'offence' seems to be a much narrower term than 'act', since it would appear to cover only those 'offences' already established under domestic or international law.²⁰⁸ Although Resolution 1624 does not require the criminalisation of indirect incitement (and its reach may therefore appear to be more limited than that of its Council of Europe and European Union counterparts), use of the phrase "terrorist acts" arguably extends its reach beyond the European instruments so as to potentially encompass a wider range of conduct that might be (directly or indirectly) incited. This point, however, is likely only to be of semantic value since the definitional problems surrounding the very concept of 'terrorism' (see discussion above), ultimately mean that neither term ('terrorist acts' or 'terrorist offence') provides any real certainty or clarity when used to criminalise expression. In other words, the breadth of the concept of 'terrorism' itself means that the term 'terrorist offence' (in the CoE Convention) is unlikely, in reality, to correspond with a narrower understanding of the conduct covered than 'terrorist act' (in UNSC Res 1624).

In conclusion, and to reiterate the earlier argument, the very concept of 'terrorism' entails deeply subjective and political judgments that enable the authorities to proscribe a very wide range of conduct. This section has shown that, despite a number of apparent differences, both UNSC Resolution 1624 and the CoE Convention on the Prevention of Terrorism allow the criminalisation of indirect incitement to terrorism, and thus render an exceedingly wide range of expression vulnerable to criminal sanction. The following section outlines the elements of the offences relating to 'terroristic speech' since an understanding of these elements will assist with the case law analysis in chapters 4, 5 and 6.

2.3.3) Elements of these Offences

The elements of the offences that impose criminal liability for 'terroristic speech' (specifically, the 'mens rea', 'actus reus', 'content of expression' and 'context of expression') play a crucial role in drawing the boundary between permissible and forbidden speech.²⁰⁹ It has been noted, for instance, that the legal elements of the offence of 'sedition' have traditionally been ill-defined.²¹⁰ Playing close attention to these elements has the potential to shield the exercise of legitimate expression from abuse of power.²¹¹

2.3.3.1) Actus Reus

Offences related to 'terroristic speech' can be regarded as inchoate offences which proscribe steps taken towards the commission of another offence which has not yet been committed.²¹²

²⁰⁸ Ibid 142

²⁰⁹ Albin Eser, *The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective*, in D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), *Freedom of Speech and Incitement Against Democracy* (Kluwer, 2000) 119-120

²¹⁰ The Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia* (Report 104, 2006) para 2.4

²¹¹ Ronen (n. 180) 665

²¹² Jonathan Herring, *Criminal Law: Text, Cases and Materials*, (OUP, Fifth Ed, 2012) 787

In English common law there are three general inchoate offences: attempt, conspiracy and incitement.²¹³ In the case of incitement, the crime is completed despite the person incited failing to commit the act to which he or she has been incited.²¹⁴ Thus, the offence of incitement relies on the rationale that “the concern [in criminal liability] is not merely with the occurrence of harm but also with its prevention”.²¹⁵ Yet, this link is rather vague and might also permit criminalising expression that poses only an abstract and remote risk of violence.²¹⁶

Importantly, the causal link between the preparatory step (expression) and the final offence (perhaps some specified act of terrorism) can be widened or narrowed by the inclusion of a probability test (ranging from the mere possibility that the offence will occur, to a strong likelihood that it will do so) and a temporal proximity test (for example, that it will occur imminently). In terms of the requisite of probability threshold, Ronen rightly argues that the criminalisation of ‘terroristic speech’ cannot be justified without harm being probable (rather than merely possible).²¹⁷ To do otherwise would be to unduly expand the reach of the preparatory offence to include any danger or risk, thereby placing remote harm on a par with likely harm as an equally valid reason for criminalisation.²¹⁸

Ronen also suggests two further parameters to inform the probability threshold: “*one is the scope of speech that may be prohibited; the other is the gravity of the offence (or the social interest which it protects)*.”²¹⁹ In relation to the former, what constitutes ‘terroristic speech’ may be determined by the choice of verb used in the offence (e.g. disseminating; supporting; propagating; apologizing for; advocating; encouraging; promoting; defending; glorifying; venerating; provoking; inciting, praising etc.). In this regard, the distinction between ‘actus reus’ and ‘mens rea’ is difficult to draw, and the two elements become indistinguishably blurred. As suggested in the sub-section below, culpability should be reserved only for those forms of speech where the speaker actually intends to bring about the final offence.

In relation to the gravity of the offence (and the corresponding social interest being protected), the question here is whether the final offence is ‘harmful enough’ to legitimize the criminalization of the preparatory expressive act. The offence must be more precisely defined than simply ‘an act of terrorism’ since, as we have seen, there is no agreed definition of ‘terrorism’. Moreover, great care must be taken not to also include acts of social protest, expression that might be regarded as ‘merely’ offensive, or speech that may have a tendency

²¹³ Michael Allen, *Textbook on Criminal Law*, (OUP, 12th Ed. 2013) 279

²¹⁴ W. K. Timmermann, ‘Incitement in international criminal law’, (2006) 88 *International Review of the Red Cross*, 823, 825

²¹⁵ A. Ashworth, *Principles of Criminal Law*, (OUP, 4th Ed, 2003) 445

²¹⁶ Bibi van Ginkel, *Incitement to Terrorism: A Matter of Prevention or Repression?* (ICCT Research Paper, August 2011) 14

²¹⁷ Ronen (n. 180) 667 (emphasis added)

²¹⁸ Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (Springer, 2007) 44-45

²¹⁹ Ronen (n. 180) 667

to stir up inter-communal tensions. Indeed, a pluralist democracy should also be able to accommodate speech that addresses subjects such as the desirability of a change in government or even territorial secession. Given the penal consequences associated with terrorist offences, the offence must be one that involves serious violence or instability that would place a population in fear.²²⁰ Indeed, while it might be possible to allow for a variable threshold of probability based the particular legal interest at stake, where ‘terrorism’ is concerned, it is unlikely that the legal interest would be anything other than ‘national security’ (so this argument becomes redundant).

A number of judicial formulations have successfully combined these elements. For example, the International Commission of Jurists (ICJ) has affirmed that “speech should be criminalised where it is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the speech and the likelihood or occurrence of such violence”.²²¹ Similarly, the US Supreme Court does not permit the criminalisation of incitement unless it can be shown that violations of the law are not only ‘imminent’, but are also likely to occur.²²² The Brandenburg test thus rejects a sliding- scale (or ‘bad tendency’) approach regardless of the magnitude of the harm.²²³

In summary, ‘terroristic speech’ should not be criminalised when the risk of harm is remote and abstract.²²⁴ Close attention must be paid to the probability threshold, requirements of temporal proximity, the gravity of the final offence, and the nature of the speech act itself. These factors play a crucial role in determining the breadth and scope of the offences relating to ‘terroristic speech’ in national law, and their absence or dilution inevitably results in the over-criminalization of speech.²²⁵ This is an area of law that must be rigorously defined, and both legislators and judicial institutions should remain acutely aware of the risks posed to freedom of speech by subjective and speculative evaluations of harm.²²⁶ In addition, offences relating to ‘terroristic speech’ should also be qualified by a requirement of specific intent, as briefly examined in the following sub-section.

2.3.3.2) Mens Rea of Speaker

Through the concept of ‘mens rea’, criminal law doctrine provides a legal basis on which to assess a speaker’s culpability.²²⁷ The ‘mens rea’ requirement varies for different offences. For

²²⁰ In this regard, some of the distinctions referred to earlier in the chapter regarding different forms of ‘political violence’ (some of which may be morally justified if resorted to in response to state repression or in self-defence) could also potentially be used to inform the gravity threshold.

²²¹ The International Commission of Jurists (ICJ): Briefing Paper: Amendment to the Framework Decision on Combating Terrorism – Provocation to Commit a Terrorist Offence. p.2

²²² *Brandenburg v Ohio*, 395 U.S. at 447

²²³ S. Masur Jonathan, *Probability Thresholds*, (2007) 92 IOWA L. REV. 1293, 1307.

²²⁴ Saul (n. 199) 884

²²⁵ Michal Buchhandler-Raphael, ‘Overcriminalizing Speech’ (2015) 36 *Cardozo Law Review*, 1667, 1725

²²⁶ Lawrence (n.106) 23

²²⁷ *Ibid* 32

example, an offence might require an intention to achieve a particular outcome, and this could be a subjective intention (i.e one that the defendant him/herself intended), or an objectively measured intention (requiring, for example, an assessment of what a reasonable person in the defendant's position could be said to have intended). Furthermore, the mens rea requirement might not be 'intention' at all, but rather a lower mens rea requirement such as 'recklessness' or 'negligence' (as to whether a particular outcome may occur), or 'knowledge' (that a particular outcome may result). As such, intention is not a requisite element of all endangerment speech crimes.²²⁸

However, both the UN Security-General and the CoE Convention on the Prevention of Terrorism have emphasized that intention should be required as an element of incitement offences.²²⁹ Similarly, the former Special Rapporteur on Counter-Terrorism and Human Rights, Martin Scheinin, argued that in addition to there being an objective danger that a terrorist act will be committed, incitement to terrorism (and related offences) should also require a subjective intention to incite the commission of a terrorist act.²³⁰ The Supreme Court in *Brandenburg v Ohio* required intention as an element of 'incitement' which is directed at producing and inciting to imminent lawless action.²³¹ Indeed, the greater the role that can be given to the speaker's subjective intention, the greater the chance of eliminating the possibility of arbitrary interferences with non-culpable expression. The requirement of specific intention to incite terrorism is especially important when offences including indirect incitement are involved.²³²

2.3.3.3) Content of Expression and Context of Expression

An assessment of content and context of expression can be viewed as integral to the questions of probability and temporal proximity of harm touched upon above.²³³ It is worth noting that, the ECtHR has often engaged in an examination of the content of speech, the states of the speaker, and the intended addressee of the message, as well as the context in which the words uttered.²³⁴ It has done so in order to objectively determine the nature of the purported danger and thus to assess the necessity and proportionality of the restrictions imposed.²³⁵ This

²²⁸ Buchhandler-Raphael (n. 225) 1733-4

²²⁹ Report of the Secretary-General, *The Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/63/337, 28 August 2008, para 61; Article 5 of the Council of Europe Convention on the Prevention of Terrorism 2005; Council of Europe Convention on the Prevention of Terrorism - Explanatory Report - [2005] COETSER 2 (16 May 2005) para 99

²³⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: *Ten areas of best practices in countering terrorism*; (A/HRC/16/51) 22 December 2010 at 30

²³¹ *Brandenburg v Ohio*, 395 U.S. at 448-9 (1969)

²³² Ronen (n. 180) 669

²³³ Williams (n. 146) 198

²³⁴ For example, *Sürek v. Turkey* (No:1) App no 26682/95 (ECtHR, 8 July 1999) para 62

²³⁵ Explanatory Report on Council of Europe Convention on the Prevention of Terrorism, 16 May 2005 para 100

evaluation of the content and context of expression will be more comprehensively analysed later in the chapter five, which focuses on ECtHR case law.

2.4) Rationales against Restricting 'Terroristic Speech'

There are a number of rationales within the free speech theory that serve to counter the impulse to restrict 'terroristic speech', noting, as previously discussed, that the latter concept is difficult to define.²³⁶ While in a non-democratic society, political dissent is repressed through criminal laws in order to protect the state and its institutions (rather than the rights of individuals), in a democratic system, criminal law should not be used to suppress political dissent or radical critiques. This final section seeks to identify the values that the right to freedom of expression serves, and to reflect upon how offences that criminalize 'terroristic speech' might ultimately undermine these values. It is structured around the four values, identified by Professor Emerson, that are served by the protection of speech: (1) "*assuring individual self-fulfilment*"; (2) "*advancing knowledge and discovering truth*"; (3) "*provid[ing] for participation in decision-making by all members of society*"; and (4) "*achieving a more adaptable and hence a more stable community, maintaining the precarious balance between healthy cleavage and necessary consensus.*"²³⁷

Firstly, Emerson described self-fulfilment as the realization of a man's or woman's character and potential in order to distinguish his/her mind. Humans have the potential to express their thoughts and emotions as communicative acts and to establish a culture as a way of life. They also have the capacity to imagine, show insight and feel, and thus to develop and find their place and meaning in life.²³⁸ This can be achieved by disclosure of information and the dissemination of ideas and opinions.²³⁹

Secondly, Mill described the search for truth by considering 'truth' as the outcome of discussion of political, moral and social affairs (rather than as a scientifically or mathematically deduced proposition).²⁴⁰ In the market place for ideas, individuals will have opportunities to test the truth of different ideas and propositions, and try to convince others of their rectitude or error. The market place -without governmental suppression- thus works to eliminate falsehood and reveal the truth.²⁴¹ As Justice Holmes argued, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."²⁴² Similarly, Schauer argues that 'the

²³⁶ D. Kretzmer, F. K. Hazan, F. E. Stiftung (Eds), *Freedom of Speech and Incitement Against Democracy* (Kluwer, 2000) 32

²³⁷ T. Emerson, *The System of Freedom of Expression* (Random House, 1976) 6-7

²³⁸ T. Emerson, 'Toward A General Theory of the First Amendment' (1963) 72 *The Yale Law Journal* 877, 879

²³⁹ Eric Barendt, 'Freedom of Speech' (UOP, second Ed, 2005) 15

²⁴⁰ *Ibid* 10

²⁴¹ Frederick Schauer, 'Facts and The First Amendment' (2010) 57 *UCLA Law Review* 897, 909

²⁴² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

marketplace of ideas' is essential for the development of human knowledge and determining which propositions get accepted or rejected within a society.²⁴³ Furthermore, as Mill argued, "we can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."²⁴⁴

Thirdly, democracy requires that all members of society participate freely in political activities and that they are free to express their own beliefs and ideas in the political debate.²⁴⁵ Democracy cannot function without the freedom to discuss government, its policies and other political ideas. Greenawalt thus views 'democracy' as a preventative tool, one that serves to protect against governmental suppression, and to ensure that the people are not misled.²⁴⁶ This happens by ensuring citizens' participation in decision-making processes.²⁴⁷ By doing so, society can constitute a check on government. As Meiklejohn said, "*the people need free speech*" *because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others.*"²⁴⁸ 'Democracy' as a rationale for protecting speech is thus closely related to the notions of self-government and collective self-determination.²⁴⁹

Lastly, an adaptable and stable community can be achieved through tolerance and pluralism. Lee Bollinger argues the definition of tolerance as "showing understanding or leniency for conduct or ideas ... conflicting with one's own".²⁵⁰ 'Tolerance' is necessary for the coexistence of different beliefs and attitudes.²⁵¹ Bollinger claims that the realisation of freedom of speech is entirely dependent on providing an organizing principle for acts of toleration. Otherwise, intolerance will simply become the main reason for governments to restrict speech.²⁵² In addition, Joseph Raz argues that the right to freedom of expression serves to validate particular ways of life, individual behaviours and experiences.²⁵³ Such validation is necessary to the development of individual identity, but can only occur when these experiences are communicated to others.²⁵⁴ Pluralism offers multiple alternative ways of life and can only be fully realized through a process of cross-cultural transmission, and mutual relations.²⁵⁵ The right to freedom of expression is placed at the heart of this process.

²⁴³ Frederick Schauer, 'Facts and The First Amendment' (2010) 57 UCLA Law Review pp.897-919, 909

²⁴⁴ J.M. Mill, On Liberty (first published 1859, Batoch Books 2001) 19

²⁴⁵ R. Calvin Massey, 'Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression' (1992) 40 UCLA Law Review 103, 118

²⁴⁶ Kent Greenawalt, 'Free Speech Justifications' (1989) 89 Columbia Law Review 119, 119

²⁴⁷ Ibid

²⁴⁸ A. Meiklejohn, 'Political Freedom' (1960) (expanded version of Meiklejohn's Free Speech (1948). P.5 see also, M. H. Redish, 'The Value of Free Speech' (1982) 130 University of Pennsylvania Law Review 591, 603

²⁴⁹ Robert Post, Equality and Autonomy in First Amendment Jurisprudence, (1997) 95 MICH. L. REV. 1517, 1532-24

²⁵⁰ Webster's Third New International Dictionary, see also, Lee Bollinger, 'The Tolerant Society' (OUP, 1986) 10

²⁵¹ Lee Bollinger, 'The Tolerant Society' (OUP, 1986) 10

²⁵² Ibid 134

²⁵³ Joseph Raz, 'Free Speech and Personal Identification' (1991) 11 Oxford Journal of Legal Studies 303, 312

²⁵⁴ Ibid

²⁵⁵ Ibid

In the light of these underlying values, one might question whether any of them justifies the protection of ‘terroristic speech’? This might be possible, for instance, with ‘the market place for ideas’. ‘The marketplace of ideas’ relies on the logic that all opinions ought to be allowed regardless of how offensive they may be.²⁵⁶ The opportunity to subject all these ideas to criticism ultimately means that better arguments will prevail.²⁵⁷ If, on the other hand, we are not able to hear and understand the views of our political adversaries, it is not possible to change their minds and convince them that they are wrong, or even to change our own behaviour to generate opposing views that turn out to be right.²⁵⁸ Justice Brandeis famously noted that

“...no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”²⁵⁹

In this regard, ‘terroristic speech’ might, in the long run, be exposed as falsehood by counter-speech (presuming that it is not first stifled by the authorities). More speech` or `counter speech` might even avert the dangers possibly caused by expression, and should be preferred over suppression given the intrinsic value of free speech. Indeed, it might be argued that the marketplace would be fundamentally impoverished if it was deprived of ‘terroristic speech’ (at least, ‘terroristic speech’ that does not incite violence that is likely to occur imminently).²⁶⁰ There might also be good ‘public interest’ reasons to protect ‘terroristic speech’.²⁶¹ Arguably, the public interest might be advanced through knowing that certain individuals hold extreme views, through hearing why they hold those views.²⁶² Barendt argues, allowing extremist speech in the market place also prevents extremist speech from being driven underground, and thus potentially operates as something of a safety-valve.²⁶³

In addition to this, Dworkin proposes a ‘rule of law’ based argument concerning the impact of hate speech bans on the legitimacy of other laws (such as anti-discrimination provisions).²⁶⁴ It is argued here that Dworkin’s point can potentially be extended to laws which criminalize ‘terroristic speech’ (at least, speech that falls short of intentional advocacy of imminent violent action). Dworkin argues that for a law’s coercive force to have political legitimacy, the decision

²⁵⁶ Sorial (n. 94) 14

²⁵⁷ Ibid 129

²⁵⁸ Saul (n. 199) 886

²⁵⁹ *Whitney v. California*, 274 U.S. 357 para 377 Brandeis, J., Concurring Opinion

²⁶⁰ *Brandenburg v Ohio* 395 US 444, 447 (1969).

²⁶¹ Eric Barendt, *Threats to Freedom of Speech in the United Kingdom?* (2005) 28/3 UASW Law Journal 895, 898

²⁶² Ibid

²⁶³ Ibid 898

²⁶⁴ Ronald Dworkin, ‘Foreword’, in Ivan Hare and James Weinstein, (eds.) *Extreme Speech* (OUP: 2009), at viii-ix.

to enact the law must have been taken in a way that affirms each individual as a responsible agent: *'the majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken.'*²⁶⁵ As such, it can be argued that the rule of law itself is undermined when it imposes criminal liability for 'terroristic speech' (widely defined): other laws which seek to enhance national security would thereby forfeit their legitimacy if overbroad laws criminalizing 'terroristic speech' were enacted. Dworkin thus defends maximum protection for all speech by suggesting that governments must be impartial and should not favour some forms of expression over others.²⁶⁶ This means that Sorial extends free speech protection equally to all groups and individuals, even to Communists, Nazis, and the Klu Klux Klan (KKK).²⁶⁷ Ultimately, he argues, interference with speech, once it is permitted, is hard to retract and easy to expand.²⁶⁸ Government is not entitled to deny freedom of speech where inflammatory effects are unclear.²⁶⁹

2.5) Conclusion

This chapter has sought to establish a foundation for the remainder of the thesis – specifically, by formulating a framework for the critical evaluation of legal responses to 'terroristic speech' in Turkey in light of regional and international standards. It has argued that the term 'terrorism' conspires against the successful attainment of a precise and clear criminal law doctrine. Since the term 'terrorism' seeks to present violence as self-evidently illegitimate, it at once renders nugatory free speech considerations (and the values that underpin freedom of speech, discussed above), and precludes any more nuanced consideration of the different categories of 'political violence' which ought properly to inform both the work of legislators and judicial scrutiny of restrictions on 'terroristic speech'. The final section of the chapter identified a number of philosophical justifications for protecting 'terroristic speech'. If there is no opportunity to hear and understand the views of our political adversaries, it will not be possible to change individuals' minds and persuade them that they are wrong, or even to generate and sharpen opposing views that might ultimately prevail. It is suggested that this rationale extends to the protection of 'terroristic speech', and should only be departed from in exceptional circumstances where inflammatory speech is intended and likely to cause imminent violence or other serious unlawful conduct.²⁷⁰ The chapter also traced the historical evolution of offences that impose criminal liability for 'terroristic speech', demonstrating how these are

²⁶⁵ Ibid at vii-viii. For Dworkin, freedom for hate speech legitimizes the enforcement of other laws that the haters oppose (for example, laws forbidding discrimination). Dworkin elaborates (at ix) only a little further about how his argument might apply beyond the specific confines of hate speech: 'we cannot make an exception for religious insult if we want [to] use law to protect the free exercise of religion in other ways'.

²⁶⁶ Ronald Dworkin, *Taking Rights Seriously: with a new appendix. a response to critics*, (Harvard University Press, 1978) 198-199

²⁶⁷ Sorial (n. 94) 52

²⁶⁸ Dworkin (n. 266) 202, 203

²⁶⁹ Ibid

²⁷⁰ *Brandenburg v Ohio* 395 US 444, 447 (1969).

both similar to, and different from, offences falling within the category of 'sedition'. Indeed, as Soriel argues, the sedition laws have simply been modernised under the guise of 'counter-terrorism', which similarly criminalises advocacy of resistance to the state and its institutions.²⁷¹ Both types of offence have tended to be broadly framed, and clearly give primacy to the protection of the State over and above the protection of individual rights.

That said, it has also been argued that not only do such enactments reflect the widely acknowledged preventive turn in criminal law, but that this preventive turn is itself underwritten by the positive obligations imposed by international human rights law (beginning with UN Security Council Resolution 1624 (2005), and then Article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism, and the Council of the European Union Framework Decision on Combating Terrorism of 28 November, 2008). Ultimately, these international instruments have encouraged national authorities to introduce new offences proscribing 'terroristic speech' (including direct and indirect incitement) notwithstanding the absence of an internationally agreed definition of 'terrorism'. These instruments have thus resulted in the criminalisation of expression because they themselves reflect and reproduce the pathologies of the 'war on terror'.

²⁷¹ Soriel (n. 174) 275

CHAPTER 3: DOCTRINAL PRINCIPLES APPLIED TO ‘TERRORISTIC SPEECH’ UNDER THE RIGHT TO FREEDOM OF EXPRESSION BY TURKISH JURISPRUDENCE, ECtHR AND UN HUMAN RIGHTS COMMITTEE

3.1) Introduction

The doctrinal framework within which restrictions on freedom of expression are scrutinized ultimately determines the scope of this fundamental right. While there are differences between the textual guarantees of freedom of expression under Article 26¹ Turkish Constitution, Article 10² ECHR, and Article 19³ ICCPR, the underlying doctrinal principles are broadly shared between the three jurisdictions. These shared principles include the requirement that restrictions have a clear and prospective legal basis, that they pursue a legitimate purpose, and that they are necessary and proportionate. These doctrinal principles serve to organise and give structure to legal reasoning. As such, they function as tools through which an appropriate balance may be struck between the right to freedom of expression and other legitimate State interests such as

¹ Article 26 of Turkish Constitution: Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing. (As amended on October 3, 2001; Act No. 4709) The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. (Repealed on October 3, 2001; Act No. 4709) Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented. (Paragraph added on October 3, 2001; Act No. 4709) The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law.

² Article 10 of ECHR: 1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³ Article 19 of ICCPR: 1) Everyone shall have the right to hold opinions without interference. 2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3) The exercise of the rights provided for in paragraph 2 of this article carries it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

the protection of national security and the maintenance of public order. This chapter analyses the importance of these principles for cases concerning ‘terroristic speech’.

The emphasis which human rights law places upon the fundamental importance of a democratic polity’s freedom of expression has been responsible for the repeal, in other jurisdictions of the offences of sedition and treason, resulting in their gradual excision from the legal lexicon. Even in Turkey, the infusion of European human rights norms into domestic free speech jurisprudence has gone some way to expanding the space for political expression.⁴ Nonetheless, as chapter two explained, a parallel development has given rise to a troubling paradox. While human rights law disfavors these archaic offences, it has, through the imposition of open-ended and widely-framed positive obligations, simultaneously paved the way for States’ enactment of a range of new offences criminalizing ‘terroristic speech’. These new offences have enabled States to increasingly silence political opposition and dissent due to its definitional imprecision.

In this light, a key concern is the lack of traction which these doctrinal principles have ultimately had in curtailing States’ invocation of the ‘counter-terrorism’ narrative. In this regard, two further fundamental principles are of note. First is the ‘margin of appreciation’ doctrine, which confirms the subsidiary role of the European Court of Human Rights. This chapter examines the way in which the margin of appreciation has served to undercut the level of scrutiny afforded by the European Court of Human Rights to restrictions introduced by States on freedom of speech in general, and ‘terroristic speech’ in particular. Second, when considering restrictions on purported ‘terroristic speech’, questions immediately arise about the extent to which it is legitimate for States to restrict speech that may challenge or undermine a particular (democratic) political order. Arguments deriving from the notion of ‘militant democracy’ (a democracy capable of defending itself) thus come to the fore.⁵ As Clive Walker has acknowledged, ‘the state has a right and a duty to take action against significant forms of terrorism’, and thus ‘should indeed be ‘militant’ in certain ways.⁶ However, too often the focus upon ‘*significant forms of terrorism*’ is widened, and militant restrictions – what John Borneman refers to as ‘belligerent legal measures’⁷ – are more indiscriminately targeted. The historical-political context inevitably informs the target of any such measures that are

⁴ See, for example, Sir Geoffrey Palmer, ‘Political Speech and Sedition’ (2009) 36; 11 and 12 Yearbook of New Zealand Jurisprudence, 36-51.

⁵ The key text on militant democracy is Karl Loewenstein, ‘Militant Democracy and Fundamental Rights’ (1937) 31 American Political Science Review 417, 638. See also, András Sajó, ‘From Militant Democracy to the Preventive State?’ (2005-2006) 27 Cardozo L. Rev. 225; P. Harvey, ‘Militant democracy and the European Convention on Human Rights’ (2004) 29 (3) European Law Review 407-420; Judith Wise, ‘Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party’ (1998) 5 U. Chi. L. Sch. Roundtable 301; Bill Bowring, ‘Negating pluralist democracy: The European Court of Human Rights Forgets the Rights of Electors’ (2007) 11 KHRP Legal Review 67

⁶ Clive Walker, ‘Militant Speech about Terrorism in a Smart Militant Democracy’ 80(4) Mississippi Law Journal, 1395, at 1396-7.

⁷ John Borneman, ‘Settling Accounts: Violence, Justice, and Accountability in Post-socialist Europe’ (Princeton: Princeton University Press, 1997) 53.

introduced. In the case of Turkey, this context is defined predominantly by the long-running, and frequently violent, mobilization for Kurdish independence struggle by the PKK. The concept of militant democracy implies that States may legitimately impose restrictions on activities considered to promote undemocratic ends. As Professor András Sajó noted, ‘militant democracy’ serves as a kind of ‘precautionary legality’ – one that prioritizes risk aversion and self-preservation in the face of incalculable harms.⁸ While the concept of militant democracy has rarely been expressly acknowledged in the Strasbourg court’s jurisprudence (and only then in cases concerning the dissolution of political parties),⁹ it is at least arguable that it operates at the national level as a tacit norm – as an unspoken background principle, harnessed putatively in the defence of ‘an effective political democracy’¹⁰ – in cases involving restrictions on ‘terroristic speech.’

This chapter therefore aims to explore the doctrinal principles relied upon within these different national and supra-national legal systems. It also provides a comparative overview of how these principles have impacted upon the protection of the right to freedom of expression. Section 2.1 explores the scope of the right to freedom of expression, and section 2.2 elaborates further on the interpretation of the following doctrinal principles – ‘prescribed by law’, ‘legitimate aims’, ‘democratic necessity’ and ‘proportionality’. In section 2.3, the concepts that have served to diminish the protection of freedom of speech – the ‘margin of appreciation’, and ‘militant democracy’ are analysed.

3.2) The Right to Freedom of Expression

The value that human rights law places upon the fundamental importance of freedom of expression to a democratic polity has been responsible for the repeal in other jurisdictions of the offences of sedition and treason. This has resulted in their gradual disuse and disappearance, in the national, regional and international legal context. Freedom of expression has been widely expounded in this, the human rights era, as a fundamental right within a democratic polity. The scope of the right to freedom of expression, set forth under the ECHR and ICCPR, covers a wide range of subject matter, including among others commercial, artistic, political, academic and religious arenas. As this right extends to the freedom both to receive and impart information and ideas, this provides us all with the opportunity to participate in the public exchange of cultural, political and social information and ideas of all kinds.¹¹ This exchange process is critical for democratic society and as such it might require a state to

⁸ András Sajó, ‘Militant Democracy and Transition towards Democracy’ in András Sajó (ed.) *Militant Democracy* (Eleven International Publishing, 2004) 209, 211-212, drawing on Lowenstein’s discussion of the threat to democracy presented by emotional populism.

⁹ *Herri Batasuna v. Spain*, Application nos 25803/04 and 25817/04, (ECtHR, 30 June 2009)

¹⁰ Preamble to the ECHR;

¹¹ *Alinak v. Turkey* App no. 40287/98 (ECtHR, 29 March 2005) para 42; see also in *The Judgment of Republic of Turkey Constitutional Court*, App no: 2013/2602, 23/1/2014 para 40

facilitate the enjoyment of the right.¹² On an individual level, freedom of expression is also an essential condition for the full development of the person, which in turn constitutes the foundation stone for every free and democratic society.¹³ These human rights conventions are important for national authorities accepting their positive obligations as commitments. As the European Court has highlighted:

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.”¹⁴

Likewise, the right to freedom of expression under Article 19 of ICCPR consists of three elements: "(a) the right to hold opinions without interference; (b) the right to seek and receive information and the right of access to information; and (c) the right to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice."¹⁵ More importantly, freedom to publicly criticise and evaluate one's governments without fear of interference or punishment falls under the protection of the right of freedom of expression.¹⁶ Additionally, the European Court gives more weight to political criticism and debate as being in the public interest. Criticism can even be provocative or insulting or involve serious allegations against public authorities.¹⁷ In this regard, the ECtHR noted that

“... the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician...the dominant position which a

¹² Alınak v. Turkey App no. 40287/98 (ECtHR, 29 March 2005) para 42; see also in The Judgment of Republic of Turkey Constitutional Court, App no: 2013/2602, 23/1/2014 para 41

¹³ General Comment No. 34 (2011) on Article 19, para. 2; Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40, vol. I (A/66/40 (Vol. I), annex V. see also Komarovskiy v. Belarus Communication, CCPR/C/109/D/1839/2008 at 9.3, see also, Mecheslav Gryb v. Belarus, CCPR/C/103/D/1316/2004 (Human Rights Committee, Communication 2011-10-26) para 13.3; Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 8.10

¹⁴ Handyside v the United Kingdom App no 5493/72 (ECtHR, 7 December 1976) para 46

¹⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue (A/HRC/14/23) 20 April 2000 at 26, see also in, Avon Lovell v. Australia, CCPR/C/80/D/920/2000, (Human Rights Committee, Communication 2004-03-24) para 9.2; Kim Jong-Cheol v. the Republic of Korea, CCPR/C/84/D/968/2001, (Human Rights Committee, Communication 2005-07-27) para 8.2

¹⁶ Aduayom et al. v. Togo, 422/1990, 423/1990 and 424/1990, (Human Rights Committee, Communication 1996-07-12) para 7.4; Rafael Marques de Morais v. Angola, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29) para 6.2

¹⁷ Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000) para 61

*government occupies makes it necessary for it to display restraint in resorting to criminal proceedings*¹⁸

However, the right to freedom of expression can be restricted by state parties on the grounds that the rights or interests of other persons or of the community as a whole might be compromised. The Court sets the principle that although “*freedom of expression may be subject to exceptions*”; they “*must be narrowly interpreted*” and “*the necessity for any restrictions must be convincingly established*”.¹⁹ This is an accepted view of the Committee. Freedom of expression is not an absolute right and the exercise of the right to freedom of expression incurs certain special duties and responsibilities.²⁰ At the same time, any restrictions on freedom of expression must conform to strict tests of necessity and proportionality;²¹ they must seek to achieve one of the aims for which they were prescribed in article 19 paragraph 3, and must also be directly related to the specific necessity on which the restriction is predicated.²² It is crucial to establish a fine tune balance between the interest of freedom of expression and other rights.

3.2.1) The Right to Freedom of Press

Another principle asserted by the European Court is that the duties and responsibilities of the media play an essential role in the functioning of political democracy. The press plays a most

¹⁸ Castells v Spain App no 11798/85 (ECtHR, 23 April 1992) para 46; Şener v. Turkey App no 26680/95 (ECtHR, 18 July 2000) para 40; İncal v. Turkey, App no 41/1997/825/1031 (ECtHR, 9 June 1998) para 54

¹⁹ Şener v. Turkey App no 26680/95 (ECtHR, 18 July 2000) para 39

²⁰ Human Rights Instruments Volume I; Complaint of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.9 (Vol. I) 27 May 2008 p.182; see also Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.2; Vladimir Velichkin v. Belarus, CCPR/C/85/D/1022/2001 (Human Rights Committee, Communication 2005-10-20) para 7.3; Viktor Korneenko v. Belarus, CCPR/C/95/D/1553/2007 (Human Rights Committee, Communication 2009-03-20) para 8.3; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

²¹ The Committee’s general comment No. 34 (2011) on freedoms of opinion and expression, para. 22, Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40, vol. I (A/66/40 (Vol. I)), annex V ; see also, Human Rights Instruments Volume I; Complaint of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.9 (Vol. I) 27 May 2008 p.182; Maria Tulzhenkova v. Belarus, CCPR/C/103/D/1838/2008 (Human Rights Committee, Communication 2011-10-30) para 9.2; Komarovskiy v. Belarus, CCPR/C/109/D/1839/2008 (Human Rights Committee, Communication 2013-10-25) para 9.3; Denis Turchenyak v. Belarus, CCPR/C/108/D/1948/2010 (Human Rights Committee, Communication 2013-07-24) para 7.7; Galina Youbko v. Belarus, CCPR/C/110/D/1903/2009 (Human Rights Committee, Communication 2014-03-17) para 9.3

²² The Committee’s general comment No. 34 (2011) on freedoms of opinion and expression, para. 22, Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40, vol. I (A/66/40 (Vol. I)), annex V ; see also, Human Rights Instruments Volume I; Complaint of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.9 (Vol. I) 27 May 2008 p.182; Leonid Sudalenko v. Belarus, CCPR/C/104/1750/2008, (Human Rights Committee, Communication 2012-03-14) para 9.3; Syargei Belyazeka v. Belarus, CCPR/C/104/D/1772/2008, (Human Rights Committee, Communication 2012-03-26) para 11.4; Vladimir Schumilin v. Belarus, CCPR/C/105/D/1784/2008, (Human Rights Committee, Communication 2012-07-23) para 9.3; Vladimir Katsora v. Belarus, CCPR/C/106/D/1836/2008, (Human Rights Committee, Communication 2012-10-24) para 7.3; Antonina Pivonos v. Belarus, CCPR/C/106/D/1830/2008, (Human Rights Committee, Communication 2012-10-29) para 9.2; Alexander Protsko and Andrei Tolchin v. Belarus, CCPR/C/109/D/1919-1920/2009 (Human Rights Committee, Communication 2013-12-2) para 7.3

important “public watchdog” role by reporting news,²³. For that reason, journalists should not be penalized simply for carrying out their legitimate professional duties and tasks, even reporting on acts of terrorism.²⁴ States should also protect journalists from any kind of attack such as threats, intimidation, arbitrary arrest, torture, threat to life and killing because of their professional activities.²⁵ The right to freedom of press covers not only imparting information and ideas but also receiving them.²⁶ The press is in charge of discovering, forming and shaping opinions, ideas and attitudes in politics and politicians,²⁷ including divisive ones. This function can be maintained not only by the media or professional journalists, but also by public associations or private individuals.²⁸ Thus the free communication of information and ideas regarding public and political issues are essential for individuals to participate fully and properly in public affairs and to use their right to vote, both of which are at the core of democracy.²⁹ It means that the freedom to publish political material, to campaign for election and to advertise political ideas must be free and without censorship or restraint, and individuals must be able to engage in political activity individually or through political parties and other organizations so as to debate public issues, to organise peaceful protest and to run a campaign for election.³⁰

Additionally, the European Court considers that a prior restraint on publication is a danger for free press because *“news is a perishable commodity and to delay its publication, even for a short time may well deprive it of all its value and interest”*.³¹ In this regard, the European Court noted in the case of *Ürper* that banning the future publication of periodicals was not ‘necessary in a democratic society’ and that this could be regarded as censorship of the press.³² However, the Court noted that *“prior restraints may be more readily justified in cases which demonstrate no ‘pressing social need’ for immediate publication and in which there is no obvious contribution*

²³ *Jersild v. Denmark* App no 15890/89 (ECtHR, 23/09/1994) para 31; see also *Saygılı and Falakaoğlu v. Turkey* Application no. 39457/03 (ECtHR, 21/01/2009) para 23

²⁴ Human Rights Committee, General Comments 34 (102nd Session, 2011, Geneva) at 46

²⁵ *Ibid* at 23

²⁶ *Jersild v. Denmark* App no 15890/89 (ECtHR, 23/09/1994) para 31; *Linges v Austria* App no 9815/82 (EComHR Decision, 8 July 1986) para 41; *Nurbek Toktakunov v. Kyrgyzstan*, CCPR/C/101/D/1470/2006, (Human Rights Committee, Communication 2011-03-28) para 7.4; *Mavlonov and Sa’di v. Uzbekistan*, CCPR/C/95/D/1334/2004, (Human Rights Committee, Communication 2009-03-19) para 8.4; *Gauthier v. Canada*, CCPR/C/65/D/633/1995 (Human Rights Committee, Communication 1999-3-7) para 13.4

²⁷ *Linges v Austria* App no 9815/82 (EComHR Decision, 8 July 1986) para 41, see also *Şener v. Turkey* App no 26680/95 (ECtHR, 18 July 2000) para 42; *Sürek v. Turkey* (no. 3) App no 24735/94 (ECtHR, 8 July 1999) para 38

²⁸ *Nurbek Toktakunov v. Kyrgyzstan*, CCPR/C/101/D/1470/2006, (Human Rights Committee, Communication 2011-03-28) para 7.4; *Gauthier v. Canada*, CCPR/C/65/D/633/1995 (Human Rights Committee, Communication 1999-3-7) para 13.5

²⁹ CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), CCPR/C/21/Rev.1/ADd.7, 12 July 1996 para 25; see also, *Viktor Korneenko v. Belarus*, CCPR/C/95/D/1553/2007 (Human Rights Committee, Communication 2009-03-20) para 8.4; *Gauthier v. Canada*, CCPR/C/65/D/633/1995 (Human Rights Committee, Communication 1999-3-7) para 13.4

³⁰ CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), CCPR/C/21/Rev.1/ADd.7, 12 July 1996, para 19

³¹ *Observer and Guardian v. UK* App no 13585/88 (ECtHR, 26 November 1991) para 60

³² *Ürper and Others v. Turkey* App nos 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07 (ECtHR, 20/01/2010) para 44

to a debate of general public interest."³³ The bounds are set for the press not to transgress or usurp crucial State interests such as national security or territorial integrity, prevention of terrorism or the prevention of disorder or crime.³⁴ For instance, in the case of Saygılı and Falakaoğlu, the Court approved the national authorities' three-day ban on publication due to its content which was thought capable of inciting violence in the prisons, especially at a time when serious disturbances between the security forces and detainees had taken place in several prisons.³⁵ The press is expected to act based on their 'duties and responsibilities' in situations of conflict and tension by ensuring that their publication does not contain information that incites violence or that can be turned into or disseminated as an instrument of propaganda for terrorist organisations or a call for violence.³⁶

That said, in order for us fully to enjoy the right to freedom of expression as a fundamental right in a democratic society, particularly (but not exclusively) for its instrumental contributions to the marketplace of ideas and collective self-government, public authorities need either to provide or facilitate the provision of a wider communicative space for individuals and public to exercise their right to freedom of speech. This must include removing from the statute book, or limiting the ambit of, such vague and unclear offences as sedition. What we shall see in subsequent chapters is that while this has occurred in many states, the period since 2001 in particular, has witnessed the creation and rise of offences that are as vague and as unclear as sedition (and quite possibly more so), in the guise of 'terroristic speech'. Thus, as the public sphere has expanded in one direction by a lessening of restrictions on freedom of expression so it has also shrunk in another. The remainder of this thesis will identify and plot these developments. For now, we need to look in more detail at the approach by the European Court and Human Rights Committee has taken to the right to freedom of expression.

3.3) The Doctrinal Principles under the Scope of the Right to Freedom of Expression

The ECtHR and the Human Rights Committee, through their jurisdiction, have established doctrinal principles on freedom of expression. These doctrinal categories may be considered as general interpretations of article 10 of ECHR and article 19 of ICCPR when adjudicating on individual applications or communications. Although the ECtHR and the Human Rights Committee share many principles in freedom of expression cases, there are some differences between these two in their application of these doctrinal categories. The Turkish Constitutional Court has adopted these doctrinal principles into its own jurisdiction, since the right to

³³ Mosley v. UK App no: 48009/08 (ECtHR, 15/09/2011) para 117

³⁴ Jersild v. Denmark App no 15890/89 (ECtHR, 23/09/1994) para 31; Linges v Austria App no 9815/82 (EComHR Decision, 8 July 1986) para 41

³⁵ Saygılı Saygılı and Falakaoğlu v. Turkey (no. 2) App no. 38991/02 (ECtHR, 17/05/2009) para 28

³⁶ Şener v. Turkey App no 26680/95 (ECtHR, 18 July 2000) para 41

individual application to the Turkish Constitutional Court was introduced in 2010.³⁷ The European Court has formulated the following framework by which to examine, and to assess, the lawfulness of any interference. 1) 'Prescribed by law' means that interference must have some basis in national law, the law must be adequately accessible by citizens, and the law must be sufficiently foreseeable,³⁸ 2) 'legitimate aim' means that the restriction should seek to achieve the aims listed in the common limitation clauses in the legal texts,³⁹ 3) 'necessity in a democratic society' implies that the relation between interference and its aim must be legitimate, and that there be a rational connection between the two. This legitimate reason for interference must find 'democracy' and 'necessity' compounded.⁴⁰ The existence of a 'pressing social need' is implied here, but it goes hand in hand with European supervision to provide a certain margin of appreciation in assessing whether such a need exists.⁴¹ This three-stage assessment test constitutes a very open-ended method by which the Court seeks to balance the competing individual right and the collective interest on a case-by-case basis.⁴² In other words, the Court takes the circumstances of each case into consideration, so the result of the case may be unpredictable for further implementation.⁴³ While its individual application may be uncertain, the European Court implements the Convention with a uniform measure of proportionality while examining the democratic necessity of the interference. It is also important to highlight that in examining the proportionality of particular measures, the Court seeks to answer the question of whether there is an alternative means of protecting the relevant public interest without any interference with the exercise of the right, or where the interference is (significantly) less.⁴⁴ This is also strongly connected to protecting and sustaining the values of democracy, and the exercise of freedom of expression. These are the doctrinal principles applied in the relevant cases whether that be for assessing offences of sedition or 'terroristic speech'. Let us now turn to exploring each of those doctrinal categories.

³⁷ See for examples: The Constitutional Court, App No: 2012/1184, 16/7/2014 para 26; The Constitutional Court (App No: 2013/409) 25/6/2014 para 55; The Constitutional Court (App No: 2013/1461), 12/11/2014 para 50; The Constitutional Court, App No: 2014/3986, 2/4/2014, para 43

³⁸ *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979) paras 46-49;

³⁹ Legitimate purposes (limitation clauses) are specified in Article 10 of the Convention: national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others, the protection of public order, the protection of territorial integrity, the protection of the reputation of others, the prevention of the disclosure of information received in confidence, and the maintenance of the authority and impartiality of the judiciary.

⁴⁰ Gerhard van der Schyff, 'Limitation of Rights: A Study of the European Convention and the South African Bill of Rights' (Nijmegen, Wolf Legal Publishers, 2005) 196, 172, see also Stefan Sottiaux, 'Terrorism and the Limitations of Rights: the ECHR and the US Constitution' (Hart Publishing, 2008) 44

⁴¹ *Observer and Guardian v. UK* App no 13585/88 (ECtHR, 26 November 1991) para 59

⁴² Schyff (n. 40) 213, see also Sottiaux (n.40) 46

⁴³ Steven Greer, 'The Exceptions to Articles 8 to 11 of the European Convention on Human Rights' (Strasbourg, Council of Europe, 1997) 42; *The Sunday Times v. the United Kingdom* (no. 2) App no 13166/87 (ECtHR, 26 November 1991) para 50

⁴⁴ Philip Leach, *Taking a Case to the European Court of Human Rights*, (Oxford, Second Ed. 2005) 163

3.3.1) Prescribed by law

Many laws are legislated to some extent vaguely, and their interpretation and application depend on their practice.⁴⁵ Yet state authorities are responsible for ensuring that vague terms are not used when imposing interference with freedom of expression as to do so would constitute a violation.⁴⁶ The `prescribed by law` test is an important step to move forward on to the further assessment of the case in question. If the conviction and sentence of the applicant were not prescribed by law, then the European Court does not apply further doctrinal categories.⁴⁷ The `prescribed by law` test has two requirements: first, the act representing the interference must have a legal basis grounded in national law in the form of legislation or case-law; second, that law must be publicly accessible and sufficiently precise for citizens both to assess whether or not their conduct would breach the law, and to understand what the consequences of any such breach would be.⁴⁸ However, this is not necessary for the consequences, since for the law to cause consequences to be foreseeable with absolute certainty *“may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances”*.⁴⁹

The Human Rights Committee decrees that any restriction on the right to freedom of expression must cumulatively meet the following conditions. It must be provided by law, it must address one of the aims set out in paragraph 3 of article 19, and it must be necessary to achieve one of these legitimate purposes.⁵⁰ The law imposing restrictions or limitations must be clear, accessible and unambiguous so as to be understood by everyone.⁵¹ It must not be used in arbitrary or unreasonable ways, and as political censorship, or for silencing criticism of public officials or public policies.⁵² If any interference is based on administrative provisions, it prima

⁴⁵ The Sunday Times v UK App no 6538/74 (ECtHR, 26 April 1979) para 49

⁴⁶ Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis (1005th meeting – 26 September 2007) para V/19

⁴⁷ Ünsal Öztürk v. Turkey (Application no. 29365/95) 4 October 2005 at 63

⁴⁸ The Sunday Times v UK App no 6538/74 (ECtHR, 26 April 1979) para 49; see also Silver and Others v. UK App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR, 25 March 1983) para 86; The Sunday Times v UK App no 6538/74 (ECtHR, 26 April 1979) para 49; see also Association Ekin v. France App no 39288/98 (17 July 2001) para 44

⁴⁹ The Sunday Times v UK App no 6538/74 (ECtHR, 26 April 1979) para 49

⁵⁰ Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.2; Avon Lovell v. Australia, CCPR/C/80/D/920/2000, (Human Rights Committee, Communication 2004-03-24) para 9.3; Leonid Sudalenko v. Belarus, CCPR/C/104/1750/2008, (Human Rights Committee, Communication 2012-03-14) para 7.2 see also, Report of the Special Rapporteur, Mr. Abid Hussain, on the Promotion and protection of the right to freedom of opinion and expression; (E/CN.4/1995/32) 14 December 1994 para 41; Rafael Marques de Morais v. Angola, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29) para 6.8; Kim Jong-Cheol v. the Republic of Korea, CCPR/C/84/D/968/2001, (Human Rights Committee, Communication 2005-07-27) para 8.2; Shchetko v. Belarus, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.3; Viktor Korneenko v. Belarus, CCPR/C/95/D/1553/2007 (Human Rights Committee, Communication 2009-03-20) para 8.3; Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights: Annex, UN Doc E/CN.4/1984/4 (1984) at 5

⁵¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue (A/HRC/14/23) 20 April 2000 at 79

⁵² Ibid at 79

facie violates article 19.⁵³ Additionally, in order to prevent misuse or legal discretion, the law must specify the scope of any discretion conferred on the authorities with sufficient clarity, having regard for the legitimate aim of the interference in question, to provide adequate protection for the individual against arbitrary interference.⁵⁴

The European Court and the Committee have found, in the majority of cases, that most national laws related to sedition and 'terroristic speech' offences fulfil compliance with the requirement of foreseeability, certainty and accessibility, and restrictions are thus prescribed by law. The European Court has avoided opening discussion on cases which are said to be not 'prescribed by law', even though some applicants claimed that the law failed, to define with sufficient clarity, the constituent elements of the relevant offence.⁵⁵ It can be claimed that the Committee is more in favour of applying a necessity test as to whether a restriction serves one of the legitimate aims.⁵⁶ The Committee often observes that requirements for publications set out under national law, press law etc., are generally in compliance with the Covenant and are 'provided by law'.⁵⁷ Yet the individual opinion of Committee member Lallah highlights that systematic violation of freedom of expression should be addressed in the views, to encourage the state party to adopt legislation in pursuance of the Covenant.⁵⁸ Lallah stated that faulty legislation has become the main source of certain violations.⁵⁹ As a result, the Committee suggested the state party should review the legislation, that was the source of the restriction, for compliance with article 19.⁶⁰ This would be considered as an alternative way of examining the legislation. For instance, the Committee noted in its concluding observation of Belarus that the Belarusian authorities have broad executive discretion without judicial control,⁶¹ a matter was not as yet really open in discussion by the Committee in its jurisprudence, even though state parties are under a legal obligation to respect the Covenant rights and to ensure them to all individuals in their jurisdiction.⁶²

⁵³ Report of the Special Rapporteur, Mr. Abid Hussain, on the Promotion and protection of the right to freedom of opinion and expression; (E/CN.4/1995/32) 14 December 1994 para 42

⁵⁴ *Al Nashif v. Bulgaria* App no 50963/99, (ECtHR, 20/06/2002) para 119

⁵⁵ See for example; *Erdoğdu and İnce v. Turkey* App no 25067/94 and 25068/94 (ECtHR, 8 July 1999) para 44

⁵⁶ The Committee refers to the author's claim regarding the sanction were unlawful. The Committee preferred to apply necessity test rather than examining whether the restriction is lawful or not. see in; *Leonid Sudalenko v. Belarus*, Communication, CCPR/C/104/1750/2008, 3 May 2012, at 9.5; *Syargei Belyazeka v. Belarus*, Communication, CCPR/C/104/D/1772/2008, 6 June 2012, at 11.5

⁵⁷ *Marques de Morais v. Angola*, Communication, CCPR/C/83/D/1128/2002, 18 April 2005 at 6.8

⁵⁸ Individual opinion of Committee member, Mr. Rajsoomer Lallah (concurring) at *Maria Tulzhenkova v. Belarus*, CCPR/C/103/D/1838/2008 (Human Rights Committee, Communication 2011-10-30)

⁵⁹ *Ibid*

⁶⁰ *Sergei Govsha, Viktor Syritsa and Viktor Mezyak v. Belarus*, CCPR/C/105/D/1790/2008 (Human Rights Committee, Communication 2012-07-27) para 11

⁶¹ Concluding observations of the Human Rights Committee on Belarus (CCPR/C/79/Add.86) 19 November 1997 para 7

⁶² Human Rights Committee's General Comment 31 (2004), Nature of the General Legal Obligation on States Parties to the Covenant, (CCPR/C/21/Rev.1/Add.13); Article 2 of ICCPR

The European Court gives limited judicial or administrative discretion to national authorities when considering whether or not the legal basis fails to be 'accessible' and 'foreseeable'.⁶³ It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power.⁶⁴ The European Court is rather more comfortable with disapproving ministerial/administrative orders on broadcasting/publication by checking whether an applicant's conviction is 'prescribed by law'. In a number of cases, the Court found that orders by Turkish ministerial or administrative bodies, such as a ban on the circulation and distribution of a newspaper were drafted in very broad terms and gave wide discretion to these bodies.⁶⁵ This is because the executive order was made without judicial scrutiny and without any justification.⁶⁶ In the case of *Association Ekin v. France*, the Court found that the applicant was not able to foresee the consequence of his publication because the domestic court revised its case law in this case and widened its assessment on the basis of ministerial decisions entitled to the law.⁶⁷ At the same time, the section of law contained very wide terms and provided a broad range of discretion for administrative authority to impose administrative bans on foreign publications and publications written in a foreign language.⁶⁸ As a result, it was suggested that the ban should have been subjected to judicial scrutiny with detailed reasoning otherwise the decision would be open to various interpretations and attributed to a unilateral discretionary act.⁶⁹ Nevertheless, European case law is not entirely consistent. The Commission was convinced that the ministerial directions given by British and Irish authorities in 1988-1989 on direct appearances of representatives or supporters of para-military organisations and their political wings on TV and Radio, was approved as 'prescribed by law' due to the foreseeability of the executive decision.⁷⁰ This indicates that some administrative decisions might meet the requirements of 'prescribed by law', if they are formulated with sufficient precision to enable persons to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁷¹ The order here to refrain from broadcasting certain matters, was given solely on the basis of the applicant's "opinion that the broadcasting of a particular matter or any matter of a particular class would be likely to promote, or to incite crime or would tend to undermine the authority of the State".⁷² While restrictions in British-Irish cases met sufficient precision of the administrative order, restrictions in French and Turkish cases above did not fulfil the

⁶³ *Al Nashif v. Bulgaria* App no 50963/99, 20/06/2002 at 118

⁶⁴ *Ibid* at 119

⁶⁵ *Fevzi Saygılı v. Turkey* App no 74243/01 (ECtHR, 8 January 2008) para 30; see also *Çetin and Others v. Turkey* App nos 40153/98 and 40160/98 (ECtHR, 13 February 2003) paras 10, 13

⁶⁶ *Fevzi Saygılı v. Turkey* App no 74243/01 (ECtHR, 8 January 2008) para 30

⁶⁷ *Association Ekin v. France* App no 39288/98 (17 July 2001) para 46

⁶⁸ *Ibid* para 58

⁶⁹ *Çetin and Others v. Turkey* App nos 40153/98 and 40160/98 (ECtHR, 13 February 2003) paras 63,66

⁷⁰ *Purcell and others v Ireland* App no 15404/89 (EComHR Decision, 16 April 1991) p.12; *Brind and Others v. The UK* App no 18714/91 (EComHR Decision, 09/05/1994) p.7-8; *McLaughlin v. the UK* App no 18759/91 (EComHR Decision, 09/05/1994) p.8-9

⁷¹ *Ibid*

⁷² *Purcell and others v Ireland* App no 15404/89 (EComHR Decision, 16 April 1991) p.12

requirement of foreseeability.⁷³ Such administrative prior restraints might not be compatible with the Convention but it is more important to have strict control over the scope of bans and enhance effective judicial review to avoid any misuse of power.⁷⁴

3.3.2) Legitimate Aims

Turning now to the second stage of the analytical framework, when a state body interferes with expression, it must justify this by reference to one of the legitimate purposes set out under article 19(3) of ICCPR, article 10(2) of ECHR or article 26(2) of the Turkish Constitution, showing that the restriction was necessary.⁷⁵ Permissible limitations and restrictions on the exercise of freedom of expression must be an exception and kept to the minimum necessary to pursue the legitimate aim of protecting other rights set forth under the Covenant.⁷⁶ In cases where a state party fails to justify requirements and measures taken with a legitimate aim, the Committee deems such interference as a violation of freedom of expression.⁷⁷ In the case of *Laptsevich v. Belarus*, the author was charged with failing to register his publication with the administrative authorities to obtain index and registration number.⁷⁸ Yet, the Committee noted that State party did not explain why this registration was necessary for one of the legitimate purposes.⁷⁹ Another instance is that the state party failed to justify prosecution and conviction of the author on charges of criminal insult, something said to be necessary for protection of the rights and reputation of domain political figure.⁸⁰ The state party convicted the author for encouraging voters to boycott elections, without explaining how the interference could support or sustain any legitimate aim.⁸¹ The Committee highlighted specifically that intimidation and coercion imposed by the author to call voters to boycott elections would be a justifiable explanation for the interference.⁸² Yet here, the boycott was called without intimidation and coercion and thus

⁷³ *Association Ekin v. France* App no 39288/98 (17 July 2001) para 46

⁷⁴ *Ibid* para 58

⁷⁵ *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights: Annex*, UN Doc E/CN.4/1984/4 (1984) at 10

⁷⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue (A/HRC/14/23) 20 April 2000 at 77

⁷⁷ *Marques de Morais v. Angola*, Communication, CCPR/C/83/D/1128/2002, 18 April 2005 at 6.8; *Leonid Sudalenko v. Belarus*, Communication, CCPR/C/104/1750/2008, 3 May 2012, at 9.5; *Kim vs. the Republic of Korea*, Communication No. 574/1994, 3 November 1998, see also, *Park vs. the Republic of Korea*, No. 628/1995, 20 October 1998, see also, *Vladimir Petrovich Laptsevich v. Belarus*, CCPR/C/68/D/780/1997 (Human Rights Committee, Communication 2000-03-20) para 8.2; *Vladimir Velichkin v. Belarus*, CCPR/C/85/D/1022/2001 (Human Rights Committee, Communication 2005-10-20) para 7.3; *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.3; *Viktor Korneenko v. Belarus*, CCPR/C/95/D/1553/2007 (Human Rights Committee, Communication 2009-03-20) para 8.3; *Syargei Belyazeka v. Belarus*, CCPR/C/104/D/1772/2008, (Human Rights Committee, Communication 2012-03-26) para 11.6

⁷⁸ *Vladimir Petrovich Laptsevich v. Belarus*, CCPR/C/68/D/780/1997 (Human Rights Committee, Communication 2000-03-20) para 8.5

⁷⁹ *Ibid*

⁸⁰ *Zeljko Bodrožić v. Serbia and Montenegro*, CCPR/C/85/D/1180/2003 (Human Rights Committee, Communication 2005-10-31) para 7.2

⁸¹ *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.5

⁸² *Ibid* para 7.4; see also in, *The Committee's General Comment No. 25 (1996): Article 25 (Participation in Public Affairs and the Right to Vote)*, (CCPR/C/21/Rev.1/Add.7) para 19

it fell under the protection of article 19.⁸³ In a different communication, the Committee noted that lawful measures taken against a call for a hunger strike could be considered as trying to secure the health and safety of prisoners including young children, one of the legitimate aims listed under article 19(3).⁸⁴ The measures taken against the applicants must be justified with reference to one or more aims specified by public authorities. Yet the Committee noted that invoking these laws to censure or to limit the public information of legitimate public interest, or to prosecute journalists, activists or human rights defenders who disseminate information, are not at all compatible with restriction clauses.⁸⁵ In this regard, state parties must apply the strict requirement test of the legitimate aims for article 19 in national security provisions, (including treason and sedition laws).⁸⁶ This, as we shall see, has led to a limiting of the 'bite' of such laws, only for them to be replaced by even broader and less precise measures relating to 'terroristic speech'.

In some cases, the European Court did not consider 'particular aim', which was presumed by the government to be a legitimate aim, as one of the legitimate aims set forth under the Convention. An example is the *Erdođdu and İnce* case in which the government legitimized the interference with expression citing of 'national unity'.⁸⁷ But the European Court did not count it as one of the legitimate aims. Rather, the national authorities claimed to interfere with applicant's expression aiming furtherance of certain of the legitimate aims (protection of national security, territorial integrity and the prevention of disorder and crime).⁸⁸ For that reason, the national authorities may justify restrictions on freedom of expression with only a legitimate aim set forth under these human rights conventions.

3.3.3) Democratic Necessity

An effective political democracy as a fundamental purpose of the European Convention is a critical element of the European Court's judicial reasoning. A 'democratic society' is one that relies on the rule of law and permits the expression of political ideas which question the existing order where their realisation is advocated only by peaceful means.⁸⁹ There must be proper

⁸³ *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.5

⁸⁴ *Omar Sharif Baban v. Australia*, CCPR/C/78/D/1014/2001 (Human Rights Committee, Communication 2003-08-06) para 6.7

⁸⁵ The Committee's general comment No. 34 (2011) on Freedoms of Opinion and Expression (CCPR/C/GC/34) para 30; see also, Concluding observations of the Human Rights Committee on Hong Kong (CCPR/C/HKG/CO/2) 21 April 2006 para 21, 22

⁸⁶ The Committee's general comment No. 34, para 30

⁸⁷ *Erdođdu and İnce v. Turkey* App no 25067/94 and 25068/94 (ECtHR, 8 July 1999) para 41; *Karatas v. Turkey* App no 23168/94 (ECtHR, 8 July 1999) para 41; *Başkaya and Okçuođlu v. Turkey* App no 23536/94 and 24408/94 (ECtHR, 8 July 1999) para 54; *Sürek v. Turkey* (no. 4) App no 24762/94 (ECtHR, 8 July 1999) para 47; *Gerger v. Turkey* App no 24919/94 (ECtHR, 8 July 1999) para 41; *Arslan v. Turkey* App no 23462/94 (ECtHR, 8 July 1999) para 39; *Koç and Tambaş v. Turkey* App no 50934/99 (ECtHR, 21/06/2006) parat 31

⁸⁸ *Erdođdu and İnce v. Turkey* App no 25067/94 and 25068/94 (ECtHR, 8 July 1999) para 43; see also *Jacobs, White and Ovey*, *The European Convention on Human Rights* (Oxford, Fifth Ed. 2010) p.318

⁸⁹ *Eđitim ve Bilim Emekçileri Sendikası v. Turkey* App no. 20641/05 (ECtHR, 25 September 2012) para 70; see also *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* App no 29221/95 and 29225/95 (ECtHR, 2 October 2001) para 97

channels and opportunities for people to exercise the right to freedom of expression through the use of the right to freedom of association. It also requires internalizing pluralism, tolerance and social cohesion.⁹⁰ Accordingly, for a state to succeed in its claim that restrictions are based on their necessity in a democratic society, it must be shown that the restrictions are more than simply “useful”, “reasonable” or “desirable”.⁹¹ It is essential for the state to show that the interference fulfils a “pressing social need” and that it is proportionate to the legitimate aim being pursued in all the circumstances.⁹²

In contrast, to the ECtHR, the Committee has rarely stated that an interference is required to be a necessary measure in a democratic society in its jurisprudence.⁹³ In the case law of article 19, it must be shown of any restriction cumulatively that 1) it must be provided by law, and 2) it must address one of the legitimate aims and 3) it must be necessary to achieve one of these legitimate purposes.⁹⁴ The Committee did not note in any of its cases regarding article 19 that restrictions must be necessary, in a democratic society, as one of the conditions for restricting the right to freedom of expression.⁹⁵ The Committee emphasised the importance of democratic society without taking it as a conditional element of a restriction to the right to freedom of expression.⁹⁶ Thus, individuals must be free to receive information about alternatives to

⁹⁰ *Eğitim ve Bilim Emekçileri Sendikası v. Turkey* App no. 20641/05 (ECtHR, 25 September 2012) para 70; *Ouranio Toxo and Others v. Greece*, App no 74989/01 (ECtHR, 20 October 2005) para 42; *Tourkiki Enosi Xanthis and Others v. Greece* App no 26698/05 (ECtHR, 29/09/2008) para 56

⁹¹ *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979) para 59

⁹² *Ibid* para 62

⁹³ *Mecheslav Gryb v. Belarus*, CCPR/C/103/D/1316/2004 (Human Rights Committee, Communication 2011-10-26) para 13.3

⁹⁴ *Keun-Tae Kim v. Republic of Korea*, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.2; *Avon Lovell v. Australia*, CCPR/C/80/D/920/2000, (Human Rights Committee, Communication 2004-03-24) para 9.3; *Leonid Svetik v. Belarus*, CCPR/C/81/D/927/2000 (Human Rights Committee, Communication 2004-07-08) para 7.2 see also, *Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment: Promotion and protection of the right to freedom of opinion and expression; Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45 (E/CN.4/1995/32) 14 December 1994 at 41; Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29) para 6.8; *Kim Jong-Cheol v. the Republic of Korea*, CCPR/C/84/D/968/2001, (Human Rights Committee, Communication 2005-07-27) para 8.2; *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.3; *Viktor Korneenko v. Belarus*, CCPR/C/95/D/1553/2007 (Human Rights Committee, Communication 2009-03-20) para 8.3; *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights: Annex, UN Doc E/CN.4/1984/4 (1984) at 5*

⁹⁵ *Keun-Tae Kim v. Republic of Korea*, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.2; *Avon Lovell v. Australia*, CCPR/C/80/D/920/2000, (Human Rights Committee, Communication 2004-03-24) para 9.3; *Leonid Svetik v. Belarus*, CCPR/C/81/D/927/2000 (Human Rights Committee, Communication 2004-07-08) para 7.2

⁹⁶ *Keun-Tae Kim v. Republic of Korea*, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03); *Tae Hoon Park v. Republic of Korea*, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20); *Vladimir Petrovich Laptsevich v. Belarus*, CCPR/C/68/D/780/1997 (Human Rights Committee, Communication 2000-03-20); *Vladimir Velichkin v. Belarus*, CCPR/C/85/D/1022/2001 (Human Rights Committee, Communication 2005-10-20); *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8); *Viktor Korneenko v. Belarus*, CCPR/C/95/D/1553/2007 (Human Rights Committee, Communication 2009-03-20); *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29); *Kim Jong-Cheol v. the Republic of Korea*, CCPR/C/84/D/968/2001,

political systems/parties in power,⁹⁷ as well as to hold public debates concerning political figures.⁹⁸ Furthermore, they must be free publicly and openly to criticize or to evaluate their governments without fear of interference or punishment.⁹⁹ The former Special Rapporteur Martin Scheinin argues that democracy by its very nature allows organisations or persons to express their different opinions even if these are criticisms of the State or of the Government in power.¹⁰⁰ In this regard, the Committee noted that legitimate aims set forth under para 3 of article 19 cannot be used by state parties to interfere with promotion of multi-party democracy, democratic values or human rights.¹⁰¹ Furthermore, any restrictions (e.g. arbitrary arrest, torture and threat to life and killing) imposed on a person for his exercise of freedom of expression cannot be in compliance with article 19.¹⁰² The Committee members' concurring opinion in *Coleman v Australia* suggested that sanctions such as fine, imprisonment or arrest on the author, which are a considerable infringement of the authors' right to freedom of expression, must be justified by the requirements of article 19.¹⁰³ In 2011, the Committee paid more attention to democratic society in General Comment 34, which considers democratic society as a crucial principle.¹⁰⁴ For instance, the Committee highlights the role of the importance of freedom of expression in a free and democratic society in the communications brought from Belarus,¹⁰⁵ where the Committee drew attention to numerous and serious

(Human Rights Committee, Communication 2005-07-27); *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8); *Viktor Korneenko v. Belarus*, CCPR/C/95/D/1553/2007 (Human Rights Committee, Communication 2009-03-20)

⁹⁷ *Aduayom et al. v. Togo*, 422/1990, 423/1990 and 424/1990, (Human Rights Committee, Communication 1996-07-12) para 7.4; *Salim Abbassi v. Algeria*, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

⁹⁸ *Zeljko Bodrožić v. Serbia and Montenegro*, CCPR/C/85/D/1180/2003 (Human Rights Committee, Communication 2005-10-31) para 7.2

⁹⁹ *Aduayom et al. v. Togo*, 422/1990, 423/1990 and 424/1990, (Human Rights Committee, Communication 1996-07-12) para 7.4; *Salim Abbassi v. Algeria*, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

¹⁰⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/61/267) 16 August 2006 para 21; The Special Rapporteur illustrated with example that communication No. 574/1994, *Kim v. Republic of Korea*; a member of the National Coalition for Democratic Movement, was arrested after preparing documents which criticized the Government of the Republic of Korea and its foreign allies and appealed for reunification. He was convicted on the basis of National Security Law.

¹⁰¹ *Mukong v. Cameroon*, CCPR/C/51/D/458/1991 (Human Rights Committee, Communication 2007-10-26) para 2.1; see also, Human Rights Committee, General Comments 34 (102nd Session, 2011, Geneva) at 23

¹⁰² *Njaru v. Cameroon*, CCPR/C/89/D/1353/2005; (Human Rights Committee, Communication 2007-03-19) para 6.4; see also, The Committee's general comment No. 34 (2011) on Freedoms of Opinion and Expression (CCPR/C/GC/34) para 23

¹⁰³ Concurring opinion of Committee members Mr. Nisuke Ando, Mr. Michael O'Flaherty and Mr. Walter Kälin in *Patrick Coleman v. Australia*, Communication, CCPR/C/87/D/1157/2003, 10 August 2005

¹⁰⁴ Human Rights Committee, General Comments 34, para 2, 13, 23 and 34

¹⁰⁵ *Leonid Sudalenko v. Belarus*, CCPR/C/104/1750/2008, (Human Rights Committee, Communication 2012-03-14) para 9.3; *Syargei Belyazeka v. Belarus*, CCPR/C/104/D/1772/2008, (Human Rights Committee, Communication 2012-03-26) para 11.4; *P Pavel Levinov v. Belarus*, CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010 (Human Rights Committee, Communication 2012-07-16) para 10.3; *Vladimir Katsora v. Belarus*, CCPR/C/106/D/1836/2008, (Human Rights Committee, Communication 2012-10-24) para 7.3; *Antonina Pivonos v. Belarus*, CCPR/C/106/D/1830/2008, (Human Rights Committee, Communication 2012-10-29) para 9.2; *Denis Turchenyak v. Belarus*, CCPR/C/108/D/1948/2010 (Human Rights Committee, Communication 2013-07-24) para

interferences with the right to freedom of expression.¹⁰⁶ Nonetheless, the Committee still does not take democratic society as a conditional element for restriction on the right to freedom of expression.

3.3.4) Proportionality

Proportionality is the primary device in the judicial decision making process in most constitutional courts. This process consists of three main tests: ` (1) *suitability (the limiting measure must be capable of achieving the (legitimate) aim pursued)*; (2) *necessity (the limiting measure must be the least restrictive means to achieve the relevant purpose)*; and (3) *proportionality in the narrow or strict sense (there must be a reasonable balance between the limiting measure and the aim pursued)*`.¹⁰⁷ The European Court of Human Rights has not formulated or applied it as a strict principle. The European Court's proportionality analysis relies on the phrase, "necessary in a democratic society". Representing the word 'necessity' as a balancing test implies an open-ended interpretation and consideration of the needs of the particular time.¹⁰⁸ As in the case of *Handyside v. United Kingdom*, the Court noted "*the principle of proportionality inherent in the adjective 'necessary'*".¹⁰⁹ The Court has equated the term 'necessity' with a 'pressing social need'. These two terms are vital to the proportionality principle. Similarly, the Committee notes that the requirement of necessity implies an element of proportionality,¹¹⁰ and the scope of restrictions on freedom of expression must be proportional to the value that the restriction aims to protect.¹¹¹

Both the Committee and the European Court examine the proportionality of restrictions. There must be a reasonable connection for proportionality between the means employed in any interference and the aim it seeks to achieve.¹¹² The proportionality test implies similar meaning under both human rights instruments that the nature and severity of the penalties imposed should be taken into consideration when assessing the proportionality of any interference.¹¹³

7.7; *Alexander Protsko and Andrei Tolchin v. Belarus*, CCPR/C/109/D/1919-1920/2009 (Human Rights Committee, Communication 2013-12-2) para 7.3; *Galina Youbko v. Belarus*, CCPR/C/110/D/1903/2009 (Human Rights Committee, Communication 2014-03-17) para 9.3

¹⁰⁶ Concluding observations of the Human Rights Committee on Belarus (CCPR/C/79/Add.86) 19 November 1997 para 17

¹⁰⁷ D.W. Greig, 'Reciprocity, Proportionality, and the Law of Treaties', (1994) 34 Va. J. Int'l L. 295; Nicholas Emiliou, 'The Principle of Proportionality in European Law: A Comparative Study (Kluwer Law International 1996); Vicki C. Jackson, 'Being Proportional about Proportionality', (2004) 21 Const. Comment. 803; See also, Stefan Sottiaux and Gerhard Van Der Schyff, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' (2008) 31 Hastings Int'l & Comp. L. Rev. 115, 130

¹⁰⁸ Sottiaux and Schyff (n. 107) 131-2

¹⁰⁹ *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 58

¹¹⁰ *Rafael Marques de Morais v. Angola*, Communication, CCPR/C/83/D/1128/2002, 18 April 2005 at 6.8

¹¹¹ *Ibid*

¹¹² Human Rights Committee's General Comment 27 (1999), Freedom of movement (Art.12) (CCPR/C/21/Rev.1/Add.9) para 14, see also The Committee's general comment No. 34, para 34

¹¹³ *Gümüş and Others v. Turkey* App no 40303/98 (ECtHR, 15 March 2005) para 18; Human Rights Committee's General Comment 27 (1999), Freedom of movement (Art.12) (CCPR/C/21/Rev.1/Add.9) para 14, see also The Committee's general comment No. 34 (2011) on Freedoms of Opinion and Expression (CCPR/C/GC/34) para 34

The Committee has noted that restrictions have to be narrow and specific so as to comply with the principles of proportionality.¹¹⁴ The administrative and judicial bodies must take the principle of proportionality into account when they apply domestic law.¹¹⁵ In this regard, the European Court only allows proportionate state interference. In examining the proportionality of a particular measure, the European Court seeks to answer the question of whether there is an alternative means of protecting the relevant public interest with minimum or no, or indeed lesser, interference.¹¹⁶ The relationship between the public interest and any individual rights which are the subject of the restriction must be proportionate and this proportionality is closely connected to a democratic society.¹¹⁷ The length of the criminal procedure or the length of sentence or the amount of any fine all play a crucial role in determining whether the limitation is proportionate with the legitimate aim. Accordingly, where restrictions are imposed by a state party on the freedom of expression, the state party must demonstrate: i) the threat; precisely, and in specific and individualized nature, ii) the necessity and proportionality of specific measure taken, and iii) a direct and immediate link between the expression and the threat.¹¹⁸

Furthermore, the European Court case law, we can see how the contracting states have failed to employ proportionate measures, in the sense used above, when imposing restrictions on 'terroristic speech'. In many cases, the nature and severity of the penalties imposed on the applicants were disproportionate to the aims pursued and therefore not 'necessary in a democratic society'.¹¹⁹ The European Court has also pointed out that the nature and severity of the convictions imposed upon applicants may also cause the loss of a number of political and civil rights, such as being banned from a membership of a political party or union.¹²⁰ The sentence and conviction must be proportionate and carry legitimate aims in order to consider

¹¹⁴ The Committee's general comment No. 34, para 34; See also Rafael Marques de Morais v. Angola, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29) para 6.8; Patrick Coleman v. Australia, CCPR/C/87/D/1157/2003 (Human Rights Committee, Communication 2006-07-17) para 7.3; Alexander Protsko and Andrei Tolchin v. Belarus, CCPR/C/109/D/1919-1920/2009 (Human Rights Committee, Communication 2013-12-2) para 7.8

¹¹⁵ The Committee's general comment No. 34, para 34; See also Rafael Marques de Morais v. Angola, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29) para 6.8; Patrick Coleman v. Australia, CCPR/C/87/D/1157/2003 (Human Rights Committee, Communication 2006-07-17) para 7.3; Alexander Protsko and Andrei Tolchin v. Belarus, CCPR/C/109/D/1919-1920/2009 (Human Rights Committee, Communication 2013-12-2) para 7.8

¹¹⁶ Leach (n. 44) 163

¹¹⁷ Susan. Marks, 'The European Court of Human Rights and its 'Democratic Society' (1995) 66 British Yearbook of International Law Volume 209, 215

¹¹⁸ The Committee's general comment No. 34 para 34; see also, Alexander Protsko and Andrei Tolchin v. Belarus, CCPR/C/109/D/1919-1920/2009 (Human Rights Committee, Communication 2013-12-2) para 7.8

¹¹⁹ Başkaya and Okçuoğlu v. Turkey App no 23536/94 and 24408/94 (ECtHR, 8 July 1999) para 66-67; Birdal v. Turkey App no 53047/99 (ECtHR, 2 October 2007) para 39; Dicle v. Turkey App no. 34685/97 (ECtHR, 10 November 2004) para 18; Doğaner c. Turkey App no 49283/99 (ECtHR, 21 October 2004) (Turkish Translation) p.2; Halis v. Turkey App no 30007/96 (ECtHR, 11 January 2005) para 37; İncal v. Turkey, App no 41/1997/825/1031 (ECtHR, 9 June 1998) para 56; For instance, in the cases of Yilmaz and Kilic, and Tasdemir and Gul, the Court notes that the applicant was sentenced to three years and nine months' imprisonment but length of the sentence and the criminal proceedings were disproportionate.

¹²⁰ Ceylan v. Turkey App no 23556/94 (ECtHR, 8 July 1999) para 37

the interference with ‘terroristic speech’ as legitimate.¹²¹ The Committee recalled, in accordance with Committee’s general comment 34, that any restriction on freedom of expression must not be broad in nature, in order to achieve the interest whose protection is sought in the proportionate meaning.¹²² Any pertinent information to justify the state party's restriction is crucial for the Committee to decide whether the restriction meets the criteria set forth in article 19(3) or not.¹²³ For instance, the author was charged with crimes characteristic of defamation and slander against the President of Angola and the Attorney General of the Republic and he was both fined and sentenced to six months imprisonment.¹²⁴ The severity of such sanctions imposed on an author cannot be considered a measure proportionate with protecting public order or the honour and the reputation of the President, a public figure who was only subjected to criticism.¹²⁵ His arrest, detention and the restrictions on his travel all together did not achieve any legitimate aim.¹²⁶ Disproportionate interference with press is not acceptable for a free press. A free and uncensored press and media plays a fundamental role in maintaining in a democratic society as part of freedom of expression.¹²⁷

The vague definition of offences, such as 'encouragement of terrorism', 'extremist activity', 'praising', 'glorifying', or 'justifying' terrorism, all of which are to be found in the counter-terrorism measures of domestic laws, are very likely to pose the risk of being an unlawful interference with the right to freedom of expression, either (or both) because the offence fails to meet the ‘prescribed by law’ test or for overbreadth making them unnecessary and disproportionate.¹²⁸ State parties should ensure compatibility of these restrictions with articles 19 and 10.¹²⁹ We will return to this in much greater depth in the remaining chapters when we consider how vague and overly-broad provisions such as sedition fell into disuse, only to be replaced – as part of the state’s machinery to combat ‘terrorism’ – by offences of equal or arguably greater vagueness and breadth. For now, though we need to reflect upon other ways in which the exercise of freedom of expression might be limited or diminished.

¹²¹ *Gül and Others v. Turkey* App no 4870/02 (ECtHR, 8 June 2010) para 43

¹²² The Committee’s general comment No. 34 (2011) on Freedoms of Opinion and Expression (CCPR/C/GC/34) para 2; *Toregozhina v. Kazakhstan* CCPR/C/112/D/2137/2012 (Human Rights Committee, Communication 2014-10-21) para 7.4

¹²³ *Alexander Protsko and Andrei Tolchin v. Belarus*, Communication, CCPR/C/109/D/1919-1920/2009, 2 December 2013, 7.8

¹²⁴ *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29) para 2.6

¹²⁵ *Ibid* para 6.8

¹²⁶ *Ibid*

¹²⁷ The Committee’s General Comment No. 25 (1996): Article 25 (Participation in Public Affairs and the Right to Vote) (CCPR/C/21/Rev.1/ADd.7) para 25, see in *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002 (Human Rights Committee, Communication 2005-03-29) para 6.8

¹²⁸ Human Rights Committee, General Comments 34 para 40

¹²⁹ *Ibid* para 40, 46

3.4) The Concepts Diminishing the Protection of Freedom of Expression

Much of this chapter, and indeed parts of the second chapter, has dwelt on the reasons why freedom of expression should be given expansive protection. Largely, though by no means exclusively, this relates to its role in supporting and sustaining a viable and effective participatory democracy. This assumes however that the democracy in question is sufficiently robust to fend off or absorb existential threats. It is here we need to investigate the concept of a militant democracy, the idea that a democracy might seek to defend itself by restricting the very rights that give it its meaning. This is a way in which freedom of expression might (legitimately) be diminished, and the militant democracy doctrine has been applied under these three jurisdictions. Before we turn to that, let us consider any way in which freedom of expression might be given a less expansive canvas through the principle of the margin of appreciation.

3.4.1) The Doctrine of Margin of Appreciation

The margin of appreciation was developed by the European Court, and it means "*the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies*" when restricting any rights under the Convention.¹³⁰ It works on two levels: when the Court is assessing the state's assessment that a restriction was in fact needed (i.e. what threat is posed) and then again when the Court assesses the quality or extent of whatever restriction the state decides to impose. Under this doctrine, the contracting states will have a degree of discretion as to legislative, administrative or judicial action in the area of a Convention rights.¹³¹ Yet the final decision will be given by the Court as to whether such action is reconcilable with the guarantee in question.¹³² Each contracting state might have various considerations due to their societal, individual, historical and philosophical persuasions. The Convention is a reaction to and progressive comprising of changing European social and legal developments. It seeks out the questing for existence of practices and policies among the Contracting States that will enhance human rights.¹³³ This indicates that the Convention is the product of consensus as; "*the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law...*"¹³⁴ Whatever European consensus exists between the Member States of the Council plays a crucial role in the interpretation of the Convention and delineating the degree of deference given to

¹³⁰ Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff, Dordrecht, 1996) 13

¹³¹ Helen Fenwick, *Civil Liberties and Human Rights*, (Cavendish Publishing Limited, London, 4th Ed. 2007) 36

¹³² *Ibid*

¹³³ Laurence R. Helfer, *Consensus, Coherence, and the European Convention on Human Rights*, (1993) 26 *CORNELL INT'L L.J.* 133, 134; "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions." *Tyrer v. UK* App no 5856/72 (ECtHR, 25 April 1978) para 31

¹³⁴ The ECHR Preamble

Contracting States. The Convention is given a "living interpretation"¹³⁵ and the rights protected therein will be read "in light of present-day conditions".¹³⁶ The Court is willing to defer to a relativist position where consensus between the Contracting states is absent.¹³⁷

The margin of appreciation allows the Court to set "norms which one might call 'heterogeneous'" due to harmonizing these different practices and policies.¹³⁸ The Conventional unification can be established by harmonisation, or perhaps synthesis, of the identity of national and European norms together through a degree of similarity and proximity between these norms so as to achieve compatibility between both European and national norms.¹³⁹ For instance, in the case of Handyside, it was not possible to find a uniform European concept of morality in domestic laws. This is because the requirements of morality differ over time and between locations, especially in modern times due to a rapid and public re-evaluation of opinions on manners. Furthermore because of their direct and continuous connection with their respective countries, *"State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."*¹⁴⁰

However, contracting states have a limited power of appreciation.¹⁴¹ The meaning of 'necessary' under the article 10 implies the existence of 'pressing social need'. State parties have a certain margin of appreciation in both assessing whether such a need exists or not, and in deciding how to respond but this remains under the European Court's supervision.¹⁴² The Court determines whether the reason given by the State authorities justifying the restriction is 'relevant and sufficient'.¹⁴³ The interference applied by the State authorities will have to be both in compliance with the principles embodied under Article 10 and, based on an acceptable assessment of the relevant facts.¹⁴⁴ In this regard, the Court is prepared to leave a wider margin of appreciation to state authorities when expression incites violence against an individual or a public official or against a part of the population.¹⁴⁵ The Commission notes that the margin of appreciation allows governments to interfere with the right to freedom of expression by its measures against terrorism, involving the difficulties of a fair balance between protection of

¹³⁵ Tyrer v. UK App no 5856/72 (ECtHR, 25 April 1978) para 31

¹³⁶ Marckx v. Belgium App no 6833/74 (13 June 1979) para 41

¹³⁷ Daniel Regan, "'European Consensus': A Worthy Endeavour for the European Court of Human Rights?" (2011) 14 Trinity College Law Review 51, 69

¹³⁸ D. Marty Mireille, *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Kluwer Academic Publisher, 1992) 333

¹³⁹ Ibid

¹⁴⁰ Handyside v the United Kingdom App no 5493/72 (ECtHR, 7 December 1976) para 48

¹⁴¹ Ibid para 49

¹⁴² Zana v. Turkey App 69/1996/688/880 (ECtHR, 25 November 1997) para 51

¹⁴³ Barthold v. Germany App no 8734/79 (ECtHR, 25 March 1985) para 55

¹⁴⁴ Jersild v. Denmark App no 15890/89 (ECtHR, 23/09/1994) para 31; Zana v. Turkey App 69/1996/688/880 (ECtHR, 25 November 1997) para 51

¹⁴⁵ Sürek v. Turkey (no. 3) App no 24735/94 (ECtHR, 8 July 1999) para 37; Erdoğan v. Turkey App no 25723/94 (ECtHR, 15 June 2000) para 62; Öztürk v. Turkey App no. 22479/93 (ECtHR, 28 September 1999) para 66

freedom of information and the requirement of protecting state and the public against armed collusion that aims to overthrow a democratic system.¹⁴⁶

3.4.2) The Principle of Militant Democracy

Political and legal philosophy constitute an important framework for legal institutions in terms of their responses to issues regarding fundamental rights. Legal institutions make judgments in accordance with their legal philosophy, which in turn is likely to be affected by political philosophy. As a result of this, it can be assumed political and legal philosophy are loosely interlinked. The history of most modern democratic states has been shaped by the experience of totalitarianism and the inter-war period. Militant democracy provides an excuse for democratic states to restrict the rights of anti-democratic actors so as to protect the substantive, predetermined values of democracy before "*the Trojan Horse by which the enemy enters the city*".¹⁴⁷ Under the concept of militant democracy, the state might seek to preserve the foundations of the political order by banning certain types of expression/association including political parties that aim to undermine social order.¹⁴⁸ In order to protect democratic principles, militant democracy relies on the rationale that state authorities are able to restrict the freedom of expression and the association of groups and individuals who might pose a threat to the very democracy which allows them to flourish.¹⁴⁹ Militant democracy makes reference to a type of constitutional democracy which is authorized to protect political and civil freedoms by pre-emptively limiting the exercise of such freedoms.¹⁵⁰ This approach interferes with freedom of expression by using the legislation of anti-terrorism, hate-speech legislation, the banning of political parties, restricting mass demonstrations, and the criminalization of certain political organizations.¹⁵¹ There has been a very long record of action adopted under the concept of 'militant democracy' against 'terroristic speech' and it did not only commence after the 9/11 attacks.¹⁵² Chronologically, the most venerable offences to penalise expression against the state were sedition and treason.¹⁵³

The European Court has been in a position to defend democracy, (the essential system for rights and liberties to flourish), from abuses and deterioration caused by 'hate speech',

¹⁴⁶ Brind and Others v. The UK App no 18714/91 (EComHR Decision, 09/05/1994) p.11; McLaughlin v. the UK App no 18759/91 (EComHR Decision, 09/05/1994) p.11-14

¹⁴⁷ Loewenstein (n. 5) 424

¹⁴⁸ Shawn Marie Boyne, *The Criminalisation of Speech in an Age of Terror* (June 12, 2009) 6 Available at SSRN: <http://ssrn.com/abstract=1418496> or <http://dx.doi.org/10.2139/ssrn.1418496> accessed 05.03.2013

¹⁴⁹ Kasim Karagöz, "The Dissolution of Political Parties Under the Jurisdiction of the European Court of Human Rights and Examining the Case of Welfare Party According to the Venice Commission Reports" (2006) 1 *Gazi Üniversitesi Hukuk Fakültesi Dergisi* 311, 322

¹⁵⁰ Loewenstein (n. 5) 424

¹⁵¹ Patrick Macklem, 'Militant democracy, Legal Pluralism, and the Paradox of Self-Determination' (2006) 4 *International Journal of Constitutional Law* 488, 488-9; see also, Walker (n. 6) 1396 (Militant democracy provides political ground for the state to take action against significant forms of terrorism.)

¹⁵² Walker (n. 6) 1405

¹⁵³ Ibid

‘incitement to terrorism and violence’ and ‘non-democratic discourse’.¹⁵⁴ Since the end of the Second World War, the Convention has been an instrument to provide an early warning of authoritarianism in weak democracies, in order to prevent authoritarian regimes.¹⁵⁵ European Court case law has very much been closely focused on the idea of defining the ‘democratic spirit’.¹⁵⁶ The Council of Europe has sought to guarantee respect for human rights and to ensure that its members adhere to the standards of ‘an effective political democracy’ and the rule of law affirmed in the Preamble of the Convention.¹⁵⁷ Consequently, the concept of militant democracy has been adopted by the European Court to protect democracy by utilising article 17 against political expression or association which is incompliant with the Convention. The European Convention’s concept of militant democracy is activated when a political party seeks to apply a programme or activity that runs counter to democracy and to the Convention values.¹⁵⁸ In this context, the state has a positive obligation to protect the rights and freedoms of the people before such a party seizes power and begins to implement its policies.¹⁵⁹ In the case of the German Communist Party, the decision was admissible with the application of Article 17 and was completely consistent with this construction of Article 17. This is because it aimed to establish a totalitarian regime and it advocated anti-democratic values. Consequently, the Court was required to go into detail in connection with the rights set forth in Articles 9, 10 and 11 of the Convention and Article 17 because anti-democratic actors claim that the state’s interference violates the Convention rights, usually Articles 10 and 11. States defend their actions either with reference to Article 17 or to the restriction clauses, in order to protect the interests of national security, territorial integrity and public safety set forth under the Articles 10(2) and 11(2). The Court identified such political activities and statements in the Refah Partisi (Welfare Party) case, which is a contemporary case for examining the notion of militant democracy.¹⁶⁰ The Court held that it is possible that a totalitarian movement, structured in the form of a democratic party, could destroy democracy, and there has indeed been an example of such a party in modern European history.¹⁶¹ States have a responsibility to protect their democratic regimes from totalitarian political parties’ activities.¹⁶² In consequence of this, the

¹⁵⁴ The main reason for this protective attitude is to give democracy the legal weapons necessary to prevent the history from repeating itself, especially the atrocities committed in the past by totalitarian regimes of national-socialist, fascist or communist persuasions. This initial inspiration can be seen in an early admissibility decision of the former European Commission of Human Rights; the first decision ever in which Article 17 was implemented. In the case of Communist Party of Germany (KPD Case), the Commission approved of the prohibiting of the Communist Party in the Federal Republic of Germany.

¹⁵⁵ Steven Greer, *The European Convention of Human Rights: Achievements, Problems and Prospects* (CUP, 2006) 56

¹⁵⁶ *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 49 "the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

¹⁵⁷ The ECHR Preamble

¹⁵⁸ Macklem (n.151) 507

¹⁵⁹ the ECtHR, *Communist Party (KPD) v. the Federal Republic of Germany* at 101-103

¹⁶⁰ Christian Moe, ‘*Refah Partisi (The Welfare Party) and Others v. Turkey*’ (2003) 6 *The International Journal of Not-for-Profit Law* 1-14

¹⁶¹ *Refah Partisi (The Welfare Party) and Others v. Turkey* App no 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003) para 99

¹⁶² *Ibid* para 96

dissolution of the Welfare Party was justified by the convention under freedom of association, because it pursued a legitimate aim and was necessary in a democratic society. There is no doubt that the European Court of Human Rights has a positive effect on Turkey's political and social life,¹⁶³ and contributes to Turkey's advancement towards a democratic constitutional state. Yet there are also counter examples; the decision on the Welfare Party case has been criticised by Turkish liberals because it caused the authoritarian bureaucratic elites to increase in self-confidence.¹⁶⁴

Similarly, international human rights law under the UN system has attempted to create legal protection for human rights. The UDHR, ICCPR and ICERD serve the aim determined under the charter of the United Nation;

"to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."¹⁶⁵

Slightly different from the ECHR, at the UN level, the international human rights law system persuades and encourages not only democratic societies but also societies governed by oppressive and authoritarian governances that ratified the Conventions. Compared to the unity seen in the members of the Council of Europe, there are huge political differences between the countries that signed the ICCPR and ICERD, some of which had very limited proximity to legal or philosophical norms. As a result of this, the jurisprudence of the human rights bodies provides comprehensive information on the challenges that faced by the right to freedom of expression in these diversified political realms. Expression that was considered by a state party as advocating violence, even if it fell under the scope of freedom of expression, might be restricted by national authorities so as to silence or to oppress political opposition, dissenting speech, media professionals, human rights activists, academics or artists.

In the case of M.A. v. Italy, the Human Rights Committee noted that the author was sentenced upon conviction for involvement in 'reorganizing the dissolved fascist party' which has as its object to eliminate democratic freedoms and to establish a totalitarian regime with its fascist

¹⁶³ H. A. Özhan, 'Application of Decisions of European Court of Human Rights in Contracting Parties', (2001) 6 Journal of Liberal Thought, p.51 See also, Ensar Yılmaz, 'Sociology of Political Parties' Closure Regime' (2009) 3 African Journal of Business Management, 831, 832

¹⁶⁴ Mustafa Erdogan, 'Thoughts Arising from ECHR Decision on the Welfare Party', (2001) 6 Journal of Liberal Thought p.50 See also, Yılmaz (n. 163) 832

¹⁶⁵ Charter of United Nations, Preamble

leanings.¹⁶⁶ The Committee concluded that the communication was inadmissible because such kinds of political activities were not covered by article 5¹⁶⁷ (the equivalent to article 17 in the ECHR) of the Covenant but it was a justifiable restriction under article 19(3) of the Covenant.¹⁶⁸ The Committee implemented the 'militant democracy' concept when it applied article 5 of the ICCPR against totalitarian and fascist political movements. It prevented an interpretation of the treaty's provisions as permitting people to engage in activities aimed at the destruction of the rights of others. Yet, as Nowak argued, article 5 of ICCPR is far from playing a role in a militant democracy by preventing anti-democratic activities.¹⁶⁹ In these communications, the Committee did not mention preventing anti-democratic activities or preventing violent political tendencies. The concept of militant democracy has not been given a strong position in international human rights' case law. It seems that the main reason for this is that the signatories to the ICCPR and CERD include not only democratic states but also countries ruled by totalitarian and one-party systems. The Committee tends not to work with a militant democracy doctrine due to the variety of political systems, instead encouraging contracting states to respect human rights through considering complaints about other political rights including the right to freedom of expression.

The next chapter offers an evaluation of the regulation of 'terroristic speech' in Turkey, and the interplay between the right of freedom of expression and state security. Turkey's political and legal philosophy has considered the state itself as a goal, with its security and interests being prioritized over its people.¹⁷⁰ It has certainly not been understood as a civil appliance in the service of people. Militant democracy is one of the main concerns of Turkish political life especially given the military coups in 1960 and 1980 and the military interventions in 1971 and 1997.¹⁷¹ In particular, the military coup in 1980 secured the authoritarian nature of the regime, which in turn influenced the degree to which liberties were protected. The legal system has been defensive of, and protectionist towards, the 'unalterable core' of the constitution through the constitutional and criminal doctrine (Turkish Criminal Code or anti-terror law) due to the militant nature of Turkey's political and legal philosophy.¹⁷² The judiciary in Turkey is motivated to preserve the constitutional system more than to respect human rights, working in accordance with state power and state elites so as to protect official ideology.¹⁷³ These factors

¹⁶⁶ M.A. v. Italy, 117/1981 10 April (Human Rights Committee, Communication 1984-4-10) para 7.2

¹⁶⁷ "Article 5: "(1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. (2). There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

¹⁶⁸ M.A. v. Italy, 117/1981 10 April (Human Rights Committee, Communication 1984-4-10) para 13.3

¹⁶⁹ Manfred Nowak, *the UN Covenant on Civil and Political Rights* (Engel, Germany, 2005) 116–117.

¹⁷⁰ Vahap Coşkun, 'Turkey's Illiberal Judiciary: Cases and Decisions' (2010) 12 *Insight Turkey* 43, 48

¹⁷¹ Markus Thiel, 'The 'Militant Democracy' Principle in Modern Democracies' (Ashgate, 2009) 263

¹⁷² *Ibid* 264

¹⁷³ Ergun Özbudun, 'Türk Anayasa Mahkemesinin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi' (2007) 63 *Ankara Üniversitesi SBF Dergisi*, 257, 265, see also Ergun Özbudun, 'State Elites and Democratic Political Culture in Turkey'

have resulted in unclear boundaries between, on the one hand, expression promoting terrorism or violence; and mere criticism of the government and its values, as voiced in everyday political discourse, on the other. We might recall here the critical role played by clarity and certainty in satisfying the 'prescribed by law' test. Expressing opinion about economic, social and religious issues in many cases was treated as a crime because it contradicted the official/constitutional ideology set by the military coups, and was viewed as threatening the state and/or its institutions.

The Turkish Constitution permits limiting freedom of expression on the basis of article 14¹⁷⁴ and article 13¹⁷⁵: within the 'spirit of the Constitution' and according to 'the requirements of a democratic order for society and the secular Republic' and according to 'the principle of proportionality'. Within article 13, it is important to highlight the prohibition clause 'secular republic' which led to the imposition of significant restrictions on freedom of expression in Turkey before 1990. In general, the Preamble¹⁷⁶ together with articles 13, 14 and 26 of the Constitution provide vague clauses for the criminal law to sanction 'an activity' contrary to the unitary and secular ideology of the state and its democracy. The Militant nature of the legal system of Turkey can be applied through these limitation clauses. Consequently, the Constitution focused more on protecting its own institutional characterisation, entitled with "an indivisible entity with its state and territory", "Turkish historical and moral values", "the nationalism" and "principle, reforms and modernism of Ataturk and secular republic" through the TMK and TPC rather than guaranteeing fundamental rights and liberties. In a democratic system, the constitution should give priority to the protection of the rights of individuals. In addition, there are provisions in the Constitution which expressly underscore militant constitutionalism. It is difficult within these limitation clauses to provide an adequate guarantee for freedom of expression and for maintaining the necessity of a democratic society. The right to freedom of expression has been undermined by such concepts as 'militant democracy'. All provisions relating to freedom of expression are in compliance with the concept of militant democracy set forth under the Constitution. Consequently, prosecutions on 'terroristic speech' can be regarded as a reflection of the concept of militant democracy in Turkey which penalises

in ed. Larry Diamond, 'Political Culture and Democracy in Developing Countries' (Lynne Rienner Publishers, 1993) 247-68

¹⁷⁴ Article 14 of the Constitution prohibits using rights and freedoms in the Constitution against "... the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights."

¹⁷⁵ Article 13: "(As amended on October 3, 2001; Act No. 4709) Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

¹⁷⁶ The Preamble of Turkish Constitution Para 5: "(As amended on October 3, 2001; Act No. 4709) That no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of Turkishness; the nationalism, principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism;"

dissenting, hard-hitting critics of the state and its institutions. In Turkey, democracy has deteriorated by virtue of militant democracy which has posed a number of limitations and restrictions upon the right to freedom of expression.¹⁷⁷

However, constitutional amendment in 2001 softened the militant nature of the Preamble. The Preamble consisting of "*That no protection shall be accorded to thoughts and opinions contrary to Turkish national interests...*" was amended in 2001 by replacing the phrase "*thoughts and opinions*" with the word `activity`.¹⁷⁸ This was particularly important for the right to freedom of expression. By this amendment the legislative body aimed to promote and to protect the right to freedom of thought and expression from a wide range of interferences.¹⁷⁹ Nonetheless, the Preamble retains a constitutional commitment to `ideas, beliefs, and resolutions` such as Atatürk nationalism, the supremacy of the constitution, a unitary state and the protection of national sovereignty and secularism. Indeed, the `ideas, beliefs, and resolutions` affirmed in the Preamble are expressly guaranteed in Articles 1, 2, and 3 of the Constitution.¹⁸⁰ However, the concept of `an activity` can be still understood as cumulative and deliberative `expression` against the values and principles of the Constitution.¹⁸¹ In this regard, the concept of militant democracy has been an effective factor in establishing the concept of sedition to be preserved and in facilitating its translation into anti-terrorism law. However, Turkish political and legal authorities are showing a marked departure from their perception of very strict militant democracy and adopting an ECHR-friendly perception. Recent case law has shown that more attention is being given to such democratic necessities as the principle of the freedom of expression. This has been achieved though politically strengthening Turkey's civil and democratic institutions under the influence of ECtHR case law.

¹⁷⁷ H.Ali Özhan, and B.Berat Özüpek, *Yargıtay Kararlarında İfade Özgürlüğü*, (LDT, 2003) p.4

¹⁷⁸ The Constitution of the Republic of Turkey, the Preamble: (As amended on October 17, 2001) "... That no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of Turkishness; the nationalism, principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism;...

With these IDEAS, BELIEFS, and RESOLUTIONS to be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit;

Has been entrusted by the TURKISH NATION to the democracy-loving Turkish sons' and daughters' love for the motherland and nation."

¹⁷⁹ TBMM Tutanak Dergisi, Dönem 21/3, 132. Birleşim, 25.9.2001, p.70-83

¹⁸⁰ Turkish Constitution "Article 1: The Turkish state is a Republic. Article 2: The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble. Article 3: The Turkish state, with its territory and nation, is an indivisible entity. Its language is Turkish. Its flag, the form of which is prescribed by the relevant law, is composed of a white crescent and star on a red background. Its national anthem is the "Independence March". Its capital is Ankara."

¹⁸¹ Thiel (n. 171) 265

3.5) Conclusion

This chapter has analysed the importance of certain doctrinal principles for cases concerning ‘terroristic speech’. While there are differences between the textual guarantees of freedom of expression under Article 26 Turkish Constitution, Article 10 ECHR, and Article 19 ICCPR, the underlying doctrinal principles are broadly shared between the three jurisdictions. These doctrinal principles determine both the scope of the scrutinized restrictions on freedom of speech and the extent of freedom of speech itself. These shared principles require first; a precise and predictable legal basis, second; pursuit of a legitimate purpose, and last all that any restrictions be necessary and proportionate. They function as tools through which an appropriate balance may be struck between the right to freedom of expression and other legitimate interests such as the protection of national security and the maintenance of public order. They also organise and give structure to legal reasoning in the national courts. In this regard, these doctrinal categories reflect the impact of freedom of expression on national authorities by giving particular attention to this right within a democratic polity. These doctrinal principles give not only broader scope for the right to freedom of expression, but also provide the legal reasoning and jurisprudential support for a contracting state to repeal or gradually remove the offence of sedition from the legal lexicon. In Turkey, especially the Court, giving such reasoning, has concluded that many restrictions on expression constituted violations of freedom of expression. Nonetheless, as chapter two argued, a contradictory development has appeared as a troubling paradox. On the one hand, human rights law disfavors these archaic offences, international law has simultaneously paved the way for states’ enactment of a range of new offences criminalizing ‘terroristic speech’ through the imposition of open-ended and widely-framed positive obligations, on the other. The vagueness of these offences has enabled States to increasingly repress political opposition and dissent.

In this regard, a key concern is the lack of traction which these doctrinal principles have ultimately had in curtailing States’ invocation of the ‘counter-terrorism’ narrative. The contracting states have a degree of discretion in their legislative, administrative or judicial action over Convention rights under the Court’s supervisory jurisdiction as to whether such action is reconcilable with the guarantee in question.¹⁸² There is also concern about the extent to which it is legitimate for States to restrict speech that may challenge or undermine a particular (democratic) political order. The ‘militant democracy’, one that is capable of defending itself, thus comes to the fore. It operates at the national level as a tacit norm, an unspoken background principle, harnessed putatively in the defence of ‘an effective political democracy’¹⁸³ in cases involving restrictions on ‘terroristic speech.’ Nonetheless, it has rarely been expressly acknowledged in the Strasbourg Court case law concerning the dissolution of political parties. ‘Militant democracy’ serves as a kind of ‘precautionary legality’ which

¹⁸² Fenwick (n. 131) 36

¹⁸³ Preamble to the ECHR;

prioritizes risk aversion and self-preservation in the face of incalculable harm.¹⁸⁴ Yet, this principle has caused close scrutiny of political expression in Turkey in favour of preserving the state itself. Thus, there remains a contradictory climate between human rights law and Turkey's 'militant democracy'. Obviously, the Court's militant democracy differs from Turkey's in terms of the scope of freedom of expression given to dissenting expression, however, they rarely corresponded.¹⁸⁵ It is to the Turkish position, and those various contradictions identified above, that we now turn.

¹⁸⁴ Sajó (n. 7) drawing on Lowenstein's discussion of the threat to democracy presented by emotional populism.

¹⁸⁵ See for examples of such correspondence; *Refah Partisi (The Welfare Party) and Others v. Turkey* App no 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003); *Zana v. Turkey* App 69/1996/688/880 (ECtHR, 25 November 1997)

CHAPTER 4: TURKEY'S HIGH COURTS RESPONSE TO 'TERRORISTIC SPEECH'

4.1) Introduction

Over several decades, Yargıtay¹ and the Constitutional Court² have developed a significant body of case law regarding restrictions on what might be regarded as 'terroristic speech'. These have primarily involved offences under the Turkish Penal Code (hereinafter "TPC") and the 'Law on the Fight against Terrorism' (hereinafter "TMK"). There have been violent clashes instigated by leftist groups (including Kurdish separatists) and right wings groups in the country since 1960s.³ In their examination of restrictions on such speech, while Yargıtay and the Constitutional Court have demanded that a degree of imminent violence or terror must be established, there remains a significant evidential deficit in the courts' approach since they still rely on a presumption that particular ideas present an inherent threat to the state and its institutions. A significant number of cases relating to public-political expressions purportedly advocating terrorism or political violence, have been examined by Yargıtay and the Constitutional Court. Individuals have often been convicted for dissenting and hard-hitting criticism of public authorities. Despite some positive developments in Turkish law,⁴ and notwithstanding the influence of both Strasbourg jurisprudence and the enhanced constitutional protection of rights (i.e. the introduction to the Constitutional Court (in 2012) of a right of individual petition), 'terroristic speech' in Turkey continues to be treated in a similar fashion to speech that might, in the past, have been regarded as 'seditious'. As Özek stated, any crime committed against the existence of the state was accepted as 'political crime'.⁵ Similarly, Özhan notes that individuals

¹ The Supreme Court; makes the unification of judgements and supervises the evidentiary of facts of the crimes by evaluating the decisions of first instance courts. The Court of Cassation is divided into civil law and criminal law chambers (hukuk ve ceza daireleri). There are 21 civil law and 21 criminal law chambers. Most of the cases subjected to this research were examined by the Criminal Chambers of Supreme Court of Appeal hereinafter "YCD" (most of the relevant cases evaluated by 9th Criminal Law Chamber (hereinafter Y (9) C.D)) and Supreme Court of Appeal Assembly of Criminal Chambers hereinafter "YCGK".

² The Turkish Constitutional Court was established by the 1961 Constitution of Turkey. The composition, powers and structure of the Court were changed considerably and the right to individual application to the Constitutional Court was introduced by the constitutional amendments in 2010. With the actual implementation of the individual application started from 23 September 2012, the constitutional review has been implemented against the infringements of rights caused by persons or institutions exerting public authority.

³ Kemal Karpat, 'Turkish democracy at Impasse: Ideology, Party Politics and the Third Military Intervention' (1981) in ed. Karpat Kemal, *Studies on Turkish Politics and Society: Selected Articles and Essays* (Brill, 2003) 272, see also, Tanel Demirel, '12 Eylül'e Doğru Ordu ve Demokrasi' (2001) 56 Ankara Üniversitesi SBF Dergisi 43, 44-46 (emphases added)

⁴ For example, the phrase 'regardless of the methods, intentions and the ideas' was removed from Article 8 TMK (separatist propaganda/propaganda against the indivisible unity of the State), by Article 1 of 4126 Law, 27/10/1995, and this offence was repealed in 2003.

⁵ Çetin Özek, 'Devletin Şahsiyeti Aleyhine Cürümlerin Genel Prensipleri'; (1966) 32/2 İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 597, 621; see for example, The Constitutional Court, E.1979/31 K.1980/59, 27/11/1980 (In terms of Articles 141, 142 and 163 of TPC, the Legislative body was influenced by the 1930 Rocco provision

were often prosecuted based on their political preferences.⁶ Yargıtay and the Constitutional Court have thus interpreted relevant provisions in the same way that the concept of sedition has been relied upon in other jurisdictions – in order to protect the state and its ideology.⁷

This chapter consists of two sections; Section 3.1 chronicles the history of speech-related jurisprudence in the Turkish Courts, noting that political dissent – speech critical of the State, its institutions or secular ideology – was commonly treated between the 1950s and late 1990s as ‘seditious’. Section 3.2 considers the factors upon which the courts have placed weight when dealing with offences relating to ‘terroristic speech’. Historically, the courts’ approach in determining whether an utterance of particular words fell within the parameters of a crime, lacked any rigorous methodology. This lack of methodological rigour will be illustrated by analysis of the case law relating to the expressive advocacy of ‘terrorism’, broadly defined. In the early cases, there is an obvious lack of judicial attention to the imminence of acts of violence or terrorism, though later cases show some signs that the judiciary have sought to address this deficiency. Lastly, the Constitutional Court’s and Yargıtay’s response to ‘terroristic speech’, by considering the separate elements of such offences (the actus reus, mens rea, and the evidential basis for prosecution – content and context of expression) will be analysed. The content and context of expression is a relatively recent development in the Turkish legal system. This too, can arguably be attributed to the influence of Strasbourg case law.

4.2) Turkey's Legal Response to ‘Terroristic Speech’

As explained earlier in the third chapter, according to the Turkish legal system’s philosophy, the maintenance of the State and its institutions is viewed as an end in itself. The State is not primarily understood as being in the service of the people, and state security is thus prioritized over the protection of fundamental rights.⁸ The legal system in Turkey is expressly ‘charged’ with upholding security through resolutions in the Preamble⁹ to the Constitution and also

introduced by Italian Fascist regime in order to protect fascist state authority.) See Further, Köksal Bayraktar, *Siyasal Suç*, (İstanbul Üniversitesi Yayınları, 1982) 42

⁶ Hacı Ali Özhan and Bekir Berat Özipek, *Yargıtay Kararlarında İfade Özgürlüğü*, (LDT, 2003) 5; see for example, The Constitutional Court, E.1979/31 K.1980/59, 27/11/1980,

⁷ The Constitutional Court, E.1979/31 K.1980/59, 27/11/1980 (In terms of Articles 141, 142 and 163 of TPC, the Legislative body was influenced by the 1930 Rocco provision introduced by Italian Fascist regime in order to protect fascist state authority.). See also, Özhan, and Berat Özipek (n.6) 5

⁸ Vahap Coskun, ‘Turkey’s Illiberal Judiciary: Cases and Decisions’ (2010) 12 *Insight Turkey* 43, 48

⁹ The Constitution of the Republic of Turkey, the Preamble: (As amended on October 17, 2001) “The recognition that no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of Turkishness; the nationalism, principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism;...

With these IDEAS, BELIEFS, and RESOLUTIONS to be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit;

Has been entrusted by the TURKISH NATION to the democracy-loving Turkish sons’ and daughters’ love for the motherland and nation.”

restrictions listed in article 26¹⁰ of the Constitution. As such, criminal law has been used to restrict a wide range of expressions without properly distinguishing legitimate political and intellectual expression from speech that directly and indirectly incites a terrorist attack. This legal philosophy has also been furthered through anti-terrorism law. Accordingly, all expressions relating to communism, separatism, anti-secularism, or indeed relating even loosely to terrorism have been criminalised. In case law, expressions dissenting of the official ideology, promoting of Islamism, anti-secularism (irtica), anarchism, or communism have been regarded as presenting a threat to the state and its institutions, and their criminalization has been justified on the basis that they are 'destructive', 'separatist', 'reactionary', 'dangerous' or 'violent'.¹¹ Thus any expressions in relation to these ideologies were regarded as inherently politically violent, such as words like 'insurgent' and 'revolutionary'.¹²

In previous years, the most relevant offences under the TPC (1926) were the offence of propaganda under Articles 142¹³ and 163¹⁴TPC, and the offence of indoctrination under Article 163 of TPC. While these two Articles were repealed after the collapse of the Soviet Union in

¹⁰ Article 26 of Turkish Constitution: "Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing. (As amended on October 3, 2001; Act No. 4709) The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. (Repealed on October 3, 2001; Act No. 4709) Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented. (Paragraph added on October 3, 2001; Act No. 4709) The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

¹¹ The Constitutional Court E.1963/173 K.1965/40, 26/09/1965; see also, Özhan, and Berat Özipek (n.6) 4; Engin Akin, *Anayasa Mahkemesi-Yargıtay Kararları ve Uluslararası Hukuk Metinleri Çerçevesinde: Terör ve Terörün Finansmanı Suçu*, (Adalet, 2009) 45

¹² Uğur Alacakaptan, 'Demokratik Anayasa ve Ceza Kanunu'nun 141 ve 142'inci Maddeleri' (1966) 1 Ankara Hukuk Fakültesi Dergisi 3-20, 9, see also in, Bülent Tanör, *Siyasi Düşünce Hürriyeti ve 1961 Türk Anayasası*, (Phd Thesis, Oncu Kitabevi, 1969), (Doktora Tezi, Oncu Kitabevi, 1969) 100

¹³ Article 142 of TPC was repealed in 1991, "(1) Any person who unconditionally makes propaganda with the purpose of dominating one social class over others, or eliminating one social class, or overturning social or economic foundation of the country, or eliminating political or legal system of the state, is punished with imprisonment from five years to ten years.(2) Any person who unconditionally makes propaganda for one citizen or one group to govern the state as incomppliance with republicanism or the principles of democracy, is punished with same punishment. (3) Any person who unconditionally makes propaganda for partly or completely replacing the constitutional rights with consideration of race, or for eliminating or weakening national feelings, is punished with imprisonment from five years to ten years."

¹⁴ Article 163 of TPC was repealed in 1991: "Any person who unconditionally makes any propaganda or indoctrination with the purpose of changing state's social, economic, or political or legal system with religious principles and rules by using religion or religious feelings or religiously holy things, in defiance of secularism, is punished with imprisonment from five years to ten years".

1991,¹⁵ the latter provision was effectively retained by Article 312¹⁶ of the TPC.¹⁷ Under this Article, the offence of ‘incitement to hatred and animosity’ and ‘praising of offence and offender’ are both criminalised. Furthermore, a new TPC (2004) was introduced and these same offences were kept under Articles 215¹⁸ and 216¹⁹. Under these provisions, views which challenge the economic, social, and legal structures of the state by proposing their partial or complete revision, were criminalised. In addition to these provisions of the TPC since 1991, prosecutions have been brought under the offences of propaganda for, ‘inciting’, ‘justifying’, and ‘praising’ terrorism mainly under Articles of 6²⁰, 7²¹ and 8²² TMK (article 8 was repealed in

¹⁵ Zeynep Alemdar, ‘Modelling’ for Democracy? Turkey’s Historical Issues with Freedom of Speech’ (2014) 50 Middle Eastern Studies, 568, 574

¹⁶ Article 312 of 765 TPC (revealed TPC), “(1) Any person who openly incites hatred and animosity between people belonging to different social class, religion, race, sect, or coming from another origin ...in case that such act causes danger to public order.”

¹⁷ See also; Alemdar (n. 15)

¹⁸ Article 215 of 5237 TPC, “Any person who openly praises an offense or the person committing the offenses is punished with imprisonment up to two years.” Article 216 of 5237 TPC, “Any person who openly incites a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years in case such act causes a risk to public safety.”

¹⁹ Article 216 of 5237 TPC, “Any person who openly incites a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years in case such act causes a risk to public safety.”

²⁰ Article 6 of TMK: “(1) Those who announce that the crimes of a terrorist organization are aimed at certain persons, whether or not such persons are named, or who disclose or publish the identity of officials on anti-terrorist duties, or who identify such persons as targets shall be punished with one to three years imprisonment. (Amendment: 11/4/2013-6459/7 md.) (2) Those who print or publish leaflets and declarations of terrorist organizations by means of justifying or praising methods of terrorist organisation that contained violence, coercion or oppression, shall be punished with one to three years imprisonment. (3) Those who, in contravention of Article 14 of this law, disclose or publish the identity of informants shall be punished with one to three years imprisonment. (Amendment: 29/6/2006-5532/5 md.) (4) If any of the offences defined above are committed by periodicals and broadcast, editors-in-chief who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to fifteen thousand days’ rates.”

Yargıtay decided that identifying publicly known public officials in the publication were not regarded as offence under TMK 6. See in; Y. (9). C.D, E.1995/3693 K.1995/4525 (3/7/1995)

²¹ Article 7 – (1) Those who establish, lead, or are a member of a terrorist organisation in order to commit crimes in furtherance of aims specified under article 1 through use of force and violence, by means of coercion, intimidation, suppression or threat, shall be punished according to the provisions of article 314 of the Turkish Penal Code. Persons who organise the activities of the organisation shall be punished as leaders of the organisation. (Değişik ikinci fıkra/ Amendment: 11/4/2013-6459/8 md.) (2) Any person making propaganda by means of justifying or praising methods of terrorist organisation that contained violence, coercion or oppression for a terrorist organisation shall be punished with imprisonment from one to five years. If this crime is committed through means of mass media, the penalty shall be aggravated by one half. In addition, editors-in-chief who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to fifteen thousand days’ rates. The following actions and behaviours shall also be punished according to the provisions of this paragraph: a) (Mülga: 27/3/2015-6638/10 md) repealed b) As to imply being a member or follower of a terrorist organisation, 1) carrying insignia and signs belonging to the organization, 2) shouting slogans or 3) making announcements using audio equipment or 4) wearing a uniform of the terrorist organization imprinted with its insignia (Ek fıkra/Added article: 27/3/2015-6638/10 md.) (3) In a demonstrations and marching turning as a propaganda for terrorism, any person who covers his face partly or completely for the purpose of hiding his identity, shall be punished with imprisonment from three to five years.

²² Article 8 of TMK (repealed in 2003). “Written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with its territory and nation are forbidden, regardless of the methods, intentions and ideas behind such activities. Those conducting such activities

2003). Even though there is no offence expressly entitled 'sedition' in Turkish law, it is argued that sedition-like offences have effectively been reborn under the TMK (as well as under the different Articles of the TPC discussed above). These offences are akin to 'sedition' since they function in the same way and protect the same legal interests (namely, the state and its institutions). As Roger Douglas notes, 'sedition' is a 'political crime', used throughout history to 'punish people for what they think (or what they are thought to think) rather than on the basis of the degree to which their activities actually pose a threat to public order.'²³ Moreover, as Sorial argues, laws criminalizing sedition have been modernised in the context of counter-terrorism, which similarly targets types of expression advocating violence against the state.²⁴

In the past, perceived risks to the integrity and security of the State emerged in the form of discrete ideological '-isms' such as 'communism' and 'anti-secularism' or anarchism. Thus, in the historical freedom of expression cases (those occurring before the 'terrorism' era), the TPC provided a legal basis for courts to interfere with expression advocating 'communism/bolshevism', 'socialism', 'anarchism', 'fascism', 'racism', or 'authoritarianism'. Speakers were also prosecuted if their speech was found to be aimed at "weakening and destroying feelings of being a nation", "destroying the secular system" or "establishing a theocratic system".²⁵ Interestingly, however, while these goals were sufficient for the national courts to regard the speech as being tantamount to advocacy of political violence, the courts neither addressed nor mentioned any 'terrorist' organisation or motivation/ideology. Rather, the courts' focus was simply on the individual's or association's expressive act undermining or contradicting official ideology.

Today, in contrast, while the interpretation of the offences of propaganda, praising or incitement under the present TPC and TMK have been shaped by the case law of the previous TPC, these discrete ideological threats have been supplanted by more amorphous and all-encompassing '-isms' – 'fundamentalism', 'radicalism' and 'extremism' – under the umbrella of 'terrorism'. As chapter 2 explained, this thesis is premised on the argument that the reinvention during the modern 'human rights era' of archaic offences of 'sedition' can be traced to the underlying failure to narrowly define the nature of the risk posed. This, at root, mirrors the fundamental failure of the international community to draft a clear and precise definition of 'terrorism'. The legal pedigree of the speech-related offences in Turkey thus points to this deeper-level problem concerning the invocation of 'terrorism' as the basis for restricting freedom of speech. As this chapter will demonstrate, the Turkish courts have failed to distinguish and thus to prevent speech that falls far short either of intentionally inciting

shall be punished with a sentence of between 2 and 5 years' imprisonment and with a fine of between 50 million and 100 million Turkish liras."

²³ Roger Douglas 'The Ambiguity of Sedition: The Trials of William Fordon Burns' (2004) 9 Australian Journal of Legal History 227, 248

²⁴ Sarah Sorial, 'Can Saying Something Make it so? The Nature of Sedition Harm', Law and Philosophy, 29 (2010) 273-305, 275

²⁵ Bulent Acar, "Hukuk Düzenimizde Düşüncenin Acıklanmasının Cezalandırılması ve Cezalandırmanın Sınırı", (1995) 3 Ankara Barosu Dergisi 32

imminent ‘acts of terrorism’ that are likely to occur or of intentionally distributing a message with the intention to incite a ‘terrorist’ act causing a danger that such offences may be committed.²⁶ Legitimate political, intellectual and academic expression has not been attentively distinguished from ‘terroristic speech’. Indeed, expression that seeks to offer constructive ways of addressing the terrorism problem, or which reveals information about the violation of human rights committed by national authorities, has been criminalised.

That is not to say that there have no positive developments. Since the late 1990s, a number of amendments (both to the constitution and to provisions in the TMK and TPC) have moderated the impact of the sedition-like offences contained therein, and thus given more breathing space for political dissent. These revisions to the law followed from a parliamentary debate in which it was noted that systematic violations of freedom of expression in Turkey have painted a dark picture of the country.²⁷ Clearly, the ECtHR and its case law has played a significant role in whatever progress has occurred. Moreover, a right of individual petition to the Constitutional Court was introduced in 2012, and the applications initiated under this mechanism have been read in light of European Convention jurisprudence, thus ensuring that greater attention has been paid to the value of the right to freedom of expression. Turkish law has thus begun to follow more closely the Strasbourg jurisprudence (this having been accepted as binding legal authority by the Turkish judiciary), thereby enhancing the constitutional protection of this fundamental right. These positive developments aside, it is argued here that uncertainty remains the prevalent theme in the legal consideration of ‘terroristic speech’ in Turkey. The offences outlined above have been applied as preventative measures which criminalise (and thus restrict) political, journalistic, intellectual and academic expression.

In order to facilitate analysis of the case law relating to ‘terroristic speech’, the cases are categorised according to whether the courts regard the expression in question associated with (or more accurately, tending towards) ‘political violence’ generally, or instead, with ‘terrorism’ specifically. The following two sections address these two categories respectively.

4.2.1) Expressions that Advocate Political Violence

The scope of the right to freedom of expression was drawn up by the Constitutional Court and Yargıtay with the aim of disallowing expression advocating communism, National Socialism, anti-secularism (irtica), or immorality.²⁸ Expressions that undermined the secular and democratic system, and the unity of the state and its nation, constituted one of the offences above which aim to protect the essence and spirit of the Constitution.²⁹ From this point of view, national courts sought to counter the perceived threat posed by ideas and beliefs which might

²⁶ Borrowing from the wording of the UN Special Rapporteur’s model definition.

²⁷ TBMM Tutanak Dergisi, 90. Birlesim, 10/04/2013 p.33

²⁸ The Constitutional Court, E.1963/16 K.1963/83, 8/4/1963, The Constitutional Court, E.1963/17 K.1963/84, 08/04/1963, The Constitutional Court, E.1963/25 K.1963/87, 8/4/1963

²⁹ For instance; The Constitutional Court, E.1963/16 K.1963/83, 8/4/1963, see also, The Constitutional Court, E.1963/173 K.1965/40, 26/9/1965, see also The Constitutional Court, E.1971/3 K.1971/3, 20/07/1971, (disclosure of Turkey’s Labour Party due to being against “the unity of the state and its nation”)

seek to remove the established system by violence, force and insurrection/revolution.³⁰ Since the Courts regarded anti-secular, communist, and leftist ideology as a clear threat to the existence of the political system, the Courts readily imposed criminal liability on their adherents. Furthermore, such expressions were considered as expressive advocacy in favour of political violence such as revolution or insurrection. Each military coup and intervention in Turkey mostly targeted religious expressions and groups, treating them as an enemy of the state.³¹

Expression that purportedly advocates political violence is one of the oldest offences in the Turkish legal system. It was formulated under the offence of propaganda for, or praising of, communism or anti-secularism (irtica).³² Propaganda was defined as "an intention to spread an idea to others in order to attract supporters in any place at any time".³³ Yargıtay also stated that any 'ideology' must initially be rooted in intellectual life, after which it potentially becomes 'activity'; if there are no intellectual followers or supporters of an ideology, it cannot harm society.³⁴ For this reason, the courts regarded particular ideologies inherently violent. Propaganda or indoctrination against secularism, the 'indivisibility of the nation state' or propaganda for communism were accepted as 'danger crimes' (tehlike suçu) under article 142, 163 and 312 TPC. Expression falling under any one of these headings was regarded as being contrary to the constitutional principles of the state. With regards to danger crimes, the precise harm or danger is itself not specified in the law, and need not be caused directly, indeed there need not be a specific, identifiable victim.³⁵ The new TPC (2004) also criminalizes propaganda, if the speaker's intention is to propose an alternative social, economic, political and legal system so as to establish a state system based on a religion.³⁶

The TPC (1926) was enacted to repress any expression and assembly advocating communist, anarchist, dictatorial and racist ideologies.³⁷ The Constitutional Court noted that motivations such as Islamism, anti-secularism (irtica), anarchism, or communism could be regarded as a threat to Turkey's state system and its official ideology during the Cold War era.³⁸ Making propaganda in the name of these ideologies was believed by the legal institutions in Turkey to

³⁰ Acar (n. 25) 25

³¹ Hamza Turkmen, 'Müslümanların Adalet Arayışı ve Muhalif Kimlik' in Koçak T., Dogan T., Kutluata Z., Türkiye de İfade Özgürlüğü (bgst Yayınları 2009) 300; There has been two military coups (27 May 1960 and 12 September 1980) and three military memorandums (12 March 1971, 28 February 1997 and 27 April 2007) that have designed politics and law in Turkey.

³² Propaganda was first introduced in the Treason Act 1920 which defined treason as any kind of activity committed against the legitimacy of TBMM and the interests of the nation. This act was introduced to prevent the destructive propaganda and sedition caused by occupying forces.

³³ The Constitutional Court, E.1979/31 K.1980/59, 27/11/1980

³⁴ Y. (9) C.D, E.1995/9-123 K.1995/153, 22/05/1995 p.2

³⁵ Öykü Didem Aydın, 'Düşünce Özgürlüğü İlkesi Işığında Salt İfade Ve İletişimsel Eylem Suçları' 2006 http://www.turkhukuk sitesi.com/makale_1055.htm 1-31, 4

³⁶ YCGK, E.1976/9-3 K.1976/23, 26/01/1976 p.1

³⁷ Alacakaptan (n. 12) 3

³⁸ The Constitutional Court E.1963/173 K.1965/40, 26/09/1965, see also in; Akın (n. 11) 45

be a cause of political violence.³⁹ As the Constitutional Court noted, these motivations were accepted as insurgent and in support of a dictatorial regime.⁴⁰ During the Cold War period, expression that constituted ‘propaganda for communism’ was targeted.⁴¹ In this regard, the Constitutional Court decided that ‘anarchy’, ‘fascism’ and ‘communism’ could never be acceptable under the rule of law in a democratic state since their ideological tenets undermine individual and societal welfare and peace, social justice, constitutional rights, and national solidarity.⁴²

In light of this approach, the ‘sedition’-like offences in Articles 142, 163 and 312 of the TPC have caused restrictions on a broad range of expression. The wording of TPC (1926) effectively sought to impose liability for adhering to the central teachings of Marxist-communism (the dictatorship of the proletariat) by emphasizing that any attempt to pursue the domination of one social class over another (either through membership of an organisation, by spreading such propaganda, or by praising such actions) was penalized with imprisonment.⁴³ The Constitutional Court noted that the TPC (1926) sought to protect Turkish democracy, to prevent actions against freedoms, and to stop destructive activities against the state.⁴⁴

As early case law suggests, the distribution of materials advocating communism was justified as an offence by Parliament, which noted that: “*generating sanction against communism is the way to fight against undermining the established system and replacing it with a new system... communism desires to remove the established social and economic system. Communism has its own economic system which is based on collective ownership...*”⁴⁵ Materials such as Lenin’s picture, posters with leftist slogans, poems, events report and the socialist declarations,⁴⁶ were all regarded as propaganda for communism because they sought to establish the supremacy of labourers over other social classes.⁴⁷ Yargıtay further held that the mere display of posters

³⁹ Alacakaptan (n. 12) 9, see also in, Tanör (n. 11) 100; See for instance anti-secular views were criminalised; The Constitutional Court, E.1971/1 K.1971/1, 20/01/1971 AMKD Vol 9, p.55, 67, 69 (Millî Nizam Party was disclosed by the Constitutional Court due to books written by its leader whose party again was disclosed as know Refah Party. The Constitutional Court decided to disclose the party because of its aim to establishing a state system based on Islam.), see also, The Constitutional Court, E.1980/19 K.1980/48, 3/07/1980, additional reason by Judge Yekta Güngör Özden 285

⁴⁰ The Constitutional Court E.1963/173 K.1965/40, 26/09/1965, see also in; Engin Akın, Anayasa Mahkemesi-Yargıtay Kararları ve Uluslararası Hukuk Metinleri Çerçevesinde: Terör ve Terörün Finansmanı Suçu, (Adalet, 2009) 45

⁴¹ YCGK E.1974/1-230 K.1974/412,23/09/1974, see also YCGK E1990/9-330 K.1991/18, 11/02/1991, see also Y(9)CD, E.1976/2878 K.1976/4105, 18/05/1976, see also YCGK, E.1974/1-230 K.1974/412, 23/09/1974 p.1

⁴² The Constitutional Court, E.1963/173 K.1965/40, 26/9/1965, see also, The Constitutional Court E.1963/25 K.1963/87, 8/4/1963

⁴³ Alacakaptan (n. 12) 7

⁴⁴ The Constitutional Court, E.1963/173 K.1965/40, 26/9/1965 AMKD Vol 4, p.311. This was the case as to whether articles 141 and 142 of TPC were incompliant to the Constitution. The Court decided that these articles were complaint to the Constitution.

⁴⁵ The law's preamble of 765 TCC, see also Alacakaptan (n. 12) 6

⁴⁶ For example, the declaration which stated: The “unity of labourers and villagers depends on hegemonising other social classes under the supremacy of these two social classes, and systematic work, gathering and educating socialist youth associations so as to develop the level of power of the labour class.”

⁴⁷ Y. (9), C.D. E.1976/46 K.1976/48, 05/10/1976

containing the image of the 'hammer and sickle' were capable of satisfying the requirements of the offence of praising.⁴⁸ This offence was made out even where no actual attempt to change the political system resulted – in other words, it was not necessary to show that others had taken any action because of having been exposed to the 'praise'. Indeed, Yargıtay never explained what danger could be caused by such expression.⁴⁹

In another instance, the law that regulated scrutiny of a movie, and the shooting a film was approved by the Constitutional Court so as to prevent: political propaganda of any country; humiliation of any nation or race; humiliation of the feelings of an ally state or society; advocating religion; political, economic and ideological propaganda contrary to the national regime, and making propaganda to weaken national loyalty or against social morality.⁵⁰ The Constitutional Court argued that these provisions protected the public good.⁵¹ Yet, in all of these cases, the Constitutional Court was far from explicit about how protection of the public good was achieved or how such expressions might harm the public good.

Yargıtay also criminalized political expression that criticised secularism, one of the pillars upon which the state is established. Again, the Courts assumed that anti-secular views were tantamount to advocating political violence, even though in no case did the Courts provide any clear reference to 'political violence'.⁵² For instances, the written material being examined in one case simply asserted that: *"secularism was written in the constitution by a minority in spite of people's will. ... After half a century, the secularism principle was still not accepted by the people and any social, economic, political and legal system which Allah does not approve has no chance to achieve. ..."*⁵³ Yargıtay noted in this case, the speaker's expression was propaganda against secularism and carried the aim to replace the legal and political foundations of state with religious values and rules.⁵⁴ For that reason, Yargıtay concluded that expression in question met the requirements of an offence of propaganda under article 163 TPC.⁵⁵ Similarly, books which some religious movements (namely 'Nurculuk')⁵⁶ are devoted to, were criminalized on the account of the fact that the 'Nur' corpus aimed to weaken national feelings and to remove the principles of secularism, republicanism and Atatürk through the pursuit of religious principles and beliefs.⁵⁷ Similarly, in another case, a book was translated into Turkish; the translation in itself was held to constitute the offence of propaganda because the book included ideas and beliefs which entailed that: *"all branches of the social life should*

⁴⁸ Y. (9) C.D. E.1974/2 K.1974/2, 18/06/1974 p.2

⁴⁹ Ibid

⁵⁰ The Constitutional Court, E.1963/204 K.1963/179, 08/07/1963,

⁵¹ Ibid

⁵² The Constitutional Court E.1963/173 K.1965/40, 26/09/1965, see also in; Engin Akın, *Anayasa Mahkemesi-Yargıtay Kararları ve Uluslararası Hukuk Metinleri Çerçevesinde: Terör ve Terörün Finansmanı Suçu*, (Adalet, 2009) 45

⁵³ Y. (5) C.D. E.1973/2269 K.1974/379, 04/02/1974 p.1

⁵⁴ Y. (5) C.D. E.1973/2269 K.1974/379, 04/02/1974 p.2

⁵⁵ Ibid

⁵⁶ "Nurculuk": Modern Turkish religious movement named after its founder and leader, Bediuzzaman Said al-Nursi (d. 1960).

⁵⁷ Y. (9). C.D. E.1976/52 K.1976/52, 13/10/1976, p.2

*be based on Islamic rules; Islam consists of rules and principles for religion, society, mosque, state, the world and afterlife; Muslims are responsible for Islamic rules regarding world and religion...*⁵⁸

On a few occasions, the Constitutional Court has attempted to distinguish the offence of propaganda from political and intellectual expressions and to broaden academic freedom by making a judgment that academic activities should not be penalized.⁵⁹ However an overview of Turkish case law suggests that Yargıtay - in contrast to this Constitutional Court decision - still classifies book translations as the offence of propaganda without any consideration of the imminence of acts of violence caused by these books, let alone tangible evidence of the same.⁶⁰ In these cases, counter-secular expression was criminalised by the Court without consideration of any link between expression and acts of political violence.

4.2.1.1) Incitement to Hatred and Animosity, Causing Political Violence

Another notable offence applied by the Courts to criminalise a wide range of political expression, is the offence of 'incitement to hatred and animosity' under Article 312 of TPC (1926) and article 216 of the new TPC (2004). Yargıtay noted that a person can be convicted of 'incitement to hatred and animosity', if their expression causes a probability of danger to public order and public security.⁶¹ If such incitement is in relation to views on Islamism, anti-secularism (irtica), anarchism, or communism, the Courts tend to affiliate such expression as 'incitement to political violence'.⁶² This probability threshold might suggest that the courts will closely consider whether there is evidence pointing to the factual likelihood of any such danger arising. However, the courts have simply tended to infer that 'incitement' means political violence, if the expression relates to views of Islamism, anti-secularism (irtica), anarchism, or communism.⁶³

The scope of public order and public security as protected legal interests are key factors in this offence. These two notions in themselves contribute to the broadness and vagueness of the offence. 'Public order' does not focus exclusively on legal concerns but necessarily also entails an element of social and political judgment; this makes 'public order' a subjective and problematic concept in the legal context.⁶⁴ Public order has a dynamic and unstable content

⁵⁸ YCGK, E.1986/9-365 K.1987/199, 13/04/1987 p.3, H. Benna's book who was founded the Muslim Brotherhood in Egypt, was banned.

⁵⁹ The Constitutional Court E.1963/173 K.1965/40, 26/09/1965

⁶⁰ 'Nur' corpus written by Modern Turkish religious movement named after its founder and leader, Bediuzzaman Said al-Nursi (d. 1960) was sanctioned in case of Y. (9), C.D. E.1976/52 K.1976/52, 13/10/1976; H. Benna's book translated into Turkish was sanctioned in case of YCGK, E.1986/9-365 K.1987/199, 13/04/1987; Lenin's book "Proleterya Partisi Üzerine" translated into Turkish in case of Y. (8), C.D. E.1976/2878 K.1976/4105, 18/05/1976

⁶¹ Y (9), C.D E.1974/2 K.1974/2, 18/06/1974

⁶² The Constitutional Court E.1963/173 K.1965/40, 26/09/1965, see also in; Engin Akın, Anayasa Mahkemesi-Yargıtay Kararları ve Uluslararası Hukuk Metinleri Çerçevesinde: Terör ve Terörün Finansmanı Suçu, (Adalet, 2009) 45

⁶³ Fazıl Hüsnü Erdem, 'TCK'nın 312 Maddesinin Koruduğu Hukuksal Değerin Kısa Bir Analizi: Türk Devlet Düzeni v. Demokratik Kamu Düzeni' (2003) 52 Ankara Üniversitesi Hukuk Fakültesi Dergisi 37-62, 38

⁶⁴ Ibid

even though it appears to have a straightforward and self-evident meaning (containing stability, peace, public health, public welfare and an absence of disorder in social life).⁶⁵ The elements of public order differ from one country to another since each nation has its own social, political and economic conditions. This makes it understandable for courts to have an element of judicial discretion in determining the danger to public order.⁶⁶ The Constitutional Court defined `public order` as “maintaining social life in peace and security, preserving the state and its system, in other words, all the rules related to the system of public life on every field of society”.⁶⁷ As Erdem states; this definition implied `public order` to be understood as `state order` and `state security`.⁶⁸ While the term `public security` can be construed more narrowly than that of public order,⁶⁹ it too draws no certain or clear legal boundaries for the restriction of the right to freedom of expression. This is clearly the case since it has been held that the offence of inciting people to hatred and animosity can be committed against the state or its system.⁷⁰ This therefore implies that the `people` could be the enemy from whom the state must be guarded against.⁷¹

After the collapse of the Soviet Union, communism became a less imminent danger to the Turkish political and legal system. For that reason, Articles 142 and 163 of TPC (1926) were repealed, thereby potentially providing more space for religious and communist expressions.⁷² Yet, the trend of prosecution under these repealed articles continued, and similar forms of expressions were criminalised under Article 312 TPC (‘incitement to hatred and animosity’). In particular, Islamist and anti-secularist views were still criminalised under this ‘incitement’ offence, and the rise of Islamism within and outside the country drove judges to penalise such expression.⁷³ It can be argued that without clear boundaries between the different offences in the TPC, the courts perceived a gap left by Articles 142 and 163, and they filled it by relying on the offence of ‘incitement to hatred and animosity’. As Kuzu noted, the Ankara State Security Court concluded with the statement of “*daringness and courage caused by repealed article 163 of TPC*” created a legal lacuna which was filled with Article 312 TPC.⁷⁴ Here the judge believed that repealing Article 163 would encourage individuals to advocate anti-secular views. Article 312 was applied by the courts in the same way as the repealed Article 163 TPC,⁷⁵ and individuals continued to be convicted for supporting Islamism or anti-secularism. Yargıtay regarded such expression as incitement to hatred and animosity. ‘Public order’ is the protected legal interest

⁶⁵ YCGK, K.2007/8-244 K.2008/92, 29/04/2008 p.2

⁶⁶ Ibid p.3

⁶⁷ The Constitutional Court, E.1963/128 K.1964/8, 28.01.1964 p.4

⁶⁸ Erdem (n. 63) 52

⁶⁹ YCGK, E.2004/8-201 K.2005/30, 15/03/2005, p.17

⁷⁰ Erdem (n. 63) 52

⁷¹ Ibid

⁷² TBMM Tutanak Dergisi, 106. Birleşim, 11/04/1991 p.233-4, 236

⁷³ Alemdar (n. 15) 574

⁷⁴ Burhan Kuzu, `Gündemde Yine 312 Var` 12/06/2013 <http://arsiv.zaman.com.tr/2001/12/08/yorumlar/yorum2.htm>, see also, YCGK, K.2004/8-130 K.2004/206, 23/11/2004, p.14, An example for such decision: Y (8)CD E.1999/12715 K.1999/14981, 03.11.1999

⁷⁵ YCGK, E.2004/8-201 K.2005/30, 15/03/2005 p.38

under TPC. As a result of this, endeavouring to apply repealed articles under new provisions has created a risk of causing legal uncertainty by applying the broad scope of “public order”. ‘Public order’ was understood by TPC as a justification to fill the legal loophole left after the repeal of articles 142 and 163 of TPC, and led to excessive restrictions on political, intellectual and academic expressions.⁷⁶

In addition, the most crucial factor here was a threat or a probability of danger to public security regardless of whether any such consequences actually occurred.⁷⁷ This offence convicts only ‘incitement’ which Yargıtay defined as ‘influencing or mobilising others to do something’ and it does not include indirect influence over others.⁷⁸ The TPC was used to draw the boundaries of political expression by penalizing political figures who undermine the constitutional values of Turkey. For instance, a person who was the mayor of Istanbul city at the time, and who read a controversial poem in front of a crowd of people during a public meeting scheduled for election, was convicted under Article 312.⁷⁹ The poem included the following passage; “*minarets are bayonets, rotundas are helmets, mosques are barracks, and Muslims are soldiers ... and nothing else can keep myself at bay, I will never be silenced and I will not be slave to someone.*”⁸⁰ In this case, Yargıtay emphasised the impact of expression on public behaviour by noting that listeners became excited by his speech.⁸¹ Yargıtay interpreted the offence of incitement to hatred and animosity in the same way as the repealed offence under Article 163 TPC.⁸²

The political atmosphere of Turkey at the time was far from stable; a military intervention had just taken place and the governing party was dissolved by the Constitutional Court due to being a focal point against secularism in the country.⁸³ It can be claimed therefore, that Yargıtay reflected the political climate prevailing at that time and which sought to suppress a particular political movement. Similarly, the TPC was also used to penalise political expression made by the leader of the dissolved political party (the Refah Party) in a public meeting during election time. The speech included the following passage:

“When the sons of the country began their studies by ‘in the name of Allah’, you removed it. What did you replace it with? I am a Turk, honest and hardworking. If you say this,

⁷⁶ Erdem (n. 63) 51-2

⁷⁷ Y (9), C.D E.1974/2 K.1974/2, 18/06/1974 p.1-2

⁷⁸ Ibid

⁷⁹ Y (9), C.D E.1998/10296 K.1998/11672, 23/09/1998, p.2

⁸⁰ Ibid

⁸¹ Ibid

⁸² Ibid 3

⁸³ The Refah Party was in government in 1996-7. Military intervention pushed the Refah Party to step down from government. After one year, the Constitutional Court dissolved the political party on the basis that the Refah Party became central in opposing secularism, and its leadership and some members were banned from politics. See also, the Constitutional Court, E.1997/1 K.1998/1, 16/1/1998

*Muslims who are, originally Kurdish... have the right to say I am a Kurd too, more honest and more hardworking.*⁸⁴

In this case, the TPC was used to suppress expression critical of the state. The law penalized political figures for doing their job; namely, critically reflecting on the conditions of the country and suggesting a way forward based on their own political stand points. Again, the TPC was used to suppress speech in ways clearly similar to the concept of 'sedition'. In the same period, in another case, Yargıtay noted that declaring jihad against the regime in Turkey constituted the offence of incitement to hatred and animosity based on difference of religion.⁸⁵ Yargıtay again failed in these cases to explain how such expression might cause political violence. As noted previously, the Constitutional Court, in earlier cases, simply inferred that anti-secularist speech would give rise to political violence.⁸⁶

Following an amendment on the TPC in 2002, incitement to hatred and animosity can now only be committed 'between people' and not against 'the state'.⁸⁷ Ultimately, the TPC became more concerned with expressions that might cause danger to the public rather than to the state itself. Yargıtay further limited the scope of the offence of 'incitement to hatred and animosity' to expression that encourages or incites the use of violence.⁸⁸ The aim was to limit the scope of restrictions on expression by considering whether expression caused a "danger to public security".⁸⁹ Yargıtay noted that 'incitement' can be committed based on difference of social class, race, religion, sect or region and it was not possible to incite hatred and animosity against the state to be the entity against which hatred or animosity was incited.⁹⁰ Moreover, Yargıtay noted that expression that harshly criticized the government's education policy could be classified as incitement to hatred and animosity if it extended to calling for violence.⁹¹ Yet, in compliance with earlier case law, Yargıtay defined incitement to hatred and animosity as a danger crime which did not require a 'call for violence' to constitute the offence.⁹² If expression possibly created danger to public order, Yargıtay had adequate reasons to consider such expression as the offence of incitement to hatred and animosity under TPC.⁹³ In the same case,

⁸⁴ The Student Oath or Student Pledge (Turkish: Öğrenci Andı) was introduced on April, 1933 and was recited in school at the beginning of every school day. It was used until 2013 in primary schools in Turkey.

⁸⁵ Y(8)C.D, E.1997/19078 K.1997/1127, 04.02.1998; see also in, Y(8)C.D, E.1999/1140 K.1999/3117, 10.03.1999

⁸⁶ The Constitutional Court, E.1963/204 K.1963/179, 08/07/1963; The Constitutional Court E.1963/173 K.1965/40, 26/09/1965

⁸⁷ Article 312 of TPC (765) was amended with Article 2 of 4744 Act (6.2.2002). It was not clear whether incitement was committed against the state, or between people. See also in YCGK, 2004/8-130 K.2004/206, 23/11/2004, p.14 (this case is an example that shows how the amendment was interpreted by Yargıtay)

⁸⁸ YCGK, K.2007/8-244 K.2008/92, 29/04/2008 p.9

⁸⁹ Ibid

⁹⁰ Y (9), C.D E.1974/2 K.1974/2, 18/06/1974

⁹¹ Y(8), C.D E.2002/12999 K.2003/7591, 22/12/2003, see also in Y (8),C.D E.2002/10542 K.2004/3111, 08/04/2004

⁹² Y (8), C.D, E.2003/357 K.2004/2457, 19/03/2004 p.2

⁹³ Ibid

Yargıtay noted that such danger is inevitably imminent where there is a climate of violence in societies and a clear level of intolerance to different beliefs and thoughts.⁹⁴

In 2003, the TPC introduced a 'clear and present danger test' into the law so as to determine whether expression causes a danger such as to render it culpable. Yargıtay stated that this test expands the scope of the right to freedom of expression and complies with ECtHR standards.⁹⁵ Judges are required to find a tangible basis to prove that expression causes a clear and present danger to public order.⁹⁶ Yargıtay noted that criminal law deals not only with the consequences of acts but also with the possible future effects of these acts.⁹⁷ In this respect, the legal interest is protected from danger, which refers to a likelihood of causing damage or harm.⁹⁸ Hence Yargıtay adopted the 'clear and present danger' test as a method to measure the imminence or likelihood of the danger to public order. This approach is open to criticism on the basis that the test focuses the courts' gaze again on questions of 'public order' and 'public security'. As noted above, these concepts are politically and socially contingent. As a result, uncertainty has become the prevalent theme in the legal regulation of speech relating to 'political violence'

4.2.2) Expression that Advocates Terrorism

Yargıtay has considered a significant number of cases involving speakers accused of advocating 'terrorism'. Various legal provisions have been applied to curtail expressive support for terrorism, but these have also resulted in restrictions being imposed on public political and intellectual expression. The TMK and both old and new TPC have provided the legal basis for the courts to interfere with expression that constitutes propaganda for terrorism, disclosure and publication of terrorist related materials, or praise of offence or offenders over acts of terrorism. The response to 'terroristic speech' has evolved in light of the early jurisprudence of Yargıtay and the Constitutional Court regarding the sedition-like offences under the TPC.

The offence of propaganda against 'the indivisible unity of the Turkish Republic with its territory and nation' (under repealed Article 142 TPC) was retained as an offence under the TMK.⁹⁹ The retention of this offence perpetuated a structural problem in the law relating to the right to freedom of expression (see also the offences under Articles 7 and 8 TMK, discussed at 4.2.2.2 below with more details). In general, the responses to 'terroristic speech' have followed a similar pattern to the approach taken to expression relating to political violence (as discussed above). However, the definition of 'terrorism' plays a crucial role in determining whether expression can be regarded as 'propaganda for terrorism' or not.¹⁰⁰ Indeed, if the executive body decides that an organisation is a 'terrorist organisation',¹⁰¹ expression related to that

⁹⁴ Ibid

⁹⁵ YGCK, K.2007/8-244 K.2008/92,29.04.2008 p.27

⁹⁶ Ibid

⁹⁷ Ibid 2

⁹⁸ Ibid

⁹⁹ Separatism crime derived from Article 8 of TMK and it was repealed in 2003.

¹⁰⁰ YCGK, E.2003 / 9-39 K.2003 / 32, 11/03/2003; Y(9)CD, E.1994 / 2980 K.1994 / 3839, 27.06.1994

¹⁰¹ Turgut Kazan, İfade Özgürlüğü ve Terörle Mücadele Yasası, <http://www.tchd.org.tr/MenuContent.aspx?id=140> (accessed on 06/07/2013 p.14)

organisation will most likely be assumed by Yargıtay to be 'terroristic speech' regardless of whether the specific expression incites, or presents a threat of, immediate and probable violence.¹⁰² It is noteworthy that Yargıtay has penalised some 'terroristic speech' not only under the TMK but also under the offence of 'incitement to hatred and animosity' in the TPC (Article 312 of the previous TPC, and Article 216 of the new TPC). It is suggested here that the courts have deliberately penalised 'terroristic speech' under a wide range of provisions, thereby maintaining as a broad basis for prosecution as possible. Furthermore, this indicates that the courts are intentionally vague regarding which provisions penalised 'terroristic speech'. In this way, the courts have at their disposal grounds on which to criminalise a wide range of expressions.

For instance, Yargıtay penalised a weekly newspaper for publishing an article which connected a link between inhabitants of the city of Nusaybin closing down the shops (regarded as a civil disobedience), and a funeral ceremony of a member of PKK.¹⁰³ Yargıtay ruled that this article incited others into hatred and animosity on the basis of race and regional differences.¹⁰⁴ In another case, Yargıtay penalised written material due to its main theme ("*the state attack against oppressed and discriminated people in a region*") and concluded that this written material presented the state and the public as enemy and opponents.¹⁰⁵ Hence the article planted the seed for the idea that public might be the enemy of the state and, in very broad terms, could be said to create hatred and hostility aimed at aggravating the situation.¹⁰⁶ Yargıtay decided that such expression cannot be regarded as journalism or press work.¹⁰⁷ In another case, Yargıtay criminalised the expression claiming that different races exist in different regions, and that some of these races had been destroyed.¹⁰⁸ Yargıtay deemed this expression to be against 'the indivisible unity of the Turkish Republic and its territory'.¹⁰⁹ Furthermore, Yargıtay criminalised expression claiming that the state had waged a counter-terrorism campaign against the Kurdish people in which members of a 'terrorist organisation' were referred to as 'guerrillas'.¹¹⁰ The counter-terrorism campaign was presented as a campaign against the people in the conflict region and as a dirty and unjust war.¹¹¹ In each of these cases, these expression was considered to constitute the offence of incitement hatred and animosity.

¹⁰² Y(9)CD, E.1993 / 3602 K.1993 / 4318, 26.10.1993; Y(9)CD, E.1993 / 3602 K.1993 / 4318, 26.10.1993; Y(9)CD, E.1994 / 881 K.1994 / 1488, 24.03.1994; Y(9)CD, E.1994 / 725 K.1994 / 1449, 23.03.1994; YCGK, E.2003 / 9-39 K.2003 / 32, 11/03/2003 (In this cases, Yargıtay was informed whether an organisation in question is terrorist organisation or not by Turkish National Police.)

¹⁰³ Y (9), C.D, E.1992/11430 K.1993/592, 09/02/1993

¹⁰⁴ Ibid

¹⁰⁵ Y (8), C.D E.1994/6163 K.1994/7188, 10/06/1994

¹⁰⁶ Ibid

¹⁰⁷ Y (8), C.D E.1994/6163 K.1994/7188, 10/06/1994

¹⁰⁸ Y (9), C.D E.1995/6119 K.1995/5720,09/11/1995

¹⁰⁹ Ibid

¹¹⁰ Y.C.G.K E.1998/247 K.1998/335, 27/10/1998, see in İlker Duman, 'Yargıtay Kararlarında "Halkı Birbirine Düşürmek" Suçu', (2001) 1 Türkiye Barolar Birliği Dergisi 199-234, 209; Y(8)C.D, E.1994/6163 K.1994 / 7188, 10.06.1994

¹¹¹ Y.C.G.K, E.1999/77 K.1999/70, 20.04.1999; see also in, Y.C.G.K, E.1999/9-77 K.1999/70, 20.04.1999

Before 2003, Yargıtay defined ‘terrorist propaganda’ as “using any kind of moral or material tools to encourage, inculcate and influence people so as to spread, or cause to take root, specific views, ideas and opinions”.¹¹² Yargıtay has also noted that the offence of propaganda is an activity which facilitates terrorist activities and enables the existence of terrorist organisations.¹¹³ Propaganda was thus considered to be equivalent to providing ‘material support’ to terrorist organisations.¹¹⁴ However, this construction of ‘propaganda’ resulted in the imposition of highly onerous legal sanctions on the right to freedom of expression. For example, there have been convictions for providing material support to an illegal armed organisation under Article 169¹¹⁵ due to the phrase: “whatever way facilitate their (ie. terrorist organisations) activities”.¹¹⁶ This has provided the Courts with the legal ground to penalise persons for circulating propaganda on behalf of groups deemed to be ‘terrorist’.¹¹⁷ This phrase was removed from TPC by an amendment introduced in 2003, and the offence of propaganda for terrorism separated from the offence of aiding and abetting to a terrorist organisation.¹¹⁸ After the amendment Yargıtay noted that expression was not to be considered as an activity providing material support.¹¹⁹ This issue is also clearly identified under the new TPC and Yargıtay reached the conclusion that material aid to a terrorist organisation is criminalised

¹¹² YCGK, E.1999/9-33 K.1999/38, 16/03/1999 p.3

¹¹³ Ibid

¹¹⁴ YCGK, E.1999/9-33 K.1999/38, 16/03/1999 p.2 (emphasis added)

¹¹⁵ Article 169 of 765 TCC: “... any person who aids, provide, supplies, munitions or weaponry or housing for such organisation or facilitate their activities, or whatever way constitute their activities by knowing their features and status shall be punished with imprisonment three years to five years.”

¹¹⁶ YCGK, E.1999/9-33 K.1999/38, 16/03/1999 p.1-2

¹¹⁷ Ibid; this case is a comprehensive illustration for such decision of Yargıtay.

¹¹⁸ Article 2 of 4963 Law, 30/07/2003

¹¹⁹ Y(9)CD, E.2003 / 1902 K.2003 / 1934, 23.10.2003; see also, Y(9)CD, E.2003 / 1520 K.2003 / 1752, 13.10.2003; Y(9)CD, E.2003 / 2142 K.2003 / 2232, 11.12.2003; see also, Y. (9) C.D. E.2004/978 K.2004/2802, 14/06/2004, see also, Y(9)CD, E.2004 / 391 K.2004 / 962, 30.03.2004, see also Y(9)CD, E.2004 / 002396, K. 2004 / 2846, 14.06.2004, see also, Y(9)CD, E.2004 / 2912, K2004 / 3075, 17.06.2004, see also, Y(9)CD, E.2004 / 978, K.2004 / 2802, 14.06.2004, see also Y. (9) C.D. E.2004/744 K.2004/1361, 15/04/2004

under article 220/7¹²⁰ of TPC but non-material support falls under the offence of propaganda for terrorism.¹²¹

Dissenting expression has also been targeted by the administrative and legal authorities on the basis that it is capable of inciting 'terrorism'. However, merely offering alternative (non-official) perspectives on political matters was to be considered such speech. In the same vein as speech pertaining to political violence (see above), the authorities' approach accords primacy to the state and its official ideology. As Derya has argued, these provisions have been used by judges as a tool to regenerate the legal discourse of constitutional ideology.¹²² The TPCs and the TMK have been used to draw the boundaries of political, academic and intellectual expression. Of-course, particular groups may actually seek to advocate 'terrorism' (strictly defined), but the parameters of such speech must also be narrowly drawn. Watts, for example, has argued, as a matter of fact, that there are important organisational differences between the PKK and pro-Kurdish political parties, even though most of their members have close personal relationships with the PKK and support it ideologically.¹²³ Indeed, they might support the PKK's goals and offer enthusiastic criticism of the state in favour of PKK's will – but this does not mean that their speech constitutes advocacy of 'terrorism'.¹²⁴ Thus, the courts must fine-tune the balance between the right to freedom of expression and national security-public order matters, and also the courts must explain how such expression pose danger to the state.

Having said that, the introduction of individual petition to the Constitutional Court in 2012 has brought a new approach to infringements of the Constitutional right to freedom of expression. The Constitutional Court has adopted similar principles to those relied upon by the European Court of Human Rights into its constitutional doctrine. This approach is liberal in nature and

¹²⁰ Article 220 of TPC: (1) Those who form or manage organized groups to executes acts which are defined as offence by law, are to be punished with imprisonment from two years to six years unless this organized group is observed to be qualified to commit the offence in view of its structure, quantity of members, tools and equipment held for this purpose. However, at least three members are required for the existence of an organized group. (2) Those who become a member of an organized group with the intention of committing crime, are to be punished with imprisonment from one year to three years. (3) In the case of the organized criminal group is equipped with arms, the punishment to be imposed according to the above subsections is increased from one fourth to one half. (4) In the case of commission of a crime within the frame of activities of an organized group, the offender is additionally punished for this crime. (5) The directors of the organized criminal group are additionally punished for all the offences committed within the frame of activities of the organized group. (6) Any person who commits an offence on behalf of an organized criminal group without being a member of that group is additionally punished for being a member of the organized group. (7) Any person who knowingly and willingly helps an organized criminal group without a position within the hierarchic structure of the group, is punished as if he is a member of the organized group. (8) Any person who spreads propaganda by praising the organized criminal group and its object is punished with imprisonment from one to three years. The punishment to be imposed is increased by one half in the case of commission of this offense through press and broadcasting organs.

¹²¹ YCGK, E. 2007/9-230 K. 2008/23, 12/02/2008 p.4, see also, YCGK, E.2008 / 184 K.2009 / 43, 03.03.2009 p.4; see also Y(9)CD, E.2009 / 7991 K.2011 / 2120, 06.04.2011

¹²² Derya Bayir, 'Representation of the 'Kurds' by the Turkish Judiciary' (2013) 35 Human rights Quarterly 116-142, 137

¹²³ Nicole F. Watts, 'Activists in Office: Pro-Kurdish Contentious Politics in Turkey' (2006) 5/2 Ethnopolitics 125-144, 127

¹²⁴ Ibid 134

provides more protection for political expression. In this regard, the Constitutional Court has emphasized that expression may legitimately offend, shock or disturb the State or any sector of the population, and such expression may not be restricted, if they do not incite and encourage violence and hatred.¹²⁵ The Constitutional Court has thus held that some convictions for 'terroristic speech' were in violation of the right to freedom of expression.¹²⁶ For instance, after taking the whole content of a particular book into consideration, the Constitutional Court noted that while the book consisted of hard-hitting criticism of Turkey's Kurdish policy and activities in the South East of the country, it advocated using only peaceful rather than violent methods to expose the "Kurdish reality".¹²⁷ In another case, books of poetry expressed sadness for both those who had died in the armed conflict and the jailed leader of the PKK.¹²⁸ The Constitutional Court held that these books neither incited violence or armed insurrection nor embraced a terrorist organisation. The Constitutional Court also considered the way in which expression was delivered. In these cases, the expression in question was in books with a limited readership, rather than social media or other tools of mass communication.¹²⁹ In such cases, the Constitutional Court has generated a slightly different approach, one more in favour of compliance with human rights standards than its approach during the previous era of sedition-like prosecutions. As Chapter 4 demonstrates, the European Court and its case law have played a significant role in this progress. Now in turn, the following sub-sections address the individual offences related to 'terroristic speech' under TMK and TPC.

4.2.2.1) Disclosure and Publication of 'Terrorist' - related Materials

The offence of 'disclosure and publication' of terroristic materials derives from Article 6 of TMK. This provision penalises those who announce the crimes of a terrorist organization, or who disclose or publish the identity of officials in charge of anti-terror units,¹³⁰ or who print or publish leaflets and declarations of terrorist organizations which justify or praise the violent, coercive or oppressive methods of terrorist organisations, or encourage others to use these methods, or who disclose or publish the identity of informants or offenders.¹³¹ If any of these offences are committed through periodicals their publishers (or editors in chief) shall be punished. By these offences, the legislative body aims to restrict expression which justifies, praises or encourages the methods which amount to violence, coercion or oppression; not on the basis of punishing every disclosure and publication of terrorist-related materials.¹³² These

¹²⁵ The Constitutional Court (App No: 2013/409) 25/6/2014 para 108, see also The Constitutional Court (App No: 2013/1461), 12/11/2014 para 50, 94; *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 49

¹²⁶ The Constitutional Court (App No: 2013/409) 25/6/2014 para 7 and 112, The Constitutional Court (App No: 2013/1461), 12/11/2014 para 110

¹²⁷ The Constitutional Court (App No: 2013/409) 25/6/2014 para 105 and 108

¹²⁸ The Constitutional Court (App No: 2013/1461), 12/11/2014 para 106

¹²⁹ The Constitutional Court (App No: 2013/409) 25/6/2014 para 68, The Constitutional Court (App No: 2013/1461), 12/11/2014 para 59, 107

¹³⁰ *Yargıtay* decided that identifying publicly known public officials in the publication were not regarded as offence under TMK 6. See in; *Y. (9). C.D, E.1995/3693 K.1995/4525 (3/7/1995)*

¹³¹ The article 6 of TMK

¹³² TBMM, *Tutanak Dergisi*, 90. Birleşim, 10/04/2013, P.25-26

offences create criminal liability for individuals as well as publishers in the media. In fact, Özgenç states that the offence of disclosure and publication of terrorist related materials would also be interpreted as an offence under Article 7 TMK which criminalises expressions in which 'justifying', 'praising' or 'encouraging' of terrorism occurs.¹³³ This possibility creates a very broad discretion, enabling for the courts to interfere with a wide range of expression.

Initially, the TMK also afforded broad discretionary powers to judges and public prosecutors to suspend the activity of particular publications as a precaution in order to prevent these offences from being committed.¹³⁴ The Constitutional Court approved such judicial discretion on the basis that the media dissemination of terrorist propaganda can cause a much greater harm (namely, acts of terrorism).¹³⁵ Nonetheless, if Yargıtay can be convinced that publication was for the purpose of news and had newsworthy content, then it should not be regarded as 'terroristic speech'.¹³⁶ Furthermore, a subsequent amendment of the TMK repealed the relevant paragraph, and the power to suspend a periodical's activities has now been somewhat diminished.¹³⁷ This amendment sought to ensure the TMK's compliance with Article 10 of the European Convention,¹³⁸ and has to some degree provided protection for newsworthy content.¹³⁹

In addition, as Akbulut highlighted, the offence set forth under Article 6 TMK provides protection from public critique for public officers engaged in the fight against terrorism.¹⁴⁰ Since this provision mostly targets the media, Tanör emphasized that it disrupts the press and inhibits public discussion of violations of law perpetrated by public officials.¹⁴¹ Press media and periodicals particularly are subjected to this offence. The editor-in-chief and owner of one publication were heavily penalized (with a fine) under Article 6 TMK for disclosing and publishing terrorist related materials in periodicals.¹⁴² The very existence of such an offence serves to silence public dissemination of information through media outlets. When public officers involved in the fight against terrorism commit torture, murder or engage in corrupt behaviour, the TMK provides a level of legal protection for them by criminalising those who criticize their actions. The Constitutional Court, however, has made a crucial distinction between a publication's executive/editor in chief's criminal liability and that of its owner. In an early decision (in 1991), the Constitutional Court noted that the owner of publication could only

¹³³ İzzet Özgenç, *Terörle Mücadele Kanunu*, (Seçkin Yayıncılık, 2006) 43-44

¹³⁴ Article 5 of 5532, 29/06/2006, this is the act that made amendment on article 6 of TMK.

¹³⁵ The Constitutional Court, E.2006/121 K.2009/90, 18/06/2009, p.10

¹³⁶ Y. (9), C.D, E.1997/6007 K.1998/1306, 28/04/1998; see also Y. (9), C.D, E.1995/3693 K.1995/4225, 03/07/1995; Y. (9), C.D, E.1994/1027 K.1994/1881, 08/04/1994

¹³⁷ Article 105 of 6352, 02/07/2012, this is the act that repealed article 6 (para 5) of TMK.

¹³⁸ The Constitutional Court, E.2006/121 K.2009/90, 18/06/2009, p.15, see also in TBMM Tutanak Dergisi, 90. Birleşim, 10/04/2013 p.25

¹³⁹ Y(9)CD, E.2009/14883 K.2011/30914, 29/12/2011,

¹⁴⁰ İlhan Akbulut, *Terörle Mücadele Kanunu ve Açıklaması*, (İstanbul, 1993) 105

¹⁴¹ Bülent Tanör, 'Terörle Mücadele Kanunu Üzerine İlk Düşünceler' (1990) 1-2 MHB 165, 169

¹⁴² See for instance; Y. (9). C.D, E.2002/2125 K.2002/2249 18/11/2002 p.1, see also Y. (9), C.D, E.2004/2397 K.2004/2048, 10/05/2004, p.1

be counted as liable for the offence of disclosure and publication of terrorist-related materials, if he did not show adequate prudence so as to prevent this offence.¹⁴³ The owner of a publication could therefore only be held liable if there was a clear causal link between his conduct (or reasonable failure to take appropriate action) and the disclosure.¹⁴⁴ Indeed, in 2009, the Constitutional Court decided that media owner's criminal liability should be totally excluded.¹⁴⁵ Furthermore, the criminal liability of executives and editors-in-chief arises because of their specific responsibilities (such as being in charge of the publications' policy, appointing persons to the executive board, and overall supervision of the publications).¹⁴⁶ On one level, the Constitutional Court's limitation of potential criminal liability for executives or editors-in-chief can be regarded as a positive development for the exercise of freedom of expression and press. Liability only arise in the event of proven 'negligence' which shows a lack of adequate care and attention to prevent forbidden disclosures.¹⁴⁷ However, the liability of owners in negligence still persists, and this in itself serves as a control mechanism over the media,¹⁴⁸ creating a background threat of prosecution by judicial and executive authorities.¹⁴⁹ It can be argued that this is a form of indirect censorship.

Article 6 TMK criminalises a wide range of expression (books, news items, articles,¹⁵⁰ reportage in a periodical,¹⁵¹ social media etc.) containing speeches, declarations or other utterances of a leader or a member of a terrorist organisation. In such cases, Yargıtay did not require that the author agree with the terroristic sentiments – merely that it was published.¹⁵² For instance, the owner and editor-in-chief of a newspaper were penalised for disclosing and publishing a threat to a newspaper announced by the leader of a proscribed terrorist organisation.¹⁵³ The offence was committed only by publishing this threat.¹⁵⁴ The national courts have thus struggled to distinguish news, critique or political debate from the advocacy of 'terrorism'. Overly-broad judicial discretion has led to the imposition of preventive measures on legitimate political, intellectual, and journalistic expression. Indeed, even academic research and journalistic work that could have informed or contributed to a solution to the on-going terror problem in Turkey were subjected to restrictions under the TMK.¹⁵⁵ As with previous cases, here too Yargıtay failed to examine or explain how such publications may increase the likelihood of an act of terrorism being committed. The very existence of this form of strict liability offence absolves Yargıtay

¹⁴³ The Constitutional Court E.1991/18 K.1992/20 (31.3.1992) p.42

¹⁴⁴ Ibid

¹⁴⁵ The Constitutional Court, E.2006/121 K.2009/90, 18/06/2009, p.11, see also in YCGK, E.2011 / 18 K.2011 / 27, 29/03/2011

¹⁴⁶ The Constitutional Court, E.2006/121 K.2009/90, 18/06/2009, p.10

¹⁴⁷ Ibid

¹⁴⁸ The Constitutional Court, E.2006/121 K.2009/90, 18/06/2009, p.11

¹⁴⁹ TBMM Tutanak Dergisi, 106. Birleşim, 11/04/1991 p.224, 284, 285, 288

¹⁵⁰ Y(9)CD, E.2010/1679 K.2012/140, 03/01/2012

¹⁵¹ YGCK, E.1993/9-157 K.1993/190, 20.09.1993

¹⁵² Ibid

¹⁵³ YCGK, 5/12/1995, 9-321/355, quoted from Şahin Kurt, Uygulamada Terör Suçları ve İlgili Mevzuat, (Seçkin Yayınevi, 1998) 396; see also, Y(9)CD, E.2010/1679 K.2012/140, 03/01/2012

¹⁵⁴ Ibid

¹⁵⁵ Kazan (n. 101)

from giving any consideration to the causal link between expression and terrorism – since the legislature already assumes that such a link indeed exists, the courts are reduced merely to enforcing the law.

4.2.2.2) Propaganda for Terrorism

‘Propaganda’ offences under Article 7 and 8 TMK and (previously under Article 142 and 163 TPC, discussed above) have frequently been relied upon to interfere with political expression. Yargıtay defined ‘propaganda’ in its early case law as “using any kind of moral or material tools to encourage, inculcate and influence people so as to spread, or cause to take root specific views, ideas and opinions”;¹⁵⁶ or “to convince, to indoctrinate, to spread a certain idea among people and to cause ideas and beliefs to take root by using any kind of moral and material tools in order to achieve a particular end”.¹⁵⁷ The offence of propaganda can be committed by means of praising or justifying the methods of terrorist organisations (such as coercion, violence or the threat of violence), or by encouraging these methods.¹⁵⁸ The inclusion of these multiple terms - ‘encouraging’, ‘praising’, or ‘justifying’ - make the boundaries of the propaganda offence broad and over-inclusive. In one debate during the revision of the TMK, held by the legislative body, members drew attention to the way in which the addition of multiple verbs served to expand judicial discretion.¹⁵⁹ Indeed, in any case, the courts generally consider particular subjects (such as the Kurdish question, praising the leader of the PKK, debates questioning the State’s counter-terrorism policy etc.) as propaganda for terrorism, regarding these subjects as inherently predisposed to violent resistance, incompatible with the constitution, and therefore, fundamentally against the State.¹⁶⁰ Consequently, the Courts are very far from undertaking a nuanced analysis of the balance between State interests and the right to freedom of expression. Instead, they seek to protect the established political, economic and social system in a way that resembles the prosecution of sedition-like offences in previous years.

Consideration must also be given in this regard, to the offence of ‘propaganda against the indivisible unity of the State’, sometimes referred to as ‘separatism (bölücülük)’, under Article 8 TMK.¹⁶¹ Protecting ‘the indivisible unity of the Turkish Republic and its territory and nation’ meant securing each of these aspects of Turkish statehood – the ‘nation’, the ‘Turkish Republic’ and ‘Territory’.¹⁶² Hence, advocating the establishment of another nation or a separate state from the Turkish state was not acceptable.¹⁶³ Regarding the conflict based on ethno-nationalism since 1980s, Yargıtay decided that describing the Kurds or other ethnic minorities as a separate entity from the ‘Turkish Nation’ should also be criminalised under the offence of

¹⁵⁶ YCGK, E.1999/9-33 K.1999/38, 16/03/1999 p.3

¹⁵⁷ Y. (9) C.D, E.1995/9-123 K.1995/153, 22/05/1995 p.2

¹⁵⁸ Article 7 of the Law on the Fight against Terrorism

¹⁵⁹ TBMM, Tutanak Dergisi, 90. Birleşim, 10/04/2013, P.33

¹⁶⁰ Justifications of 765 TCC, see also Alacakaptan (n. 12) 8

¹⁶¹ Y. (9) C.D, E.1995/4186 K.1995/5414, 26/10/1995 p.13; see also Y(8)CD, E.1993/11775 K.1994/5, 05.01.1994

¹⁶² Y. (9) C.D, E.1995/4186 K.1995/5414, 26/10/1995 p.13

¹⁶³ Y. (9) C.D, E.1995/4186 K.1995/5414, 26/10/1995 p.13-14; see also Y(8)CD, E.1993/11775 K.1994/5, 05.01.1994

'propaganda for separatism'.¹⁶⁴ Yargıtay noted that 'Kurdism' was founded on separatism and attempted to weaken national feelings – while the use of the word "Kurds" was not forbidden, any description of Turkish citizens who are ethnically Kurdish as a separate nation was outlawed.¹⁶⁵ By adopting this approach, as with the 'disclosure and publication' offence under Article 6 TMK, Yargıtay wholly fails to examine whether the particular impugned expression posed an imminent and likely threat to the nation, the Turkish Republic or its territorial integrity. Yargıtay's approach has also led to the criminalisation of political or intellectual expression that raised issues regarding the problems or demands of ethnic minorities in Turkey.¹⁶⁶

This offence under article 8 of TMK was repealed in 2003,¹⁶⁷ and Yargıtay lifted the restrictions/corresponding sanctions under Article 8 that had previously been put in place.¹⁶⁸ This amendment was introduced in light of ECHR standards on freedom of expression.¹⁶⁹ Prosecutions for the offence of propaganda had resulted in a significant number of findings of violations against Turkey by the European Court of Human Rights.¹⁷⁰ The ECtHR held that even separatist expression or propaganda which does not incite or encourage violence sought to fall within the protective scope of the right to freedom of expression.¹⁷¹ These findings of violations did not go unnoticed by parliamentarians,¹⁷² and it is clear that ECtHR case law played a key role in incentivizing the legislative amendment of the TMK. That said, another (entirely domestic) reason that could explain the amendment is that in the early 2000s, the intensity of 'terrorist' activities in Turkey decreased,¹⁷³ and the legislative body may therefore provide more space for the right to freedom of expression.¹⁷⁴ Whatever the primary reason for the amendment, the repeal of the Article 8 offence has expanded the protection of the right freedom of expression in Turkey, especially in terms of political expression which engages with ethnic and security problems.¹⁷⁵

Notwithstanding the repeal of Article 8 TMK, Yargıtay continues to approve sanctions under Article 7 TMK 'terroristic' propaganda. For example, slogans (such as "*long live the leader Apo*;

¹⁶⁴ Y. (9) C.D, E.1995/4186 K.1995/5414, 26/10/1995 p.13

¹⁶⁵ YGCK, E.1990/9-341 K.1991/34, 18/02/1991 p.1; Y. (9) C.D, E.1995/4186 K.1995/5414, 26/10/1995 p.13

¹⁶⁶ See for example, YCGK E. 1994 / 9-183 K. 1994 / 214, 03/10/1994; :

¹⁶⁷ The article 19/b of the Act:4928, 15.7.2003

¹⁶⁸ Y(9)CD, E.2004 / 152, K.2004 / 417, 17.02.2004

¹⁶⁹ The Report of Justice Commission, TBMM, E.1/633 K.31, 14/07/2003 p.7; some cases regarding the offence of separatism: Y. (9) C.D, E.1990/3890 K.1990/4370, 12/12/1990; YCGK, E.1993/9-149 K.1993/181, 21/06/1993; YCGK, E.1995/9-123 K.1995/153, 22/05/1995; YCKG, E.1996/8-20 K.1996/29, 05/03/1996

¹⁷⁰ TBMM, Tutanak Dergisi, 90. Birleşim, 10/04/2013, P.48; see also The Report of Justice Commission, TBMM, E.1/633 K.31, 14/07/2003 p.7; some cases regarding the offence of separatism: Y. (9) C.D, E.1990/3890 K.1990/4370, 12/12/1990; YCGK, E.1993/9-149 K.1993/181, 21/06/1993; YCGK, E.1995/9-123 K.1995/153, 22/05/1995; YCKG, E.1996/8-20 K.1996/29, 05/03/1996

¹⁷¹ TBMM, Tutanak Dergisi, 96. Birleşim 19/06/2003, 456

¹⁷² Ibid 418-419 (Republican Party: Zekeriya Akçam-İzmir)

¹⁷³ 126 Tutanak Dergisi, 122. Birleşim, 19/06/2006 p.45, 72

¹⁷⁴ The amendments on TMK: 4744 Act on 6.2.2002, 4963 Act on 30.7.2003, and 4928 Act on 15.7.2003

¹⁷⁵ Y(9)CD, E.2009/21676 K.2011/29396, 05/12/2011; Y(9)CD, E.2010/5039 K.2012/3760, 21/03/2012; Y(9)CD, E.2010/16268 K.2012/5801, 09/05/2012

we are with you Öcalan; tooth for tooth, blood for blood)¹⁷⁶ or petitions (such as *“I accept Abdullah Öcalan as my political will”*)¹⁷⁷ were regarded as satisfying the requirements of the offence of propaganda after taking into account the character of the particular organisation concerned.¹⁷⁸ Similarly, a political figure was prosecuted for delivering a speech at the graveside of a ‘terrorist’ where people also chanted slogans praising the members of a proscribed ‘terrorist’ organisation.¹⁷⁹ Yargıtay decided that this speech should be understood as praising ‘terrorism’, justifying the fight against the security forces and encouraging use of ‘terrorist’ methods.¹⁸⁰ As noted previously, the inclusion of the verb ‘praising’ as an element of propaganda has greatly extended the breadth of the offence, and its outer parameters thus remain unclear. Furthermore, these sorts of expression were regarded as incitement to acts of terrorism due simply to the fact that they publicly spread the PKK leader’s ideas and thus (inevitably in the Court’s eyes) encouraged and influenced people to take up arms.¹⁸¹ It is argued, however, that such assumptions fail to recognize the value of freedom of expression (even, as chapter 2 outlined, in bringing to public attention the fact that a number of people hold such views). These assumptions also deny both the importance of counter-speech (the argument that the best corrective to extreme speech may be counter-speech rather than legal sanction), and indeed the capacity of listeners to respond rationally (having heard and considered alternative views, those of the authorities included).

Despite some partially successful endeavours (such as the repeal of Article 8 TMK) to escape from the restrictive spirit of the sedition-like offences under previous versions of the TPC and TMK, the TMK has constituted a legal obstacle to democracy and freedom of expression in the name of the fight against terrorism. In case law, the offence of propaganda is not clearly differentiated from the offence of praising. And Yargıtay fails to consistently consider the actual link between expression and their capacity or potential to incite acts of ‘terrorism’. Without close and careful consideration of such matters, the Courts will most probably continue to interpret the law in the same way as sedition-like offences, and thus to suppress even mildly dissenting expression.

4.2.2.3) Praising of ‘Terrorism’

Praising ‘terrorists’ or offences committed by ‘terrorist organisations’ is an offence under Articles 312 of the old TPC and 215 of the new TPC.¹⁸² The offence of ‘praising’ was defined as expression that contains affirmation or approval of specific crimes. This is different from

¹⁷⁶ Y(9)CD, E.2007 / 10663 K 2008 / 12819,24.11.2008; Y(8)CD, E.2009 / 3222 K.2011 / 4969, 15.06.2011; Y(8)CD, E.2011 / 9318 K.2011 / 9517, 13.09.2011

¹⁷⁷ YCGK, E.2008 / 184 K.2009 / 43, 03.03.2009

¹⁷⁸ Y(9)CD, E.2007 / 10663 K 2008 / 12819,24.11.2008; YCGK, E.2008 / 184 K.2009 / 43, 03.03.2009; Y(9)CD, E.2009 / 7991 K.2011 / 2120, 06.04.2011; Y(8)CD, E.2009 / 3222 K.2011 / 4969, 15.06.2011; Y(8)CD, E.2011 / 9318 K.2011 / 9517, 13.09.2011; Y(9)CD, E.2009/20979 K.2011/30210, 19/12/2011

¹⁷⁹ Y(9)CD, E.2009/20979 K.2011/30210, 19/12/2011

¹⁸⁰ Ibid

¹⁸¹ Y(9)CD, E.2007 / 9370, K.2008 / 617, 04.02.2008

¹⁸² YCGK, E.2007/69 K.2007/99, 17/04/2007 p.5

'incitement' which, in addition, requires a specific direction to commit a prohibited act.¹⁸³ Özek stated that the offence of 'praising' can be regarded as indirect propaganda.¹⁸⁴ In fact, these two offences seem very similar but Yargıtay defines them differently,¹⁸⁵ 'praising' consists of expressions which do not fit into the definition of 'propaganda'.¹⁸⁶ 'Praising' also means to present something in a better way; to embrace, to approve, to support, and to raise the value of a particular idea.¹⁸⁷ In contrast, propaganda consists of operationalising activities such as express persuasion or giving instructions or directions.¹⁸⁸ As a result, the offence of 'praising' can be used to cover expressions that did not meet the requirements for an offence of 'propaganda'. However, when the offence of 'propaganda' is committed, by extension, the offence of 'praising' is also committed.¹⁸⁹ Speakers are regularly penalised for the offence of 'propaganda' rather than that of praising because its punishment is heavier.¹⁹⁰

The offence of praising provided a means for the courts to interfere with a wide range of expression including indirect advocacy of 'terrorism'. Akin stated that a legal lacuna appeared after the repeal of the offence of 'separatism (bölücülük)' under Article 8 TMK, and that this gap was filled with the offences of praising and incitement under the TPC.¹⁹¹ In several cases, Yargıtay penalised expression that praised the founder of the PKK.¹⁹² For instance, a speaker was penalised for applauding slogans favouring the leader of the PKK at a public meeting which was organised to memorialize the anniversary of a suicide bomber's death.¹⁹³ Even more strikingly, Yargıtay confirmed the charge based solely on references to "Öcalan", and "*war and conflict atmosphere still continues in our country ... Kurdish nation upon Mr Öcalan ...*" because using the prefix 'Mr' itself showed respect, and thus praised the leader of the PKK.¹⁹⁴ In another case, Yargıtay approved the sanction on a speaker who made a speech in public, stating: "*... the EU added KONGRA-GEL¹⁹⁵ into the list of terrorist organisations. This decision is unfortunate and ... we worry that the conflict will start again. ...*". This statement was interpreted to suggest the speaker's approval and support for the activities of a proscribed terrorist organisation and

¹⁸³ Çetin Özek, 'Suç Teşkil Eden Fiillerin Övülmesi ve TCK'nın 142/4. Maddesi ile ilgili iki Yargıtay Kararı' (1967) 33 İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 438-458, 451

¹⁸⁴ Ibid

¹⁸⁵ YCGK 18.10.82. E.9/310 K.368; quoted from Akin (n. 11) 48

¹⁸⁶ Ibid

¹⁸⁷ Ibid

¹⁸⁸ Ibid, see also YCGK, E.1990/9-330 K.1991/18, 11/02/1991 p.2

¹⁸⁹ YCGK, E.1990/9-330 K.1991/18, 11/02/1991 p.2

¹⁹⁰ Ibid

¹⁹¹ Akin (n. 11) 87

¹⁹² Y(9)CD, E.2004 / 1528 K.2004 / 2904, 15.06.2004; Y (8), C.D E.2009/14199 K.2011/3073, 25/05/2011; Y (8), C.D E.2008/5295 K.2010/5826, 13/04/2010

¹⁹³ Y (8), C.D E.2007/7162 K.2009/4809, 26/03/2009

¹⁹⁴ Y (8), C.D E.2007/7162 K.2009/4809, 26/03/2009; see also in Y(9)CD, E.2009/17938 K.2011/27655, 13/03/2008, see also in Y (8), C.D E.2008/5295 K.2010/5826, 13/04/2010

¹⁹⁵ In October 2003, PKK underwent another name change to KONGRA-GEL (Kurdistan Peoples Congress). The decision was made public by a press statement in Iraq on 15 November 2003. In the case of "YCGK, E. 2007/69, K. 2007/99, 17.04.2007 and YCGK, E.2006 / 8345 K.2007 / 13, 30.01.2007", Yargıtay declared that KONGRA-GEL is PKK under different name.

was held to incite the public to use violence and commit a crime.¹⁹⁶ This expression was publicly delivered by political figures who were members of pro-Kurdish political parties, frequently praising or valorising the past offences of proscribed organisations.¹⁹⁷

Yargıtay has slightly changed its approach regarding this matter due to ECtHR case law,¹⁹⁸ and the scope of the offence of 'praising' has been somewhat narrowed. Yargıtay emphasised the place of ECHR in the Turkish legal system, as well as its standards on freedom of expression which should be regarded as a fundamental principle of democratic society and a prerequisite for the development of society and individuals.¹⁹⁹ In this regard, Yargıtay pays particular attention to, i) the content of expression to determine whether it incites violence or not, ii) the context in which the expression was made, and iii) whether the expression could be properly construed as incitement to violence.²⁰⁰ As a result, Yargıtay has noted in a series of cases that the expression in question falls under the protection of freedom of expression because such expression did not incite armed insurgency, insurrection or did not praise an offence or offender.²⁰¹ Following this approach, Yargıtay held that using the prefix 'Mr' to refer to 'Mr Öcalan' should be protected since the right to freedom of expression protects not only *"information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend shock or disturb the State or any sector of the population.*²⁰² This approach upholds the values of pluralism, tolerance and broadmindedness as prerequisites of a democratic society.²⁰³ It must be noted, that although Yargıtay has used ECHR standards to interpret the TPC, the law itself still provides very broad judicial discretion to draw boundaries to freedom of speech. There is always the possibility for 'praising' to be misused to suppress political critics as well as academic and intellectual work. The resulting

¹⁹⁶ YCGK, E.2006/8-345 K.2007/13, 30/01/2007, p.2-3

¹⁹⁷ YCGK, E.2006/8-345 K.2007/13, 30/01/2007; see also YCGK, E.2007 / 69 K.2007 / 99, 17.04.2007, see also YCGK, E.2006 / 8345 K.2007 / 13, 30.01.2007 p.5

¹⁹⁸ Y (8), C.D E.2009/7316 K.2012/17738, 23/05/2012 p.3-4

¹⁹⁹ Y(8)CD, E.2012/882 K.2012/6067, 10.05.2012; Y (8), C.D E.2009/7316 K.2012/17738, 23/05/2012; Y (8), C.D E.2009/7316 K.2012/17738, 23/05/2012; Y(8)CD, E.2009 / 18022 K 2012 / 21275, 20.06.2012; Y(8)CD, E. 2009/13825, K. 2012/23385, 04.07.2012; Y(8)CD, E. 2013/12126, K. 2013/20425, 10.07.2013; Y(8)CD, E.2013/1567 K.2013/5627, 15.02.2013

²⁰⁰ Sürek v. Turkey, (4) (App. 24762/94) 8 July 1999, para 12, 58; Sürek ve Özdemir v. Turkey (App.23927/94 and 24277/94) (8 July 1999) para 61; Özgür Gündem v. Turkey (App. 23144/93) 16 March 2000, para 63, see in Gözel ve Özer v Türkiye, (App: 43453/04 and 31098/05) 6 July 2010 (available in Turkish) p.7 (Yargıtay cited these ECtHR cases in the cases of Y(9)CD, E.2010 / 4243 K.2012 / 1683, 08.02.2012; Y(8)CD, E.2012/882 K.2012/6067, 10.05.2012; Y(8)CD, E.2009 / 18022 K 2012 / 21275, 20.06.2012; Y(8)CD, E. 2009/13825, K. 2012/23385, 04.07.2012; Y(8)CD, E. 2013/12126, K. 2013/20425, 10.07.2013; Y(8)CD, E.2013/1567 K.2013/5627, 15.02.2013)

²⁰¹ Y(9)CD, E.2010 / 4243 K.2012 / 1683, 08.02.2012; Y(8)CD, E.2012/882 K.2012/6067, 10.05.2012; Y (8), C.D E.2009/7316 K.2012/17738, 23/05/2012; Y(8)CD, E.2009 / 18022 K 2012 / 21275, 20.06.2012; Y(8)CD, E. 2009/13825, K. 2012/23385, 04.07.2012; Y(8)CD, E. 2013/12126, K. 2013/20425, 10.07.2013; Y(8)CD, E.2013/1567 K.2013/5627, 15.02.2013

²⁰² Handyside v. UK, App. No:5493/72, 07/10/76 para 49; see in, Y(8)CD, E.2012/882 K.2012/6067, 10.05.2012; Y (8), C.D E.2009/7316 K.2012/17738, 23/05/2012; Y(8)CD, E.2009 / 18022 K 2012 / 21275, 20.06.2012; Y(8)CD, E. 2009/13825, K. 2012/23385, 04.07.2012; Y(8)CD, E. 2013/12126, K. 2013/20425, 10.07.2013; Y(8)CD, E.2013/1567 K.2013/5627, 15.02.2013

²⁰³ Ibid

uncertainty, and the unclear boundary between the offences of praising and propaganda thus continues to create a restrictive effect on the exercise of the right to freedom of expression.

4.3) Elements to Determine whether Expression is 'Terroristic Speech'

The elements of offences both under the TPC and the TMK, are crucial to determine whether a given expression constitutes one of the offences in relation to 'terroristic speech'. It must, however, be noted that, the jurisprudence in Turkey has suffered from an absence of systematic method for determining what constitutes 'terroristic speech'. Analysis of the case law relating to 'terroristic speech' exposes this lack of methodological rigour, which in turn causes legal uncertainty. The criminal provisions confer too wide a discretion on the authorities to criminalize politically oriented speech, even without tangible evidence of imminent and/or probable harm. Indeed, the early cases display an obvious lack of judicial attention to the imminence of acts of violence or 'terrorism'. They also show a tendency to interpret terrorism cases in a similar manner to those of 'sedition'. That said, later cases do show some signs that the judiciary have sought to address this deficiency.

There has been a considerable number of amendments to the statutory provisions, and these have led to some methodological reforms. Recently, for example, the Constitutional Court undertook close evaluation of the content and context of expression to determine whether or not the authorities' interference violated the right to freedom of expression. As such, it might be said that the Constitutional Court and Yargıtay have shown greater concern for the right to freedom of expression in their case law. However, now that 'terrorism' is again very active in Turkey, 'terroristic speech' is likely to meet with significant restrictions. Such restrictions remain possible because the elements of the offences (men s rea and actus reus, the audience - publicity), the evidential basis for prosecution of expression, and the courts' evaluation of content and context of expression (as discussed below) have not been clearly or precisely defined.

4.3.1) Mens Rea

The speaker's intent is one of the constituent elements of the offences related to 'terroristic speech' under TPC and TMK. Yet its consideration is not required by each offence. Özek differentiated the offence of praising from the offence of the propaganda on the basis of absence of speaker's intention.²⁰⁴ 'Intention', the offence of propaganda, is systematically sought in all propaganda cases so as to detect this crime. In other words, Yargıtay defined propaganda as: "an intention to spread an idea to others in order to attract supporters in any place at any time".²⁰⁵ The element of intention is the pivotal factor for the offence of propaganda. Yet, the offence of praising does not require consideration of the speaker's

²⁰⁴ Özek (n. 183) 451

²⁰⁵ Y. (3) C.D. E.1955/4416 K.1955/7163, 6/4/1955, see in Erol Cihan, *Ceza Hukukunda Propaganda Kavramı*, (1978) 1 *Ceza Hukuku ve Kriminoloji Dergisi*, 9-18, see also in, *The Constitutional Court*, E.1979/31 K.1980/59, 27/11/1980

intention. This can be counted as one of the key reasons why the offence of praising is so vague thus, carries such restrictive ground over expressions.

In order to determine the existence of intention for the offence of propaganda, Yargıtay examines not only the content of speech but also its medium and context along with the relationship of the speaker to his/her audience. In one Yargıtay case, for example, the defendant said: *"I am the commander, I am the head of commands, I support 'Başbuğ'. We will demolish the Republic of Turkey and replace it with sharia government; we are determined and no one will stop us."*²⁰⁶ The local court did not sentence the speaker because the necessary intention was not proven. Instead, the speaker's words were deemed to have been impulsive and uttered in the context of a heated debate.²⁰⁷ The requisite intention constitutes an intangible element of the offence.²⁰⁸ Intention of the speaker means here that speech was made knowingly, intentionally and for the purpose of attracting supporters.²⁰⁹ In another case, Yargıtay attempted to draw the boundary for the offence of propaganda by requiring proof of an 'intention' to compel others to follow religious principles and/or a religious system in spite of the regime of the state.²¹⁰ If the speaker did not have intention for propaganda to create compulsory religious principles for the public, his speech did not constitute an offence of propaganda.²¹¹ However, if the speaker had the intention of changing the state system through such religious advocacy then it constituted an offence of propaganda due to making a religious rule binding.²¹² In early cases involving the offence of propaganda, the local court sought to establish the speaker's intention to deliver ideas to the public. If intention of the speaker did not exist then that speech was instead counted as a praising crime.²¹³ In contrast, Yargıtay did not insist on examining the intention of the speaker when determining propaganda.²¹⁴ If ideas were disseminated to other people, whether with or without intention, Yargıtay regarded the activity as a propaganda crime.²¹⁵ Praising did not amount to propaganda crime. It can therefore be argued that Yargıtay does not draw a clear distinction between the offences of propaganda and praising but does require the element of intention for the offence of propaganda.

Consequently, it is evident that Yargıtay has no clear and explicit approach of the element of intention for the offence of praising. In few cases, Yargıtay sought the element of intention to determine whether expression was 'praising of offence or offender' by evaluating the entire content of a book, not just a few pages, statements or sections, to detect the speaker's

²⁰⁶ YCGK, E.1976/9-3 K.1976/23, 26/01/1976 p.1

²⁰⁷ Ibid

²⁰⁸ Ibid 2

²⁰⁹ Y. (5) C.D. E.1973/2269 K.1974/379, 04/02/1974 p.3

²¹⁰ YCGK, E.1985/9-595 K.1986/293, 26/05/1986 p.2

²¹¹ Ibid

²¹² Ibid

²¹³ Y (1). CD. E.1967/3228 K.1967/877 Ankara 1. Ağır Ceza Mahkemesi 31/10/1966

²¹⁴ Ibid

²¹⁵ Ibid

intention.²¹⁶ In other words, Yargıtay noted that the lack of consideration of the whole content lead the intention of speaker not to be considered in the offence of praising.²¹⁷ In another case, the element of intention was detected by considering the timing of the publication which was published right before the labour strike.²¹⁸ The publisher's timing was considered as an intention to praise the offence of politically motivated strike and lockout which posed a danger to public order.²¹⁹ Likewise, Yargıtay did not consistently seek the element of intention for the offence of incitement to hatred and animosity. For instance, in one case, Yargıtay detected the element of intention after consideration of the whole expression ruling that the speaker intentionally incited hatred and animosity against the state based on ethnic and regional discrimination.²²⁰

For the offence of propaganda under TMK, generally indefinite or indirect intention was required, rather than specific intention.²²¹ Yargıtay noted that the element of the speaker's intention cannot be an element in the offence of propaganda due to the phrase in the article 8 of TMK; *"regardless of the methods, intentions and the ideas"* which contradicts criminal theory and the method of legislation.²²² However, this phrase was removed from article 8 of TMK in 1995.²²³ By this amendment, the legislative body aimed to promote the right to freedom of expression and to accommodate standards set by the ECtHR into TMK so as to prevent excessive restriction of freedom of expression.²²⁴ Ultimately, Yargıtay took whole content of expression into consideration so as to avoid sanctions upon a speaker who did not carry the intention to commit the offence of propaganda.²²⁵

In the case of an offence of publishing a declaration and announcement of a terrorist organisation under TMK, Yargıtay did not specifically seek to establish criminal intent. Yargıtay accepted such publications as an offence with or without intention. The only condition for such a crime is to publish such an announcement or declaration; Yargıtay does not consider whether the applicant believes, agrees or supports the ideas uttered in the announcement or declaration of terrorist organisation.²²⁶ In this case, Local Court put emphasis on and found the 'intention' behind the public disclosure, deciding that the speaker's 'intention' was not to publish the terrorist announcement; but Yargıtay reversed this verdict and decided that 'intention' was not required for the offence of publishing an announcement or declaration of a

²¹⁶ Y. (8) C.D, E.1985/872 K.1985/1682, 01/04/1985 p.2

²¹⁷ Ibid

²¹⁸ YCGK, E.1992/8-299 K.1993/10, 25/01/1993, p.1

²¹⁹ Ibid

²²⁰ Y (8). C.D E.1994/6163 K.1994/7188, 10/06/1994

²²¹ Y. (9) C.D, E.1995/9-123 K.1995/153, 22/05/1995 p.2; 'General intent' is defined by Hakeri as an intent in which the law-maker does not take the perpetrator's motive and purpose into consideration. See in, Hakan Hakeri, Ceza Hukuku Genel Hükümler: Temel Bilgiler (Seçkin, 8th Ed. 2012) 171

²²² Y. (9) C.D, E.1995/9-123 K.1995/153, 22/05/1995 p.2

²²³ YCGK, E.1999/9-58 K.1999/69, 20/04/1999, p.1, see also, article 1 of 4126 Law, 27/10/1995

²²⁴ YCGK E.1999/9-58 K.1999/69, 20/04/1999 p.3

²²⁵ YCGK E.1999/9-58 K.1999/69, 20/04/1999 p.3

²²⁶ YCGK, E.1993/9-157 K.1993/190, 20/09/1993, p.1

terrorist organisation.²²⁷ There remains in Yargıtay's case laws evidence of methodological rigour concerning the detection of 'mens rea'. The intention of speaker is required as an element for the offence of propaganda but the term 'general intent' has allowed a broad and vague interpretation. For this reason, 'intention' is far from bringing any measure of precision into the offences related to 'terroristic speech'. Thus, it can be argued that such an element might lead the Courts to interpret TMK as the same concept as sedition.

4.3.2) Actus Reus

Offences relating to 'terroristic speech' under the TPC and TMK can be considered as inchoate offences. These impose liability on a person who takes steps towards the commission of an offence without it yet having been committed.²²⁸ Such offences are classified as 'danger crimes' ('tehlike suçu') under the TPC. For instance, criminalisation of propaganda against the 'unity of state and nation' is designed to prevent the escalation of danger before its future effects arise.²²⁹ As noted earlier in this chapter, danger crimes do not specify the immediate harm or danger, and any ultimate danger need not be caused directly. Indeed, there need not even be a specific, identifiable victim.²³⁰ Where a person has been charged with a 'danger crime', Yargıtay has noted that there is no need to check whether their expression (or indeed, association) has achieved the ultimate offence or not – the mere act of expression (or association) is itself regarded as punishable for giving rise to a danger.²³¹

As argued in the second chapter, the criminalisation of 'terroristic speech' should not be permitted without there being a demonstrable probability that imminent harm will result.²³² Moreover, it is vital to establish both a threshold of likelihood and levels of dangerousness in order to determine when speech is "harmful enough" to be legitimately criminalised.²³³ However, the breadth of culpable 'terroristic speech' under the TPC and TMK is augmented by the sheer number of different verbs used: e.g. making propaganda;²³⁴ indoctrinating;²³⁵ inciting;²³⁶ praising,²³⁷ or justifying.²³⁸ Furthermore, most of the national security or public order offences in Turkish law merely require the *possibility* (not probability) that a terrorist act

²²⁷ YCGK, E.1993/9-157 K.1993/190, 20/09/1993, p.2

²²⁸ Jonathan Herring, *Criminal Law: Text, Cases and Materials*, (OUP, Fifth Ed, 2012) 787

²²⁹ Y. (9) C.D, E.1995/9-123 K.1995/153, 22/05/1995 p.2

²³⁰ Aydın (n. 63) 4

²³¹ Y. (9), C.D. E.1976/46 K.1976/48, 05/10/1976 p.2; Y (9), C.D E.1974/2 K.1974/2, 18/06/1974 p.1-2

²³² Yael Ronen, 'Incitement to Terrorist Acts under International Law' (2010) 23 *Leiden Journal of International Law* 645, 667 (emphasis added)

²³³ Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (Springer, 2007) 43-44

²³⁴ Articles 142 and 163 of TPC were repealed in 1991; Articles 6 and 7 of TMK; Article 8 of TMK which was repealed in 2003

²³⁵ Articles 142 and 163 of TPC were repealed in 1991. (but this choice of verb was not often used by Yargıtay)

²³⁶ Article 312 of previous TPC was replaced with articles 214 and 215 of new TPC

²³⁷ Article 312 of previous TPC was replaced with article 216 of new TPC; Articles 6 and 7 of TMK.

²³⁸ Articles 6 and 7 of TMK.

may be committed at some (unidentified) future time.²³⁹ In its early case law, Yargıtay failed to establish definite harm or probability thresholds, and thus to narrow this remote (and inevitably speculative) link between expression and the possibility of harm.

More recently, there have been some legal endeavours to bring methodological rigour to the offences relating to 'terroristic speech'. Efforts to do so, concern the offence of 'propaganda' under repealed Article 8 TMK. This was previously committed "*regardless of the methods, intentions and the ideas*", but this phrase was removed from the provision in 1995.²⁴⁰ Yargıtay stated that this amendment is important and proposes a more concrete definition of the elements of the propaganda crime,²⁴¹ enabling the methods, intentions and ideas of the speaker to be considered by the court. After this amendment, the requirements for this sedition-like offence also stipulated that it posed a "clear and present danger" to the public, the state, and the regime or public order.²⁴² Yargıtay also adopted ECtHR case law as the basis for its own approach to legal interpretation,²⁴³ thereby limiting judicial discretion.

A further example of these efforts has sought to provide a basis for the Courts to *explain* the link between expression and the possibility of harm. First, the new TPC was introduced in 2004 and Article 216 ('incitement to hatred and animosity', previously Article 312 TPC) adopted a 'clear and present danger' test. The 'clear and present danger' to public safety has thus become a key element of the crime of incitement.²⁴⁴ This test originates in US Supreme Court case law,²⁴⁵ and amounts to "*a question of proximity and degree*"²⁴⁶ as to the tendency of a speech act to cause unlawful action. The evidential basis under the 'clear and present danger' test includes consideration of the content of speech, and the position of the speaker. It also considers whether the expression in question has a violent nature by means of constituting a danger against public order or public security.²⁴⁷ Yargıtay explained 'clear and present danger' by interpreting 'clear' as meaning '*the conspicuity of danger without doubt*' and 'present' as meaning '*tangible danger caused by speech*', or the '*high likelihood to cause harm*'.²⁴⁸ By adding the phrase 'clear and present danger' to the Article, the legislature aimed to limit the previously broad judicial discretion. One judge had previously claimed, "*the judge is 95% effective, the law is 5% effective in the case of Article 312*".²⁴⁹ Thus, the 'clear and present

²³⁹ Bibi van Ginkel, Incitement to Terrorism: A Matter of Prevention or Repression? (ICCT Research Paper, August 2011) 14

²⁴⁰ YCGK E.1999/9-58 K.1999/69, 20/04/1999 p.1

²⁴¹ Ibid 3

²⁴² Ibid 3-4

²⁴³ Y (9), C.D.E.2012/882 K.2012/6067, 10/05/1012 p.1-4

²⁴⁴ Z. Hafizoğulları and M. Özen, Türk Ceza Hukuku Özel Hükümler: Toplum Karşı Suçlar, (USA Yayıncılık, 2012) 237

²⁴⁵ Debs v. United State-249 U.S. 211 (1919); Schenck v. United States, 249 US 47 (1919); Abrams v. United State-250 U.S. 616 (1919); Schaeter v. United State-251 U.S. 466 (1920); Pierce v. United State-252 U.S. 239 (1920)

²⁴⁶ Schenck v. United State, 249 US at 47, 52 (1919)

²⁴⁷ YCGK, E.2007/8-244 K.2008/92, 29/04/2008, p.30

²⁴⁸ YCGK, E.2004/8-201 K.2005/30, 15/03/2005, p.20; see also, Ömer Korkmaz, Düşünce Özgürlüğü ve Sınırları, Seyfullah Edis'e Armağan, (Dokuz Eylül Üniversitesi Yayını, İzmir 2000) 294-5

²⁴⁹ 22. Yasama Yılı, 60 Tutanak Dergisi, 120. Birleşim, 15/09/2004 p.70

danger' test was introduced to avoid the restrictive and oppressive nature of Article 312 which had become a symbol of the politicization of justice and of disregard for the rule of law.²⁵⁰ It means, in order for the courts to detect 'danger' by expression, it must be imminent.²⁵¹ Yargıtay also narrowed the meaning of 'hatred and animosity' by limiting its scope only to incitement which expressly 'advises violence or contains violence'.²⁵² Yargıtay stated that the seriousness and the extent of the danger (of causing hatred and animosity between people) should determine the nature of precautionary measures which should be taken. This sliding scale evaluation imports a level of proportionality, and enables to be considered the relative importance to freedom of speech, and public security, of the factors of time and place.

Conversely, new amendments to the TMK have retained the offence of 'praising', which provides a legal basis for the national authorities to restrict 'indirect incitement'²⁵³ and thus to interfere with a wide range of expression, purportedly related to 'terrorism'. Moreover, as this thesis has emphasized, this is particularly so given that the political nature of the term 'terrorism' and its variable and unstable definition. Now we will now look at a number of other elements of these offences in turn.

4.3.2.1) The Audience (Publicity)

The level of publicity which an expression attracts (in other words, the extent of its audience) is an element of some of the offences under the TMK and TPC. This element, however, is not required for all the offences related to 'terroristic speech'. For example, it is possible that speech might be regarded as the offence of 'praising' without delivering that speech to anyone. On the other hand, classifying expression as the offence of 'propaganda' requires the likelihood that the speech is accessible to more than one person.²⁵⁴ Yargıtay extended the offence under Article 163 of previous TPC by deciding that while 'propaganda' means to convince a large number of people of a certain belief or opinion; indoctrination is merely to convince one or two persons of a particular idea.²⁵⁵ Thus, if expression doesn't meet the requirements of the offence of 'propaganda', then it may meet with the offence of 'indoctrination' which requires only a very low level of publicity. In any case, Yargıtay has sentenced many individuals for the offence of 'propaganda against secularism' without mentioning at all the number of people who were actually exposed to, affected or convinced by the words uttered. The degree of publicity has often simply not been of concern to the courts.²⁵⁶

²⁵⁰ Ibid 69

²⁵¹ YCGK, K.2007/8-244 K.2008/92, 29/04/2008 p.6

²⁵² Ibid

²⁵³ Hafizoğulları and Özen (n. 244) 230

²⁵⁴ Aytaç Tombak, 'Ceza Hukuku Açısından Propoganda Kavramı' (1969) 6 Ankara Barosu Dergisi pp.1043-1050 p.1048

²⁵⁵ YCGK, E.1990/9-263 K.1990/336, 10/12/1990, p.3

²⁵⁶ Şahin Kurt, Uygulamada Terör Suçları ve İlgili Mevzuat, (Seçkin Yayınevi, 1998) p.407

In seeming contrast, publicity is a core element of the offences of ‘praising’ and ‘incitement to hatred and animosity’ (under article 312 previous TPC and Article 215 and 216 new TPC), and this notion was defined in the early in Yargıtay’s case law. These offences require expression to occur in a place where anyone is capable of seeing and hearing it.²⁵⁷ However, it is not required that anyone does actually see or hear the expression. ‘Place’ is the core focus of the element of publicity, rather than the number of people. As a result, the offence of ‘praising’ can be committed even if only one person is spoken to. This broad understanding of publicity – where what matters is the mere possibility of others seeing or hearing the expression²⁵⁸ – has led to a vast number of sanctions on speakers and the criminalisation of a very wide range of expression. This runs contrary to the central aim of criminal doctrine which is to provide certainty. Indeed, the spirit of Yargıtay’s case law also contradicts and undermines the stated purpose behind the statutory amendments (of ensuring compatibility with the standards of the ECtHR and the promotion of freedom of expression). As such, it is argued here that Yargıtay must amend the definition of ‘publicity’ so as to avoid the law being over-inclusive.

4.3.2.2) The Evidential Basis for Prosecution of Expression, and the Courts’ Evaluation of the Content and Context of Expression

Despite the critique developed thus far in this chapter, the Courts do require some evidential basis for prosecuting offences of ‘terroristic speech’ under the TMK and TPC. The nature of the evidential basis relied upon is critically important to determine whether the TPC and TMK are applied in a manner similar to the concept of sedition, or rather in a manner that affords appropriate weight to the value of freedom of expression. For instance, it can be argued that convictions under Articles 142, 163 and 312 of the previous TPC were essentially treated as ‘thought crimes’, criminalising unwanted political views with no solid evidential basis. The significance of the last revision of Article 142 in 1951 was that propaganda became an offence which could be committed “*unconditionally*”.²⁵⁹ This amendment eliminated any need for the Courts to measure the potential consequences (or dangers) of the impugned expression. For instance, evaluating only specific pages of a book as part of the evidence (without also considering the context of the book as a whole) has unduly exposed authors to criminal sanction.²⁶⁰ This was routinely Yargıtay’s approach before the 1990s. Indeed, this approach was sometimes repeated in later cases where Yargıtay only examined the relevant part of expression (rather than whole of it) and penalized the speaker accordingly.²⁶¹ Unfortunately, in its early case law, Yargıtay has had a long-lasting influence on the interpretation of the TPC. As a result, prosecutions continue to resemble the archaic understanding of the concept of ‘sedition’ even today.

²⁵⁷ YCGK, E.1966/276 K.1966/456, 05/12/1966, see also, Y. (9) C.D, E.1974/2 K.1974/2, 18/06/1974, see also YCGK, E.2007 / 69 K.2007 / 99, 17.04.2007

²⁵⁸ YCGK, E.2007/69 K.2007/99, 17/04/2007 p.2, see also, YCGK, E.2007/8-244 K.2008/92, 29/04/2008 p.4

²⁵⁹ The law's preamble of 5435 Amendment on article 142 of 765 TCC (1949)

²⁶⁰ Y. (9), C.D. E.1976/2878 K.1976/4105, 18/05/1976 p.1-4

²⁶¹ Y (9), C.D E.1998/10296 K.1998/11672, 23/09/1998, p.7

That said, in contrast to this earlier case law, in the early 1990s Yargıtay began to demand more tangible evidence in relation to prosecutions relating to ‘terroristic speech’. Yargıtay asserted that expression has to be evaluated as a whole, with consideration of its main theme, the reason behind its creation, the environment in which it was created, and the intention of the speaker when the propaganda crime was detected.²⁶² For instance, in one case, a writer mentioned the Kurdish question in his article; he stated that: *“the Kurdish question is in fact a Turkish question, and both nations share pain and trouble in the same way as brothers do...”*²⁶³ Yargıtay asserted that this passage did not qualify as the offence of propaganda.²⁶⁴ This can be contrasted with the approach of the local court which had penalised the author *based on evidence relating only to pages 28 and 29 of the book without consideration of the whole book* – specifically, a passage that read *“Turks, Kurds, Arabs, Armenians, Laz, Cherkes, Gerorgians and Turkish Alawites are different nations on the basis of ethnicity and those nations will breathe when the state of Republic of Turkey has collapsed.”*²⁶⁵ The local court held that this expression amounted to propaganda against the ‘indivisible unity of the State with its territory and nation’. However, Yargıtay decided that the whole book, not only particular pages had to be evaluated.²⁶⁶ The author in this book referred to ideas which might have constituted an element of the offence of propaganda crime, but the writer also disagreed with these ideas.²⁶⁷ Yargıtay decided that the author’s aim in writing the book, as well as the main theme of the book, did not indicate an intention to commit the crime of propaganda.²⁶⁸ In this case, Yargıtay evaluated the author’s intention in writing the book, his vision of the world, as well as the main theme of the book in order to reach a determination of whether or not the passages constituted a propaganda crime.²⁶⁹ Yargıtay considered speech as a whole as well as its context and the place where it was made, in addition to the group of people the speech was made for.²⁷⁰

Likewise, other evidence such as the content of speech, the position of the speaker, the aim of the publication or broadcast, the addressees of the speech and the addressees’ perceptions need to be taken into consideration.²⁷¹ Yargıtay checks these elements to evaluate whether a defendant aims to convince society of a terrorist organisation’s ideas or to spread these ideas so as to entrench them in society.²⁷² When Yargıtay criminalised this propaganda for armed terrorist organisation it sought to protect a democratic society, national security and territorial

²⁶² YCGK, E.1990/9-341 K.1991/34, 18/02/1991 p.1

²⁶³ Ibid 2

²⁶⁴ Ibid 2

²⁶⁵ YCGK E.1999/9-58 K.1999/69, 20/04/1999 p.2-3

²⁶⁶ Ibid 1-2

²⁶⁷ Ibid

²⁶⁸ Ibid 4

²⁶⁹ Ibid

²⁷⁰ Y (9), C.D E.2004/996 K.2004/3035, 17/06/2004

²⁷¹ Y. (9), C.D, E.2007/9370 K.2008/617, 04/02/2008, p.1

²⁷² Ibid

integrity.²⁷³ Especially in terms of offence of propaganda, this evidential basis is crucial to identify the intent of speaker.

In addition, the Constitutional Court has adopted an assessment of the 'content and context of expression' originating from the European Court. It examines whether the interference with 'terroristic speech' is in compliance with the right to freedom of expression. The ECtHR has often engaged in examinations of the content of speech, the status of the speaker, and the intended recipient of the message, as well as the context in which the words were uttered.²⁷⁴ This assessment method differs from early case law of the Constitutional Court and Yargıtay as it brings new methodological rigour. However, there are only a limited number of cases from the Constitutional Court that show how this method has been interpreted. This method might overcome the previous lack of methodological rigor as well as seek probability and temporal proximity of harm in the Courts' case law. The spirit of sedition is a hangover from early case law and this method shows promise in terms of eliminating.

Consequently, the Constitutional Court now adjudicates by referring to ECtHR cases. For instance, *Özgür Gündem v. Türkiye* and *Sürek v. Türkiye* shows that the content of the expression (considered in its entirety)²⁷⁵ and the context of the expression (including the identity of speaker, the time when the expression was made, the purpose of expression and possible consequences of the expression) should be considered in order to determine whether the expression advocates violence.²⁷⁶ For instance, the office of the chief public prosecutor brought a prosecution against the editorial team of the book written by the founder of terrorist organisation PKK for the offence of publishing terrorist material and terrorist propaganda.²⁷⁷ The Constitutional Court considered the whole book, and noted that it was a social, economic and political analysis of the Kurdish question in Turkey and its possible effect on Turkey's politics. As such, the book was regarded as offering a different perspective on historical events.²⁷⁸ Besides this, the Court also considered the question of the book's audience, and whether it was mass media or written material which would possibly be accessed by a much smaller audience.²⁷⁹ After considering these factors, the Constitutional Court decided that the ban on this book was a violation of freedom of expression, and the lifted prosecution on the book's editorial team.²⁸⁰ The public authorities now have a much more limited scope to

²⁷³ Ibid

²⁷⁴ For example, *Sürek v. Turkey* (No:1) App no 26682/95 (ECtHR, 8 July 1999 para 62

²⁷⁵ The Constitutional Court, App No:2013/2602, 23/01/2014, para 69, Constitutional Court, App No: 2013/5356, 08/05/2014, para 61

²⁷⁶ The Constitutional Court, App No: 2013/409, 25/06/2014, para, 100, see also Constitutional Court, App No:2013/2602, 23/01/2014, para 88

²⁷⁷ The Constitutional Court, App No: 2013/409, 25/06/2014, para, 101

²⁷⁸ Ibid para, 105

²⁷⁹ Ibid para, 7, 106

²⁸⁰ Ibid para, 108-9

penalize expression that does not, when viewed in context, incite violence, glorify terrorism, or support hatred.²⁸¹

4.4) Conclusion

As discussed earlier in the third chapter, the Constitutional doctrine has been used, through criminal jurisdiction, to preserve the 'unalterable core' of the Constitution and it has protected the state and its system from dissenting views. TPCs and TMK are applied to preserve the state's institutional characteristics such as 'an indivisible entity with its state and territory, and 'state security-public security', and the Secular Republic's interests have been prioritised over fundamental rights and liberties. This is why the Courts have interpreted these laws just like sedition law. TMK and TPCs have criminalised expressions which once provided public debate and political discussion on social, economic and legal concerns, and have been used to silence political oppositions so as to protect established systems of the state. This has promoted the disabling of the right to freedom of expression through a broad range of restrictions. The offences of 'propaganda', 'praising offence and offender' and 'incitement to hatred and animosity' have been interpreted broadly and vaguely and this has caused the criminalisation of wide range of expression including legitimate political and intellectual speech. One of the main reasons for this is that the Courts have penalised expressions related to secularism, communism, separatism, and, more recently the 'Kurdish issue', without consideration of the any actual link between expression and political violence or terrorism. Such views have been treated as a threat to the state and its institutions and inherently violent.

This is also due to a measure of judicial bigotry in the Courts, who still upheld the previous case law, even though those particular offences had been amended or repealed. For instance, 142 and 163 articles of previous TPC played a significant role of in criminalising a broad range of political expression. When these articles were repealed, the Courts interpreted article 312 of TPC in a way that filled the 'gap' left by these articles.²⁸² Kuzu stated in the case law that the Ankara State Security Court concluded with a statement about the "*daringness and courage caused by repealed article 163 of TPC*" creating a legal loophole which was then filled with article 312 of TPC.²⁸³ There have been some legal amendments, however, preserving the state and its institutions over and above the right to freedom of expression remains the priority concern. The flood of prosecutions under TPC and TMK indicates that the authorities actually use these provisions to restrict dissenting and critical expression to the state. This highlights that these provisions have a disproportionate restrictive effect on democratic debate. This has happened because the Courts failed to consider the actual link between expression of opinion and acts of terrorism or political violence until recently; in the last amendment on TMK.

²⁸¹ Ibid para, 108

²⁸² See for instance, YCGK, E.2004/8-201 K.2005/30, 15/03/2005 p.38

²⁸³ Kuzu (n. 74) see also, YCGK, K.2004/8-130 K.2004/206, 23/11/2004, p.14, An example for such decision: Y (8)CD E.1999/12715 K.1999/14981, 03.11.1999

Without said consideration, these vague provisions have become a restrictive tool against political discourse, academic and intellectual debates. Nonetheless, during the last two decades this approach has been slightly softened by amendments to these laws which adopted standards from ECtHR case law. This has slightly influenced the Courts to expand the scope of freedom of speech.

In addition, the individual elements of the offences under these provisions are key factors in drawing the boundaries for the right to freedom of expression. Yargıtay has failed to bring any methodological rigour to its approach to detecting the imminence of acts of terrorism and politically motivated violence. The speaker's intent, the audience, the evidential basis for prosecution and content - context evaluation play a major role in this type of charge. In terms of the mens rea requirement, this is the main element of the offence of propaganda, while it is not required for the offence of praising. For instance, 'publicity'/'openness' is the only element required for the offence of incitement to hatred and animosity. The law was drawn up with vague and broad terms, referencing that the place has to be such that people could see or hear speech, regardless the numbers of people who actually saw or heard. In this sense, this measure does not provide a method to differentiate between terrorism, political violence-related expressions from legitimate political expression. The 'clear and present danger' test might substitute for the absence of this methodological rigour but its use is only suggested for the offence of incitement to hatred and animosity. Furthermore, this method is not well-developed in the Turkish legal system. The intention of the speaker remains as an element that is required for the offence of propaganda but it can be broadly interpreted because of the vagueness of the term, 'general intent'. This element, therefore, is far from providing any increase in precision for the offences related to 'terroristic speech'. Thus, it can be argued that such an element might lead the Courts to interpret TMK in the same way it does for the concept of sedition. In terms of these elements, offences related to 'terroristic speech' under TMK and TPC share elements very similar to those define in the seditious expression.

However, Turkey's human rights commitments have resulted in progressive developments in its domestic free speech jurisprudence. There have been not only a number of progressive Constitutional amendments passed conferring greater protection on freedom of speech, but the doctrinal principles that structure Strasbourg court's reasoning have also been imported, to some degree, into the reasoning of the domestic courts. This has, at a minimum, served to enhance the rigour with which restrictions on speech are scrutinized at the national level. Indeed, in the last two decades, and in light of the State's obligations under the ECHR, the Turkish legislature has passed a number of amendments to the Constitution, enacted a new Turkish Penal Code (TPC), and introduced several amendments to the speech-related provisions in the 'Law on the Fight Against Terrorism' (TMK). Furthermore, it is now possible for an individual to lodge a complaint concerning a violation of Convention rights with the Constitutional Court following a milestone Constitutional amendment in 2010 (which came into force in 2012). Since 20012, following the introduction of the right of individual application to the Constitutional Court, the Constitutional Court has started using the content-context based

evaluation method in its case law. Consideration of the actual link between expression and conduct, to evaluate whether expression incites political violence and terrorism or not, might provide new methodological rigour to the constitutional and monistic approach. These progressive developments have contributed to dismantling the resemblance between modern-day offences relating to 'terroristic speech' and outdated offences of 'sedition'. There are some signs that the Courts may be steering their case law away from the sedition concept through adopting the 'clear and present danger' test and a more ECtHR-friendly approach into their jurisprudence. In contrast with these progressive developments, TMK and TPC still contain the offences of indirect incitement to terrorism (justifying and praising of terrorism) and criminal liability on media professionals. These offences provide an open-ended legal basis for national authorities to silence political dissent. Hereafter case law established by the Constitutional Court should play a key role in defining the scope of these offences as well as that of the freedom of expression.

CHAPTER 5: THE STRASBOURG COURT'S RESPONSE TO 'TERRORISTIC SPEECH'

5.1) Introduction

The second chapter set out the doctrinal framework that lies at the heart of the right to freedom of expression, determining scope of the right as well as the lawfulness of any restrictions under the scope of the offences related 'terroristic speech'. Since the end of the Second World War, the Council of Europe has sought to guarantee respect for human rights and to ensure that its members adhere to the standards of 'effective political democracy' and the rule of law. The European Convention on Human Rights (the Convention) and the European Court of Human Rights (henceforth, the Court or the Strasbourg court) have been the most important tools for the Council to review restrictions on expression to determine whether they are compatible with the Convention or not. The right to freedom of expression is protected under article 10 of the Convention and its scope has been detailed by the European Court case law. As well as this, the Council of Europe is a forum to facilitate the co-ordination of the international fight against terrorism and prevent totalitarian views from undermining the convention rights and values on the European continent. Consensus among the Member States of the Council plays a crucial role in interpretation the Convention and the degree of deference given to Contracting States. The Court is willing to defer to a relativist position where consensus between the Contracting states is absent.¹ The European Court's case law sets free speech standards for the contracting states to confer greater protection on freedom of speech. The doctrinal principles that structure the Strasbourg court's reasoning (discussed in chapter 3) has also been imported, to some degree, into the reasoning of the domestic courts.² This has, at a minimum, served to enhance the rigour with which restrictions on speech are scrutinized at a national level.³ Herein lies the tension alongside this liberalisation of free speech, the last two decades have seen contracting states required to pass a number of amendments to provisions related to 'terroristic speech', in light of the State's obligations under the Convention and as members of the Council of Europe more widely. The need to deal with terrorism in post-2001 has led to an expansion in state power through an expansion of the reasons why, and circumstance when, interferences might be permitted.

These doctrinal categories in Chapter 3 have influenced the laws as well as the case law, so as to eliminate or render redundant offences based on or structured around seditious expression. Chronologically, national courts have treated politically dissentient expression as seditious

¹ Daniel Regan, "'European Consensus': A Worthy Endeavour for the European Court of Human Rights?' (2011) 14 Trinity College Law Review 51, 69

² See further, Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP: 2008)

³ H. A., Özhan, 'Application of Decisions of European Court of Human Rights in Contracting Parties', (2001) 6 *Liberal Thought*, p.51.

through using public order/national security provisions. Thus, they are treated as political crime, dissenting, aggressive, and hard-hitting speech against the state, its system, or its official ideology. In addition to this, as Sorial argued, more recently, sedition laws have been modernised under the pretext of counter-terrorism, which extends to criminalising expression that advocates violence against the state.⁴ This has been criticised for being too broad and for imposing unjustifiable limits on the right to freedom of expression.⁵ Consequently, in overarching terms, therefore, a contradiction emerges in which the European Convention norms appear to pull in opposite directions. States can, apparently without contradiction, ratify human rights treaties protecting speech, whilst at the same time relying on ‘anti-terror’ laws to impose far-reaching restrictions upon it, and targeting dissenting and hard-hitting criticism of public authorities.

This chapter consists of two sections; Section 4.1 will provide an historical evaluation of how the Court responded to ‘terroristic speech’. The Strasbourg court has examined an augmented number of cases relating to certain public-political expression where the speaker was convicted by the national authorities for ‘terroristic speech’. Over time, the European Court has dealt with freedom of expression issues under the Council’s remit where speakers have been convicted due to their purported connection with terrorism or political violence offences under ‘sedition law’ or ‘anti-terrorism’ law. In cases where the national authorities have outlawed particular forms of expression, the level of the Court’s deference to those authorities is identified. As the purpose of the Convention is to maintain effective political democracy, in the Court’s early case law, there are cases related to totalitarianism concerning communism, National Socialism/Nazism or Fundamentalism (Pro-Sharia). In these cases, the Court examined whether the restrictions were compatible with the Convention or not. These three different ideological backdrops have been affiliated with political violence in order to achieve them and to replace the existing democratic system. Another issue that has brought a challenge to the Convention is terrorism, which appeared as an entity in the early 1970s. Expression that advocates terrorism including such as ethno-national “terrorist” organisations such as PKK, IRA and ETA and their political wings, and fundamentalist religious “terrorist” organisations such as Al-Qaida, have been regarded as a threat by contracting states as well as by the European Court. The incident of the 11 September 2001 attacks in the United States became a milestone for terrorism being seen as a threat to the Convention era, and setting a new form of conflict between the right to freedom of expression and national security laws. In this regard, the Committee of Ministers of the Council of Europe after 11 September 2001 agreed to take steps to rapidly increase “*the effectiveness of the existing international instruments within the Council*

⁴ Sarah Sorial, ‘Can Saying Something Make it so? The Nature of Seditious Harm’, (2010) 29 Law and Philosophy 273, 275

⁵ Sarah Sorial, *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism* (Routledge, 2013) 2; Geoffrey Palmer, ‘Political Speech and Seditious’ (2008-2009) 11-12 Yearbook of New Zealand Jurisprudence, 36, 49-51

*of Europe on the fight against terrorism...*⁶ Several international legal instruments encourage or even obligate contracting states to adopt criminalisation of particular types of expressions related to terrorism, including 'indirect incitement'. There remains a contradiction between the Court's article 10 case law, which has generally been highly protective of freedom of expression, and recent regional development regarding criminalisation of indirect incitement. These instruments push the national legislative and judicial bodies in terms of protecting freedom of expression in the opposite direction to that indicated by the European Convention.

Section 5.2 shows that, in the Court's case law, there remains a well-facilitated evidential doctrine as the Court still relies on a presumption that particular types or forms of expression present an inherent threat to the state and its system. In tracing the historical evolution of sedition/treason offences, those relating to 'terroristic speech' in fact mirror sedition-type offences due to sharing or requiring very alike elements at the national level. We will see that the Strasbourg Court has found many violations of the right to freedom of expression with these modern day offences relating to 'terroristic speech' which resemble 'sedition'/'treason' offences. In this regard, it is important to analyse the elements such as the probability of harm, mens rea of the speaker, and 'content of expression and context of expression' each of which plays a significant role in determining the protection of freedom of expression afforded by the Court. This analysis might provide a perspective from which to understand which elements of offences under national laws contradict with the elements that the Court requires. The level of deference given to domestic authorities in terms of interfering with 'terroristic expression' is based on these elements as to whether restriction satisfied a 'pressing social need' or not.

5.2) The European Court's Response to 'Terroristic Speech'

As explained earlier in the third chapter, we might view the European Convention as providing an early warning of authoritarianism in weak democracies.⁷ The European Court, as set out in its Preamble, aims to guarantee respect for human rights and to ensure that its members adhere to the standards of "an effective political democracy" and the rule of law. Since then, the Court has had to confront expression/associations that undermine Conventional values and rights. The European Court's response to 'terroristic speech' has been guided by these doctrinal categories discussed in the third chapter. It is important to analyse the case law in light of those doctrinal categories at a time when there is an increase in the criminalisation of expression among contracting states,⁸ and at a time when threats of terrorism or political violence have escalated at both national and international levels. The European Court's case law is a framework which elaborates what the response of contracting states should be, as it is for the

⁶ The Committee of Ministers at the Multidisciplinary Group on International Action against Terrorism (GMT) its 109th Session on 8 November 2001

⁷ Steven Greer, *The European Convention of Human Rights: Achievements, Problems and Prospects* (CUP, 2006) 56

⁸ David Banisar, *Speaking of Terror* (Council of Europe, 2008) 20

Court itself. In this regard, it is important to take the Court's response to expression advocating political violence into account in order to be able to undertake analysis of the Court's response to modern day offences of 'terroristic speech'. This approach will also provide a chronological perspective of the Court's response to violent expression. Firstly, expression was disapproved of by domestic authorities due to its authoritarian or anti-democratic nature which was deemed inherently violent. Such expression was mainly in relation to communism, Nazism or National Socialist views and authoritarianism, and caused political violence. Secondly, since the 1970s the Court has had to confront expression/associations that advocate terrorism. Such expression supports national independence struggles such as the long-running actions in the UK about Northern Ireland, and those in Spain and France about the Basque issue and in Turkey about the Kurdish separatism. Thirdly, the Court has also had to deal with new challenges concerning the states' response to terrorism, especially after the 9/11 attacks in the US.⁹ Recently contracting states have become more aware of internationally plotted terrorist threats in general and the command structure of Al-Qaeda in particular since the 9/11 attacks.¹⁰ It can be noted that terrorism is a new challenge which has become especially pressing since those attacks.¹¹ For that reason, the Council of Europe agreed to take immediate action on the fight against terrorism by making the instruments more effective. As a product of such actions, the 2005 Council of Europe Convention on the Prevention of Terrorism has been used effectively to criminalise 'incitement to terrorism', including indirect incitement to terrorism. This has led to more restrictive measures, including criminalisation of indirect incitement, prioritising security and public order concerns over freedom of expression. Criminalising 'indirect incitement' is regarded as a crucial part of these instruments' effectiveness. We can also see that 'apology for terrorism', closely linked to indirect incitement (or perhaps a sub-type), has been approved by the European Court as 'terroristic speech', and thus as a lawful restriction on freedom of expression.¹² It appears they are not alone in indicating that indirect 'terroristic speech' is a new concept in European Court case law, but it sends a signal of approval for the offence of indirect incitement in the human rights era. The expansion of the scope of legitimate restrictions evidenced by indirect incitement and apology for terrorism potentially constitutes a grave contradiction given the fact that sedition has either fallen into disuse or been specifically disapproved.

There might be a risk that the exercise of freedom of expression, i.e. the public dissemination of opinion and information, may contribute to terrorist or politically motivated violent acts. The OSCE has noted that there can be an intrinsic value in proscribing certain expression; this proscription carries a clear message to the general public that the expression in question

⁹ Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 *The European Journal of International Law* 989, 995

¹⁰ *Saravia v. Germany*, Application no. 54934/00 (ECtHR Inadmissibility Decision, 10 January 2000) para Weber and 109

¹¹ the Committee of Ministers at the Multidisciplinary Group on International Action against Terrorism (GMT), http://www.coe.int/t/dlapil/codexter/gmt_more_en.asp

¹² See for instance, *Leroy c. France* App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation)

amounts to, or causes, crime, acts of violence and terrorism.¹³ For that reason, the contracting states of the Council of Europe with their national laws have tended to criminalise indirect incitement (praising, apology or glorifying) in accordance with the 2005 Council of Europe Convention on the Prevention of Terrorism, and the 2008 Council of the European Union Framework Decision on Combating Terrorism.¹⁴ By these measures, states aimed to fulfil their obligation to take adequate measures to protect the fundamental rights of everyone within their own jurisdiction.¹⁵ In this regard, such public expression would be deemed as being outside the protection of Article 10 and incompatible with the fundamental role of the Convention.¹⁶ However, criminalisation of expression (especially indirect incitement or apologie/glorification of terrorism) entails a clear and predictable risk of abuse due to the general criminalisation of the expression of ideas or opinions (unwanted views) unless there are safeguards in place for examining whether or not such expression is likely to lead to the commission of a terrorist act.¹⁷ Seditious laws could be counted as a decent illustration for such abuse. Intrinsically, criminalizing expression carries a risk that individuals cannot speak, print or distribute material to support an organization or ideological cause, without the threat of prosecution.¹⁸ And this may pose restrictive ground and suppressive effect on the exercise of right to freedom of expression. Political criticism and debate on matters of public interest might be considered as supporting terrorism or be equated to discrimination against certain ethnic or political groups by suppressing newspapers, blocking websites and limiting their public dissemination.¹⁹ Even worse, expression might be targeted and opposed by the majority without seeking any actual or possible link with terrorism or political violence.²⁰

Having said that, the European Court principally expects national public authorities to interfere with expression only under exceptional circumstance. The contracting states will have a degree of deference as to legislative, administrative or judicial action in the area of a Convention right

¹³ Countering Terrorism, Protecting Human Rights: A. Manual (OSCE/ODIHR 2007) 216

¹⁴ "Apologie du terrorisme" and "incitement to terrorism" (Council of Europe Publishing, 2004) p. 15, 23, 48. Six of the forty-five states define "apologie du terrorisme" and/or "incitement to terrorism" in their national legislation as a specific criminal offence: Bulgaria, Denmark, France, Hungary, Spain and the United Kingdom. But not all states have legislation that deals specifically with terrorism. These states can nevertheless deal with terrorist acts and terrorists on the basis of general criminal law.

¹⁵ Guidelines on Human Rights and the Fight Against Terrorism adopted by the Committee of Ministers at its 804th meeting (11 July 2002) 14

¹⁶ Security Council Meeting of World Leaders Calls for Legal Prohibition of Terrorism Incitement, Enhanced Steps to Prevent Armed Conflict, UN Resolutions 1624 (2005); CoE Article 5 of Council of Europe Convention on the Prevention of Terrorism (2005); Article 4 of EU Council Framework Decision on Combating the Terrorism (2008)

¹⁷ OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities, Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences (Vienna, 19-20 October 2006) p.9

¹⁸ Countering Terrorism, Protecting Human Rights: A. Manual, (OSCE/ODIHR 2007) 216

¹⁹ David Banisar, 'Speaking of Terror: A Survey of the Effects of Counter-Terrorism Legislation on Freedom of the Media in Europe' (2009) 7 International Journal of Civil Society Law p.50

²⁰ OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities, Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences (Vienna, 19-20 October 2006) p.9

given by the European Court, as we seen in chapter 3.²¹ Indeed, in the last two decades, and in light of the State's obligations under the European Convention, Turkey (especially for this thesis) and other contracting states have passed a number of amendments on the relevant provisions which have a positive influence over the protection of the right to freedom of expression. States' human rights commitments have resulted in progressive developments in domestic free speech jurisprudence.

The pathological period of the 'war on terror' has led to anti-terror laws bearing a striking resemblance to sedition laws, formerly used in other pathological periods such as the World Wars and the Cold War against communism or Nazism.²² This close resemblance to historical offences of 'sedition' points to a deeper-level problem concerning the invocation of 'terrorism' as the basis for restricting freedom of speech. However, the Convention as a human rights document has not given such a wide degree of deference to contracting states to apply the modern-day offences relating to 'terroristic speech' as was given to the older (and in some jurisdictions, now archaic) offences of 'sedition' and 'treason' they resemble.²³ No matter what is the mode of expression, the Court gives narrow deference to contracting states to restrict political expression, unless it incites terrorism or political violence.²⁴ Otherwise, the scope of conviction on 'terroristic speech' is broadened to cover criminal liability to persons who publicly advocate terrorism by whatever means,²⁵ and the European Court may defer contracting states widely in terms of criminalisation of a wide range of expression.

In order to facilitate analysis of the case law relating to 'terroristic speech', the cases are categorised according to whether the courts regard the expression as relating to (or more accurately, tending towards) 'political violence' generally, or instead, to 'terrorism' specifically. The following two sections address these two categories respectively.

²¹ Helen Fenwick, *Civil Liberties and Human Rights*, (Cavendish Publishing Limited, London, 4th Ed. 2007) 36

²² Michael Head, 'Counter-Terrorism' Laws: A Threat to Political Freedom, *Civil Liberties and Constitutional Rights*, (2002) 26 *Melbourne University Law Review*, 666, 671 (emphasis added)

²³ See for example; The Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Report 104, 2006), para 2.6

²⁴ Daragh Murray, 'Freedom of Expression, Counter Terrorism and the Internet in Light of the UK terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights' (2009) 27 *Netherlands Quarterly of Human Rights* 331, 358; see also, Committee of Experts on Terrorism, *Collection of Relevant Case-Law of the European Court of Human Rights Related to Apologie du Terrorisme* and 'Incitement to Terrorism', Council of Europe, Strasbourg, 4 June 2004, p. 6

²⁵ The Committee of Experts on Terrorism (CODEXTER) or the Council of Europe "Apologie du terrorisme" and "incitement to terrorism" (Council of Europe Publishing, 2004) 11

5.2.1) Expressions that Advocate Political Violence

European Court case law tightly focused on the idea of defining the 'democratic spirit'.²⁶ Since members of political organisations enjoy the protection of the Convention, they can propose political, legal or constitutional changes to the structure of the state by duly considering their legality and fundamental democratic principles.²⁷ However, there might be the possibility that a political party, other types of associations or even simply forms of expression might attempt to develop practices or activities intended to destroy the rights and freedoms set forth in the Convention and entrenched in democracy.²⁸ For that reason, the Court relies on article 17 of the Convention which aims to protect the principles of the Convention from individuals and groups whose aim is to foster totalitarian systems.²⁹ The Court applies article 17 only in cases where statements of members of an organisation, its programme or personal views indicate the destruction of the rights and freedoms set forth in the Convention.³⁰ In order to maintain this aim, it is not necessary to stop every-one's right to freedom of expression as guaranteed by article 10 of the Convention.³¹ In order to protect democratic principles, militant democracy relies on the rationale that state authorities are able to restrict the freedom of expression and association of groups and individuals who might pose a threat to democracy.³² Especially, Germany's "bitter period that followed the collapse of" the Weimar Republic, and "the nightmare of Nazism ..." led the German constitution and the European Court to adopt the principle of 'a democracy capable of defending itself'.³³ Organisations and individuals with such a tendency might be considered as having sufficient ground to propagate their totalitarian ideas and activities. As a result, a leader of a political organisation who advocates violence or fails to show respect in their policy to democracy and the rights and freedoms guaranteed in a democratic society, cannot enjoy protection under the Convention.³⁴ Such political expressions and organisations are prevented from enjoying protection under the Convention (due to Article 17) because (if) their statements call for political violence or seek to undermine the fundamental principles of democracy.

²⁶ *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 49 "the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

²⁷ *Kasymakhunov and Saybatalov v. Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013) para 105

²⁸ *Ibid* para 104; see also *Kühen v Germany* App no. 12194/86 (EComHR Decision, 11 April 1986) p.4-5

²⁹ *Norwood v UK* App no 23131/03 (ECtHR, 16 July 2003); *Kasymakhunov and Saybatalov v. Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013) para 103

³⁰ *Socialist Party and Others v. Turkey* App no 20/1997/804/1007 (ECtHR, 25 May 1998) para 28; see also *United Communist Part of Turkey and Others v. Turkey* App no 133/1996/752/951 (ECtHR, 30 January 1998) para 60; *F.P v Germany* App No. 19459/92 (EComHR Decision, 30 January 1992) p.4

³¹ *Reimann and Fisch v. Germany* App no 250/57 (EComHR Decision, 17 August 1956) (German Communist Party) p.5; *Refah Partisi (The Welfare Party) and Others v. Turkey* App no 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003) para 99; *Kasymakhunov and Saybatalov v. Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013) para 103

³² Kasım Karagöz, "The Dissolution of Political Parties Under the Jurisdiction of the European Court of Human Rights and Examining the Case of Welfare Party According to the Venice Commission Reports" (2006) 1 Gazi Üniversitesi Hukuk Fakültesi Dergisi 311, 322

³³ *Vogt v. Germany* App no. 17851/91 (ECtHR, 26 September 1995) paras 50, 59

³⁴ *Kasymakhunov and Saybatalov v. Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013) para 105

The European Court has responded to such expressions through the ideas of militant democracy implied by article 17 and by the restricting clauses set forth under article 10(2) of the Convention. In this respect, the European Court has examined views related to Nazism and communism after the Second World War and during the Cold War, and regarded most of them as potential threats to the Convention rights. As well as this in the past post-Cold War era, pro-Sharia political motivations which might advocate political violence have been considered a source of threat to Convention rights and values.³⁵

Totalitarian tendencies subjected to this section might actually or (only) potentially invoke political violence, which for our purposes we might consider as referring to all collective attacks occurring among a political community against political authorities or actors with the violent activities aimed at challenging their policies.³⁶ In this regard, in the case law, the Commission made a noteworthy conclusion in the case of the German Communist Party, where the Court declared the case inadmissible because the party's aim of attaining a "*socialist-communist system by means of proletarian revolution and dictatorship of proletariat*" were contrary to the Convention's democratic values.³⁷ Communism especially before the collapse of the Soviet Union was considered as an imminent threat by European countries. In addition, National Socialist views were also considered as threat and source of political violence in the region of the European Convention. For example, in Germany, the applicant was dismissed from his position as a civil servant (he held a university lectureship) due to his political activities relating to the National Democratic Party of Germany (NDP) and of the content of his two books.³⁸ He identified himself with the NDP and with its many militant activities; the government identified the NDP as an organisation rejecting human rights and the existing democratic order and preaching extreme nationalism and a racist ideology.³⁹ He expressed his views in his books casting his disloyalty to the Constitution and praising Nazi Germany without any criticism and reservation.⁴⁰ In addition, the German authorities were under a special responsibility in the fight against all forms of extremism, whether right-wing or left-wing due to the experience of the Weimar Republic.⁴¹ This responsibility was achieved through considering the civil service as the keystone of a "democracy capable of defending itself".⁴² In this regard, the Court took this past experience into consideration and decided that interferences such as 'termination of

³⁵ See both, *Refah Partisi (The Welfare Party) and Others v. Turkey* App no 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003), and *Kasymakhunov and Saybatalov v. Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013)

³⁶ Ted Robert Gurr, *Why Men Rebel* (Princeton University Press (New Jersey, 1971) 4

³⁷ *Reimann and Fisch v. Germany* App no 250/57 (EComHR Decision, 17 August 1956) p.4

³⁸ *Kosiek v. Germany* App no. 9704/82 (ECtHR, 28 August 1986) para 33

³⁹ *Ibid* para 17, 23

⁴⁰ *Ibid* para 23

⁴¹ *Vogt v. Germany* App no. 17851/91 (ECtHR, 26 September 1995) para 54

⁴² *Ibid* para 54; *Kern v. Germany* App no 26870/04 (EComHR Decision, 29 May 2007) p.7; *Otto v Germany* App no 27574/02 (ECtHR, 11 July 2002) p.7; *Erdel v Germany* App no. 30067/04 (ECtHR, 12 August 2004) p.7

employment contract'⁴³, 'not being promoted'⁴⁴ and 'revok[ing] the applicant's call-up order'⁴⁵ were imposed on the applicants as a result of their activities and their membership of organisations aiming at unconstitutional goals. The Court noted that these interferences were necessary to prevent any further criminal offences from someone with a right-wing extremist background, and past experience of the Third Reich caused the national authorities to consider these views as threat.⁴⁶ The Court declared these applicants inadmissible.⁴⁷ Yet, in the case *Vogt v Germany* the applicant was dismissed from the civil service because she was engaged in various political activities on behalf of the German Communist Party (DKP) which aimed to overthrow the social structure and the constitutional order, and replace it with a political system of the Third Reich.⁴⁸ Here in this case the European Court noted there was a violation of the right to freedom of expression because she did not use the advantage of her position (as a teacher in a State secondary school with a permanent position as a civil servant) to indoctrinate her pupils during lessons.⁴⁹ For that reason, the European Court noted that restriction was disproportionate and her membership to DKP was lawful (because DKP was a lawful political party).⁵⁰ Even the Court found the restriction on her expression as a violation of article 10, the Court highlighted and examined her expression whether undermined democracy or not under the principle of a "democracy capable of defending itself" was clearly approved.⁵¹

In addition, there have been inadmissible decisions regarding individuals involved in activities inspired by National Socialist ideas.⁵² These activities included preparation and promotion of certain publications such as racist pamphlets, the principle of elitarianism and proposals to introduce typical Nazi songs.⁵³ The Court case law, it was noted that the prohibition against activities involving expression of National Socialist ideas can be justified as being necessary in a democratic society. This is in the interests of national security and territorial integrity due to the historical experience of Austria during the National Socialist era.⁵⁴ The Commission noted that National Socialism is a totalitarian doctrine aiming at the destruction or limitation of the Convention rights.⁵⁵ Another applicant was convicted by the national court for advocating the

⁴³ *Kern v. Germany* App no 26870/04 (EComHR Decision, 29 May 2007)

⁴⁴ *Otto v Germany* App no 27574/02 (ECtHR, 11 July 2002)

⁴⁵ *Erdel v Germany* App no. 30067/04 (ECtHR, 12 August 2004)

⁴⁶ *Ibid*; *Otto v Germany* App no 27574/02 (ECtHR, 11 July 2002); *Kern v. Germany* App no 26870/04 (EComHR Decision, 29 May 2007)

⁴⁷ *Erdel v Germany* App no. 30067/04 (ECtHR, 12 August 2004); *Otto v Germany* App no 27574/02 (ECtHR, 11 July 2002); *Kern v. Germany* App no 26870/04 (EComHR Decision, 29 May 2007)

⁴⁸ *Vogt v. Germany* App no. 17851/91 (ECtHR, 26 September 1995) para 58

⁴⁹ *Ibid* para 60

⁵⁰ *Ibid* para 60-1

⁵¹ *Ibid* para 54, 59

⁵² *Kühen v Germany* App No. 12194/86 (EComHR, 28 May 1986); *B.H., M.W., H.P. and G.K. v. Austria* App No. 12774/87 (EComHR, 12 October 1989); *Herwig Nachtmann v. Austria* App no. 36773/97 (EComHR, 2 July 1997); *Schimanek v Austria* App no. 32307/96 (ECtHR, 1 February 2000)

⁵³ *B.H., M.W., H.P. and G.K. v. Austria* App No. 12774/87 (EComHR, 12 October 1989) p.2

⁵⁴ *Ibid* p.4; see also *Herwig Nachtmann v. Austria* App no. 36773/97 (EComHR, 2 July 1997) p.5; *Schimanek v Austria* App no. 32307/96 (ECtHR, 1 February 2000) p.7

⁵⁵ *Ibid*

reinstitution of what was an unconstitutional organisation of the National Socialist Party (NSDAP); which had been prohibited in Germany due to its National Socialist ideology and the state violence and illegality that had formerly existed in Nazi Germany.⁵⁶ The Commission noted that national socialism undermines freedom and democracy, and the applicant's publications included pride of race and elements of racial and religious discrimination.⁵⁷ The Court provided wider deference for national authorities to interfere with such expression where it constituted a threat to national security or territorial integrity. Horrific experience (the mass destruction and crime of genocide) during the Second World War has provided a justification regarding the restrictions on expression advocating communism and National Socialism. In these cases, the Court took such historical experiences as a basis to establish an actual link between these expressions and harmful conduct.

In addition, in the *Refah Partisi* case, the Court identified 'fundamentalist' and 'pro-sharia' political activities and views, and considered it as subject to militant democracy.⁵⁸ The Court held that it is possible that a totalitarian movement, structured in the form of a democratic party, may destroy democracy, and there had been such an example in modern European history.⁵⁹ States have a responsibility to protect their democratic regime from the activities and incursion of totalitarian political parties.⁶⁰ The Court noted that the legal and constitutional changes proposed by the political party in question (*Refah (Welfare) Party*) were rooted in Islamic thought, something that would be untenable because neither an Islamic state nor Sharia as a system was compatible with the Convention.⁶¹ Furthermore, in the *Kasymakunow* case, the Court was not convinced by the fact that statements made by members of the organisation rejected the possibility of resorting to violence.⁶² Indeed, the terminology used by the fundamentalist organisation gives reference to the methods adopted to gain power and to the propensity of the organisation to resort to violence.⁶³ Here, the organisation, which intended to overthrow the government and to replace it with an Islamic state, distributed leaflets and brochures that contained statements calling for violence.⁶⁴ The organisation's literature advocated and glorified struggle in the form of a jihad, used here in the meaning of 'holy war' to establish the domination of Islam.⁶⁵ For the purpose of this domination, legal and constitutional changes proposed by the organisation were found to be incompatible with fundamental democratic principles that undermine the Convention.⁶⁶ These cases imply

⁵⁶ *Kühen v Germany* App No. 12194/86 (EComHR, 28 May 1986) p.2-3

⁵⁷ *Ibid* p.5

⁵⁸ Christian Moe, '*Refah Partisi (The Welfare Party) and Others v. Turkey*' (2003) 6 *The International Journal of Not-for-Profit Law* 1-14

⁵⁹ *Refah Partisi (The Welfare Party) and Others v. Turkey* App no 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003) para 99

⁶⁰ *Ibid* para 96

⁶¹ *Ibid* para 119

⁶² *Kasymakhunov and Saybatalov v. Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013) para 107

⁶³ *Ibid* para 108

⁶⁴ *Ibid*

⁶⁵ *Ibid* para 107

⁶⁶ *Ibid* para 109

‘militant democracy’ as a kind of ‘precautionary legality’ to criminalise views which cause incalculable harms to the Convention rights and values.

However, especially after the collapse of the Soviet Union, the Court has not shown itself willing to show wide deference to national authorities when they convict expression supporting communism. For instance, convictions by the Hungarian authorities for publicly displaying symbols of communism were found by the Court to be a breach of article 10 of the Convention. The Hungarian criminal code outlawed the display of symbols equated to communism and Nazism “*a swastika, an SS-badge, an arrow-cross, a symbol of the sickle-and-hammer or a five-pointed red star, or a symbol depicting any of them*”⁶⁷ and regarded them as propaganda for totalitarian ideology.⁶⁸ However, the Court concluded that potential propaganda for a communist ideology could not be regarded as a sole reason to ban the display of symbols of communism.⁶⁹ Meanwhile, displaying ‘a red star’ does not mean one is propagating totalitarian ideology,⁷⁰ and wearing a red star in public must be taken into account as a means of lawful political expression.⁷¹ The Court held that for such a ban, the government was required to prove the existence of a real and present danger of a known political movement or party that was seeking to re-establish a dictatorship.⁷² Likewise, in another case this time against Turkey, the applicants were convicted by the domestic court for disseminating a Bolshevik organisation’s (TIKB’s) propaganda which aimed at establishing a political regime based on Marxist-Leninist ideology by means of disseminating propaganda messages through the publication and distribution of a book.⁷³ The Court noted that some of the ideas from the book might be regarded in a hostile tone, and glorifying the struggles of ‘revolutionaries’ against slavery, genocide, fascism and national and class exploitation.⁷⁴ The national authorities even claimed that dissemination of such views might intensify serious disturbances in the prisons or in the country generally.⁷⁵ Yet, the Court noted that although some passages of the book were in a hostile tone, it was in fact a critique of the Turkish penitentiary system and conveyed personal anecdotes that were affiliated with the organisation, and narrated general conditions and personal experiences in prisons such as ill-treatment or pressure put on detainees.⁷⁶ The Court concluded that the domestic courts did not adduce in their argument any specific passages showing incitement of hatred and violence.⁷⁷ Furthermore, the book, written by private individuals, would reach a relatively narrow readership.⁷⁸ In those cases, domestic courts failed

⁶⁷ *Fratanoló v. Hungary* App no 29459/10 (ECtHR, 08/03/2012) para 9, Act no. IV of 1978 on the Criminal Code of Hungary, section: Section 269/B (The use of totalitarian symbols)

⁶⁸ *Fratanoló v. Hungary* App no 29459/10 (ECtHR, 08/03/2012) para 9

⁶⁹ *Ibid* para 25

⁷⁰ *Vajnai v. Hungary* App no 33629/06 (ECtHR, 8 July 2008) para 25

⁷¹ *Ibid* para 56, see also *Fratanoló v. Hungary* App no 29459/10 (ECtHR, 08/03/2012) para 24

⁷² *Fratanoló v. Hungary* App no 29459/10 (ECtHR, 08/03/2012) para 25

⁷³ *Çamyar and Berktaş v. Turkey* App no 41959/02 (15 February 2011) para 8

⁷⁴ *Ibid* para 40

⁷⁵ *Ibid* para 39

⁷⁶ *Ibid* para 38-40

⁷⁷ *Ibid* para 41

⁷⁸ *Ibid* para 42

to convince the Court that the expressions in question advocated communism which was regarded as inherently violent. The European Court now requires more evidential basis for such expression to be restricted, especially since the end of the Cold War. This means a narrow deference would be given to national authorities while restricting communism-related expression.

We can see how the Court has provided wider deference to domestic authorities when expressions or organisations pose a danger to the rights embodied in the Convention. As an overview of these cases above, the Court and the Commission were convinced that expression in relation to communism, National Socialism and to the Sharia system, as well as their advocacy of political violence, constituted a real and potential danger to the principles of the Convention. Yet, these cases span what was referred to in chapter 2 as the pathology of the Cold War, and the new pathology regarding fundamentalist religious motivations has only marginal differences in judicial approach. It can be argued that the Court acts based on the political atmosphere of the time when particular views or ideologies might constitute a threat to the Convention system. This allows the Court to keep up-to-date in preparation for, and guarding against, threats that could undermine the principles of the Convention and democracy, whatever their source of motivation. This protectionist reaction is the code at the centre of the Court's response to expression that advocate political violence.

5.2.2) Expressions that Advocate Terrorism

Political violence that seeks to stir up fear and intimidate populations is not something new. However, terrorism in law and politics is a new phenomenon which has appeared only in recent decades.⁷⁹ Today, views that are contrary to democracy and the Convention have been supplanted by more amorphous and all-encompassing '-isms' – 'fundamentalism', 'radicalism' and 'extremism'. This, at root, mirrors the fundamental inability of the international community to agree upon a definition of 'terrorism'. This thesis is premised on the argument that the reinvention (during the modern 'human rights era') of archaic offences of sedition can be traced to the underlying failure to narrowly define the nature of the risk posed. Starting from the 1970s, terrorism has arisen as the main source of threat to states and to national security. Terrorism remains as a new source of threat and it indicates a pathology towards expressions advocating it especially after the incidents of 9/11 attacks which led US, the UN and the Council of Europe to declare "war on terrorism". These attacks triggered the US, the Council of Europe, the EU and the UN to develop both a regional and worldwide response against terrorism,⁸⁰ including criminalisation of incitement to terrorism.⁸¹ Some of the contracting states of the

⁷⁹ Ben Golder, and George Williams, 'What is 'Terrorism'? Problems of Legal Definition' (2004) 27/2 University of NSW Law Journal, 270, 270

⁸⁰ Shawn Marie Boyne, 'Free Speech, Terrorism, and European Security: Defining and Defending the Political Community' (2010) 30 Pace L. Rev. 417, 447

⁸¹ Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences, OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities (Vienna, 19-20 October 2006) p.5

Convention have been confronted with “terrorism” emanating from national separatist movements and fundamentalist organisations. There will be some contextual comparison with cases emanating from various countries with a similar political backdrop. These include Kurdish separatists in Turkey, Basques separatists in Spain and Irish republicans in Northern Ireland,⁸² as well as religious fundamentalists acting without borders in order to address the Court’s response to such expression. The older sedition offences, (broad and vague as they were), have disappeared/fallen into disuse primarily as a result of the influence of the European Convention as a human rights instrument but they have also served as the basis for modern day “terroristic speech” offences, that are also broad and vague. For that reason, the European Convention is a crucial human rights instrument tends to constrain “terroristic speech” offences from the vague and broad meaning that has its basis in ‘sedition’. Thus, States’ human rights commitments have resulted in progressive developments in domestic free speech jurisprudence in accordance with the case law of the Court where there is considerable amount of violation of freedom of expression, especially in the cases from Turkey. There are, though, also cases where the Court has expanded the scope of ‘terroristic speech’, in cases where the state has convicted with wider deference given by the Court.

Initially, there were cases where the European Court gave wider deference to contracting states: where people who disseminated ‘terroristic speech’ had been convicted. We might take *Zana v. Turkey* as an example. The views expressed by the mayor of an important city in the South East Turkey were likely to escalate an already explosive situation, shortly after PKK militants had killed a number of civilians. His statement *“I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake ...”*⁸³ was published in a national daily newspaper.⁸⁴ The applicant was charged by the national court with the offence of disseminating propaganda for the activities of PKK as an armed organisation, whose aim was to break up Turkey’s national territory and public order.⁸⁵ The Turkish courts observed that his statements defined terrorist organisation as “national liberation movement”⁸⁶ and the fight against terrorism as a “dirty war”.⁸⁷ This is also one of the most important judgments in which the Court held by twelve votes to eight that there had not been a violation of freedom of expression.⁸⁸ During the deadly attacks and extreme tension caused by the PKK in the region, the mayor who was obviously a leading figure in society, declared his support for an illegal armed organisation.⁸⁹ The European Court gave particular attention to contextual evaluation such as the applicant’s statement as

⁸² OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities, Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences (Vienna, 19-20 October 2006) p.21

⁸³ *Zana v. Turkey* App 69/1996/688/880 (ECtHR, 25 November 1997) paras 15, 17

⁸⁴ *Ibid* para 2

⁸⁵ *Ibid* para 17

⁸⁶ *Ibid* para 15, 17

⁸⁷ *Ulusoy v. Turkey* App no 52709/99 (ECtHR, 31 July 2007) para 16

⁸⁸ *Zana v. Turkey* App 69/1996/688/880 (ECtHR, 25 November 1997) para 21

⁸⁹ *Ibid* para 60

published in the national daily newspaper, and the circumstances of the time, when murderous attacks carried out by the PKK on civilians in south-east Turkey, in order to establish a link between expression and terrorism.⁹⁰

Measures taken by national authorities against 'terroristic speech' are considered as part of the fight against terrorism. The European Court's response to 'terroristic speech' allows national authorities under the margin of appreciation to interfere with freedom of expression in order to facilitate the proper functioning of political democracy.⁹¹ If an expression is associated with a terrorist organisation and if it called for terrorist acts and armed conflict to achieve a political end, the Court confers much greater deference to national authorities to interfere with the right to freedom of expression.⁹² In cases where the Court has been persuaded that there was a clear connection between the applicant and a terrorist organization, the Court has either not regarded the interference at national level as a violation of freedom of expression or has declared the application inadmissible.⁹³ For instance, the Court noted that expression including the following passage; *"The national liberation struggle, growing like the ripples caused by a stone cast into a pool of water, has already gone past Botan in waves, ... PKK sources briefly describe the extent of the national struggle in Kurdistan as follows..."*⁹⁴ was capable of inciting further violence in south east Turkey.⁹⁵ Another instance of direct incitement to terrorism stemmed from the large-scale campaign, started by PKK's presidential counsel, to lift the ban on PKK's activities in Germany. The campaign persuaded supporters of the PKK to request and uphold this demand.⁹⁶ As part of the campaign, supporters signed a declaration as follows: *"I further declare that I belong to the PKK"* and *"I support the line of the PKK's democratic struggle,"* and submitted this declaration in large numbers to parliaments, administrative bodies and law courts.⁹⁷ The applicant was convicted by the national court in Germany of contravening the ban on the PKK's activities by reason of providing security for PKK to plan its further unlawful activities and reinforce solidarity amongst potential supporters.⁹⁸ Here, the European Court have found a direct and actual link between the expression in question and terrorism. Similarly, in the case of Jobe, the Court noted that the conviction of the person under the law which criminalised *"the collection or possession of material likely to be useful to a person committing or preparing an act of terrorism"*, and which was found legitimate due to having no reasonable defence.⁹⁹ The Court declared the application inadmissible due to fact that the applicant was carrying a large number of digital files including, *"Military Training manual"*, *"Al Qa'eda Training Manual"*, *"How Can I Train Myself For Jihad?"*, and *"39 ways to Serve and*

⁹⁰ Ibid para 57-59

⁹¹ Sürek v. Turkey (no. 3) App no 24735/94 (ECtHR, 8 July 1999) para 37, 38

⁹² Ibid para 40, 43

⁹³ Kilic v Turkey App no 40498/98 (ECtHR, 8 July 2003) p.5

⁹⁴ Sürek v. Turkey (no. 3) App no 24735/94 (ECtHR, 8 July 1999) para 10

⁹⁵ Ibid para 41

⁹⁶ Aydın v Germany App no 16637/07 (ECtHR, 27/04/2011) para 10

⁹⁷ Ibid para 11

⁹⁸ Ibid para 15

⁹⁹ Jobe v. UK App no 48278/09 (ECtHR, 14 June 2011) p.10

Participate in Jihad".¹⁰⁰ In another case, Swiss authorities seized materials such as books and magazines belonging to the PKK and concluded that this constituted advocacy for and glorification of violence, and aimed at convincing as many people as possible to favour armed struggle.¹⁰¹ In all these cases, the European Court found a direct incitement to terrorism, or a clear connection between expression material and terrorism or terrorist organisation, such that the Court concluded the interference served a pressing social need.

From a different perspective, the Commission has declared several applications relating to 'terroristic speech' inadmissible. In particular, brought against the UK, the members of paramilitary organisations and their lawful political wings (such as Sinn Fein, Republican Sinn Fein and the Ulster Defence Association) were prevented by the Secretary of State from having access to the broadcast media (radio and television programmes) for the purpose of commenting on economic and political issues.¹⁰² The ban was applied to restrict members from being interviewed further on TV and radio, to prevent them trying to justify their criminal activities.¹⁰³ The rationale given by the government for introducing such bans was that the terrorists appealed for support from the public by using and having access to radio and television. The Government decided to restrict access to these platforms especially to those whose aim was to promote terrorism. Since the aim of this restriction was to prevent direct appearances of those who used or supported violence, it was not a restriction on reporting.¹⁰⁴ With respect to ministerial directions in the cases brought before the Commission, it is noted that restrictions were formed to *"deny representatives of known terrorist organisations and their political supporters a possibility of using the broadcast media as a platform for advocating their cause, encouraging support for their organisation and conveying the impression of their legitimacy"*.¹⁰⁵ The Commission noted that this ministerial direction did not have any impact on the content of words and images broadcast on TV or radio.¹⁰⁶ The directions had very limited impact on the information available to the public because it only prevented journalists from having interviews with, and public appearances of, particular people.¹⁰⁷ The Commission rather considered this ban as an element of domestic policy that was formulated to combat terrorism.¹⁰⁸ Additionally, the Commission agreed with the domestic court that since the ban was aimed at terrorism, then it was applicable to persons who supported violence as it is part of an organisation's policy (in this case-Sinn Fein).¹⁰⁹ In a similar case, the applicant who was a

¹⁰⁰ Ibid 2

¹⁰¹ Kaptan Switzerland App no 55641/00 (ECtHR, 12 April 2001) p.2, 5

¹⁰² McLaughlin v. the UK App no 18759/91 (EComHR Decision, 09/05/1994); Adams and Benn v. the UK App no 28979/95 30343/96 (EComHR Decision, 13/01/1997); Brind and Others v. The UK App no 18714/9118714/91 (EComHR Decision, 09/05/1994)

¹⁰³ Ibid; Purcell and others v Ireland App no 15404/89 (EComHR Decision, 16 April 1991)

¹⁰⁴ Brind and Others v. The UK App no 18714/9118714/91 (EComHR Decision, 09/05/1994) p.2; McLaughlin v. the UK App no 18759/91 (EComHR Decision, 09/05/1994) p.2-3

¹⁰⁵ Brind and Others v. The UK App no 18714/9118714/91 (EComHR Decision, 09/05/1994) p.10

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ McLaughlin v. the UK App no 18759/91 (EComHR Decision, 09/05/1994) p.11

former member of the Red Army Faction (RAF), a left-wing extremist terrorist movement in Germany, was refused the request for radio interviews or being filmed.¹¹⁰ The national courts dismissed these requests based on the declaration that the applicant made against him during the trial.¹¹¹ As the Court noted, the applicant's declaration showed a critical attitude towards the strategy of the RAF notably the murder of the US soldier.¹¹² However, the applicant considered her critical analysis of the RAF's history as a prerequisite for "the determination of future fights" and she continued to identify herself with the aims and the ideology of the RAF in general and apparently considered herself as a representative of the organisation.¹¹³ The European Court noted that the domestic court's refusal to allow the applicant to be interviewed and filmed met a "pressing social need" due to the fact that the national court considered that the applicant's access to the journalist and the filmmaker could allow the applicant to influence supporters of the Red Army Faction (RAF) and gain more support.¹¹⁴ The applicant was the one of the main representatives of the RAF organisation, which had waged a murderous fight against Germany for more than twenty years.¹¹⁵ The Court considered the applicant's statement as promotion of the terrorist organisation and as an influence on supporters of this organisation.¹¹⁶

As in all these similar cases, the Commission and the Court showed wide deference to the national authorities to interfere with the right to free expression. These decisions can be criticised on the basis that the media ban had an effective impact on restricting criticism of British government policy towards Northern Ireland.¹¹⁷ Arguably, the main difference between the Turkish cases and British cases mentioned above is that the British ministerial directions aimed to prevent particular figures' speech before it was delivered and available in the public domain via TV or radio whereas the Turkish courts restricted applicant's speech after it was expressed in the press or documented as a written material. In this instance, the appearance of representatives of political parties on TV was not considered by the Court as preventing different perspectives on the situation in Northern Ireland. This is because the British ministerial ban was limited to specific persons and their appearances on TV and radio; this implies that a different perspective on the situation in Northern Ireland could have been placed in the public domain by delivering such views using various other media (excepting only broadcasting). This prevented a broad prior restraint on the free press. It is extremely important for the Court to consider the expression mode of delivery to the audiences (broadcasting or publishing) due to their potential impact on the audience and number of people accessed by

¹¹⁰ Hogefeld v Germany App no 35402/97 (ECtHR, 20 January 2000) p.2

¹¹¹ Ibid 3

¹¹² Ibid 7

¹¹³ Ibid

¹¹⁴ Ibid 1-2

¹¹⁵ Ibid 7

¹¹⁶ Ibid 6

¹¹⁷ David Miller, 'The media and Northern Ireland Censorship, information management and the broadcasting ban' Censoring Northern Ireland; in Greg Philo (Ed), *The Glasgow Media Group Reader*, Vol. II: Industry, Economy, War and Politics (Routledge, 1995) 72

the speaker. In these cases, the Court pays particular attention to the expression in question being available to the audience in different formats so as to ensure a different perspective on the circumstances is available to the listeners.

However, the anti-terror and national security laws target political and intellectual expression due to their purported connection to incitement to terrorism. The European Court has adopted the principle that, “... *the limits of permissible criticism are wider with regard to the government than in relation to a private citizen ...*”¹¹⁸ In a democratic system, there must be a close scrutiny not only of the legislative and judicial authorities but also of public opinion regarding the actions or omissions of the government.¹¹⁹ The Court has found many violations of freedom of expression in the cases where the domestic courts mostly convicted the speakers for disseminating propaganda by means of supporting terrorism. This is especially true of the views expressed regarding the Kurdish question or PKK. Dozens of people have been dragged to the Court for violating Turkish criminal code and anti-terror laws. Many cases related to the specific circumstances in South East Turkey are taken into consideration in assessing whether or not expression leads to acts of terrorism. National authorities, especially in Turkey, tend to interpret some statements very sensitively with focus on their content, particularly when they are about economic, social, academic or political aspects of situations potentially linked to terrorism or its relevant issues.¹²⁰ This again implies here that national security laws (TMK and TPC in Turkey) have been interpreted just like sedition law. In contrast with national authorities, however, the European Court has found some expression as offering different perspectives on the subject,¹²¹ or as being focused on a critical assessment of government policy and thus disapproved of such interferences.¹²² The Court noted that these expressions could seem provocative or to be delivered in a hostile tone to the national authorities, but that did not mean they must be taken as provoking violence.¹²³ There are many cases where the Turkish

¹¹⁸ Şener v. Turkey App no 26680/95 (ECtHR, 18 July 2000) para 40; Sürek v. Turkey (no. 4) App no 24762/94 (ECtHR, 8 July 1999) para 57; Gerger v. Turkey App no 24919/94 (ECtHR, 8 July 1999) para 48

¹¹⁹ Sürek v. Turkey (no. 4) App no 24762/94 (ECtHR, 8 July 1999) para 57; Gerger v. Turkey App no 24919/94 (ECtHR, 8 July 1999) para 48

¹²⁰ Erdoğan and İnce v. Turkey App no 25067/94 and 25068/94 (ECtHR, 8 July 1999); Karatas v. Turkey App no 23168/94 (ECtHR, 8 July 1999); Başkaya and Okçuoğlu v. Turkey App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999); Sürek v. Turkey (no. 4) App no 24762/94 (ECtHR, 8 July 1999); Gerger v. Turkey App no 24919/94 (ECtHR, 8 July 1999); Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000)

¹²¹ Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000) 70; Erdoğan and İnce v. Turkey App no 25067/94 and 25068/94 (ECtHR, 8 July 1999); Karatas v. Turkey App no 23168/94 (ECtHR, 8 July 1999); Başkaya and Okçuoğlu v. Turkey App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999); Sürek v. Turkey (no. 4) App no 24762/94 (ECtHR, 8 July 1999); Gerger v. Turkey App no 24919/94 (ECtHR, 8 July 1999); Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000)

¹²² Dicle v. Turkey App no 34685/97 (ECtHR, 10 November 2004) para 17; Halis v. Turkey App no 30007/96 (ECtHR, 11 January 2005) para 32

¹²³ Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000) para 70; Dicle v. Turkey App no 34685/97 (ECtHR, 10 November 2004) para 17; Doğaner c. Turkey App no 49283/99 (ECtHR, 21 October 2004 (Turkish Translation) p.2; Gümüş and Others v. Turkey App no 40303/98 (ECtHR, 15 March 2005) para 18; Arslan v. Turkey App no 23462/94 (ECtHR, 8 July 1999) para 48; Varli and Others v Turkey App no 57299/00 (Turkish translation) (ECtHR, 27 April 2006); Varli v. Turkey (No.2) App no 38586/97 (ECtHR, 19 October 2004) (Turkish Translation);

authorities held that particular remarks such as “Kurdistan” or “demanding education in mother tongue” were capable of destroying the unity and integrity of Turkish Republic and its nation, and regarded as advocacy of terrorism. But the Court does not consider the term of “Kurdistan” as disseminating separatist propaganda and incitement to violence; indeed, it merely alleges that people of Kurdish origin live in that part of the country,¹²⁴ or separate from the territory of Turkey, and as such exercises authority on behalf of that entity.¹²⁵ The Turkish national courts considered such expressions as a threat to its national security, and not as political criticism. Yet, the European Court regarded an applicants’ expression regarding these issues as offering “*a different perspective on the situation in south-east Turkey*”.¹²⁶ Additionally, in the case of Gerger, the European Court concluded that the applicant’s comments including the statement “*from the seeds of liberation of the Kurdish people sown in those days the guerrilla campaign in the mountains of Kurdistan was born*”¹²⁷ constituted political criticism of the Turkish authorities, to which the use of words such as “revolt” and “oppression” added a certain virulence.¹²⁸ The national courts took the view that the applicant’s expression was not a political criticism of the Turkish authorities; rather it was intended to incite Kurdish citizens to engage in armed combat against the Turkish State, supported separatist violence and encouraged for the activities of the PKK.¹²⁹ Similarly, in the case of Başkaya and Okçuoğlu, the national authorities maintained that the applicant’s expression sought to justify PKK terrorism as well as incite violence.¹³⁰ And the European Court draws attention to words or deeds which have the potential to exacerbate the security situation in the region, where there had been serious disturbances and conflict between the security forces and members of the PKK since early 1980s.¹³¹ Yet, the European Court noted that the statements in question were, again, tied up with the public’s right to be informed of a different perspective on circumstances in south east Turkey.¹³² Furthermore, the expression in question was characteristic of an academic study, the socio-economic evaluation of Turkey’s political history and political ideology.¹³³

Likewise, the Court gives less deference to national authorities if it finds that a particular expression contains hard-hitting criticism of the national authorities.¹³⁴ By doing this, the Court provides a wider space to voice permissible political expression regarding the government and its policies.¹³⁵ However, the Court considered and evaluated giving reference to the

Kalin v. Turkey App no 31236/96 (ECtHR, 10 November 2004) (Turkish Translation); Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000) paras 70-71

¹²⁴ Şener v. Turkey App no 26680/95 (ECtHR, 18 July 2000) para 45

¹²⁵ Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000) paras 70-71

¹²⁶ Şener v. Turkey App no 26680/95 (ECtHR, 18 July 2000) para 45; Özgür Gündem v. Turkey App no 23144/93 (ECtHR, 16 March 2000) paras 69

¹²⁷ Gerger v. Turkey App no 24919/94 (ECtHR, 8 July 1999) para 10

¹²⁸ Ibid para 47

¹²⁹ Gerger v. Turkey App no 24919/94 (ECtHR, 8 July 1999) para 41

¹³⁰ Başkaya and Okçuoğlu v. Turkey App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999) para 59

¹³¹ Ibid para 65; Zana v. Turkey App 69/1996/688/880 (ECtHR, 25 November 1997) para 10, 60

¹³² Başkaya and Okçuoğlu v. Turkey App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999) para 65

¹³³ Ibid para 64

¹³⁴ Sürek v. Turkey (no. 4) App no 24762/94 (ECtHR, 8 July 1999) para 58

¹³⁵ Ibid para 57; Sürek and Özdemir v. Turkey App no 23927/94 and 24277/94 (ECtHR, 8 July 1999) para 61

incriminated news commentary described as an awakening of Kurdish sentiment, mainly by way of romanticising the Kurdish cause and drawing on the names of legendary figures of the past, in the context of the overall literary and metaphorical tone of the article and not as an appeal to violence.¹³⁶ On the whole, the content of the articles cannot be construed as being capable of inciting to further violence.¹³⁷ Yet, the Court noted that the domestic authorities in this case failed to have sufficient regard for the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.¹³⁸ In another case, a union made a demand to promote the development of education in the mother tongue (the Kurdish language) was ruled upon by the national courts.¹³⁹ As distinct from the national court's argument based on an alleged risk to the integrity of national territory, the Court did not consider this demand as calling for use of violence, armed resistance or uprising, nor as inciting hatred.¹⁴⁰ That is why the Court concluded that "*there was no clear or imminent threat to the State's territorial integrity*"¹⁴¹ from a demand to develop an educational curriculum in the mother tongue.

In addition, to elaborate on the principle above, in the case of *Otegi Mondragon v Spain*, a spokesperson of the Sozialista Abertzaleak parliamentary group in a press conference responded to the issue of the *Egunkaria* newspaper which was searched and subsequently closed by the police due to its perceived links with ETA.¹⁴² Some members of its editorial board were consequently arrested.¹⁴³ Also, during a visit by the Spanish king to the Basque region, the spokesperson criticised the King in the following terms "*it was pathetic*", "*a genuine political disgrace*" and "*... the King is the commander-in-chief of the Spanish army, ... is in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence?*"¹⁴⁴ The Court agreed with the national court that the speech was provocative, yet the Court noted that there was room for a degree of exaggeration, or even provocation without being seen as advocating the use of violence.¹⁴⁵ Thus, the Court found a violation of freedom of expression because the speech did not advocate terrorism and political violence and thus underplayed the crucial impact that political criticism has on the functioning and flourishing of democracy in any society.¹⁴⁶

¹³⁶ *Süreç v. Turkey* (no. 4) App no 24762/94 (ECtHR, 8 July 1999) para 58

¹³⁷ *Ibid*

¹³⁸ *Süreç v. Turkey* (no. 4) App no 24762/94 (ECtHR, 8 July 1999) para 58; see also this, *Süreç and Özdemir v. Turkey* App no 23927/94 and 24277/94 (ECtHR, 8 July 1999) para 62

¹³⁹ *Eğitimve Bilim Emekçileri Sendikası v. Turkey* App no 20641/05 (ECtHR, 25 September 2012) para 74

¹⁴⁰ *Ibid* para 75

¹⁴¹ *Ibid*

¹⁴² *Otegi Mondragon v. Spain* App no 2034/07 (ECtHR, 15 March 2011) para 8

¹⁴³ *Ibid*

¹⁴⁴ *Ibid* para 10

¹⁴⁵ *Ibid* para 54

¹⁴⁶ *Ibid* para 54, 61

5.2.2.1) Response to ‘Terroristic Speech’ after the incidents of 9/11 (Indirect incitement)

The Council of Europe Convention on the Prevention of Terrorism (2005) (which carries very alike features with UNSC Resolution 1624 (2005) and the European Union Framework Decision on Combating Terrorism (2008)), is the regional instrument entailed in criminalizing indirect incitement to terrorism after the ‘terrorist’ attacks in the US on 11 September 2001, and other attacks in European capitals which emerged as a challenge to the realm of Convention. The Committee of Ministers defined this challenge as a direct threat to the fundamental values of human rights, democracy and the rule of law.¹⁴⁷ It can be stated that the post 9/11 era relies on increased restrictions in order to prioritise security and public order concerns over freedom of expression. Even political expression that indirectly advocates ‘terrorism’ or ‘violence’ can be limited in this context.¹⁴⁸ Measures adopted in order to combat terrorism covers material support to terrorist activities, and expert advice and assistance, as well as public support for terrorism by whatever means.¹⁴⁹ The Committee of Ministers of the Council of Europe agreed to adopt these instruments more effectively in fighting against terrorism.¹⁵⁰ The Council of Europe has introduced prohibitions on both direct and indirect incitement.¹⁵¹ In this regard, the Council of Europe Convention on the Prevention of Terrorism provides restrictions on a much wider range of expression including *"the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour"* and *"making available of a message to the public advocating terrorist offences"*.¹⁵² It also defines public provocation to commit a terrorist offence as *"the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed."*¹⁵³

This contrasts with the approach taken by the European Court which as it was argued above, gives wider deference to national authorities in cases where statements or expression have directly incited violence or armed struggle.¹⁵⁴ For instance, the European Court gave wider deference to national authorities in cases such as, *Zana v. Turkey*, *Sürek v. Turkey (No. 3)*, *Aydin v Germany*, *Jobe v. UK* and *Kaptan v. Switzerland* where there was a direct connection between the expression and terrorism. In cases of criminalisation of direct incitement rather than indirect one complies with the principle of *"... the limits of permissible criticism are wider with*

¹⁴⁷ Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies; Directorate General of Human Rights, December 2002

¹⁴⁸ Murray (n.24) 358

¹⁴⁹ The Committee of Experts on Terrorism (CODEXTER) or the Council of Europe “Apologie du terrorisme” and “incitement to terrorism” (Council of Europe Publishing, 2004) p.11

¹⁵⁰ the Committee of Ministers at the Multidisciplinary Group on International Action against Terrorism (GMT) http://www.coe.int/t/dlapil/codexter/gmt_more_en.asp

¹⁵¹ Explanatory Report on Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, para 96

¹⁵² Ibid paras 95, 96

¹⁵³ Ibid para 94

¹⁵⁴ Eric De Brabandere, ‘The Regulation of Incitement to Terrorism in International Law’, In: Hennebel, L. & Tigroudja, H. (Eds.), *Balancing Liberty and Security: The Human Rights Pendulum* (Nijmegen: Wolf Legal Publishers, 2012) 236

*regard to the government than in relation to a private citizen ...*¹⁵⁵ For that reason, the European Court regards some provocative, hostile and offensive expression, where the speaker was convicted of indirect incitement to terrorism by the national authorities, as offering a different perspective, or as hard-hitting criticism to international or internal politics. Thus it can be argued that the Court tended to give wider deference to national authorities only for direct incitement to terrorism until the 9/11 incidents. We can see immediately that a tension must arise between, on the one hand, the Court's historic approach – that of far greater toleration towards expression that 'only' indirectly incites terrorism – and on the other, the counter-terrorist preventive turns epitomised by the Council of Europe's Committee of Ministers' approach of post-9/11.

The Court has sought to avoid criminalisation of indirect incitement due to its broad restrictive effect on public political expression. For that reason, convictions for expressing views based on offences related to sedition, as it is argued in the second chapter, historically seen as incompatible with the exercise of the right in article 10. Yet, the post-9/11 era has posed a new pathology for the operation of the Convention. There is a national, regional and international trend which suggests and encourages criminalisation of indirect incitement after 9/11 incidents.¹⁵⁶ Adopting a broader scope of 'terroristic speech' including indirect incitement such as apology, has been adopted into national laws, and encouraged member states by international law.¹⁵⁷ Thus, it can be argued that the pathology of the 'war on terror' prompts national authorities to apply anti-terror laws in a manner closely resembling sedition law. In other words, the concept of sedition might be reborn under the notion of criminalizing indirect incitement as part of anti-terror measures through the European Court.

There are only two leading case that supports this argument. In *Leroy v. France*, the Court referred to the Council of Europe Convention on the Prevention of Terrorism and took it into account in its reasoning when examining indirect incitement (apology and glorification of terrorism).¹⁵⁸ The Court noted that the conviction of the cartoonist was necessary in a democratic society due to the importance of the fight against terrorism and the cartoon's possible impact on public order.¹⁵⁹ In this case, in a weekly magazine, *Ekaitza*'s editorial team drew a cartoon representing the attack of 11 September 2001 with the slogan of a famous

¹⁵⁵ *Şener v. Turkey* App no 26680/95 (ECtHR, 18 July 2000) para 40

¹⁵⁶ Bibi van Ginkel, *Incitement to Terrorism: A Matter of Prevention or Repression?* (ICCT Research Paper, August 2011) 15-24

¹⁵⁷ *Brabandere* (n. 154) 236

¹⁵⁸ *Leroy c. France* App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 37, See Further, Martin Scheinin, "Limits to freedom of expression: lessons from counter-terrorism" in Tarlach McGonagle and Yvonne Donders (Ed.), *The UN and Freedom of Expression* (CUP: 2015) 437-8

¹⁵⁹ Dirk Voorhoof, *European Court of Human Rights: where is the 'chilling effect'? Conviction of cartoonist for drawing 9/11-cartoon condoning terrorism is not a violation of freedom of expression as guaranteed by Article 10 of the Convention*; http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/VOORHOOF.2008.LeroyDr aft.6.10bis.pdf

brand: "We have all dreamt of it... Hamas did it".¹⁶⁰ The cartoon was published in the newspaper on 13 September 2001. In its following issue, the newspaper published extracts from letters and emails received in reaction to the drawing. The applicant emphasised that his aim was to represent the decline of the US through the 9/11 attacks.¹⁶¹ The cartoonist was charged with complicity in condoning terrorism. The European Court unanimously found no violation of freedom of speech by reason of regarding the cartoon as glorifying terrorism.¹⁶² The Court noted that the details of the speech proved it was far more than a mere criticism of US imperialism and the use of the first person plural 'we' proved that the author identified himself with terrorism.¹⁶³ A further example identifies that the applicant was charged for his press release on the internet which was, as the European Court noted, approval of the 'terrorist attacks' (events of 9/11).¹⁶⁴

However, in many cases concerning national independence struggles, the Court has instead found convictions for PKK-related expression and articles as violations of article 10 even where the reality of terrorism was much more imminent and intense.¹⁶⁵ These cases have required the Court to engage in analysis of the compatibility, in Convention terms, of the criminalisation of indirect advocacy of terrorism (such as glorification/apology) which was adopted mainly after the 11 September attacks.¹⁶⁶ As we saw above, in many cases the Court has rather found PKK-related expression to be hard-hitting criticism of and offering a different perspective on south east Turkey, rather than incitement to terrorism. In case of Leroy, the Court however considered the cartoon was not limited to criticism of American imperialism but supported and glorified the destruction of the Twin Towers by 'terrorism'.¹⁶⁷ Another distinctive point made by the Court in the Leroy case is that moral support for those he had presumed to be the perpetrators of 11 September attacks was provided by the applicant,¹⁶⁸ by approving the violent death of victims whose dignity was further diminished by the submission of his cartoon on the anniversary of the attacks.¹⁶⁹ Yet, the Court does not taken victims' dignity and moral support to perpetrators of terrorist acts into consideration in other cases. For instance, there are cases against Turkey where providing moral support for the perpetrators of a terrorist attack or terrorist was not counted a legitimate reason, even though the government argued that the applicant's expression was moral support for the terrorist organisation and separatist violence.¹⁷⁰ We might well conclude that the European Convention and the Court, fully

¹⁶⁰ Leroy c. France App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 6

¹⁶¹ Ibid para 14

¹⁶² Ibid para 48

¹⁶³ Ibid para 10 and 43

¹⁶⁴ Kern v. Germany App no 26870/04 (EComHR Decision, 29 May 2007) p.7

¹⁶⁵ Voorhoof (n. 159)

¹⁶⁶ Brabandere (n. 154)

¹⁶⁷ Leroy c. France App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 43

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Başkaya and Okçuoğlu v. Turkey App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999) para 59; Erdoğan and İnce v. Turkey App no 25067/94 and 25068/94 (ECtHR, 8 July 1999) para 45

approved the criminalisation of indirect incitement, and moved away from its earlier incitement standard.¹⁷¹ They indicate the Court perceives a contradiction with its actual role in ensuring the Conventional rights, especially here the right to freedom of expression. Criminalisation of indirect incitement can be regarded as a rebirth of sedition laws on a national level.

Having established the different approaches, the European Court takes or has taken exception to speech that advocates political violence or terrorism, both before and after 9/11 with both direct and indirect incitement. In each, we have noted different trends or presumptions. Let us turn now in more detail to the Court's jurisprudence, where we will analyse the case-law under the same headings as were used for Turkey (chapter 4) and the UN (chapter 6 to come). This will discern any common themes or differences in approach for the various elements we identified: content and context of expression, specifically audience and publicity, probability of harm and mens rea.

5.3) The Elements that Required by the European Court in Terms of 'Terroristic Speech'

It is highly important to specify the elements taken into consideration by the Court while examining the interferences imposed by national authorities. These elements reflect on the scope of the right to freedom of expression as well as the scope of the offences related to 'terroristic speech'. The European Court principally established that "*in exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made.*"¹⁷² This implies that the Court carefully considers the elements of content and context of the expression, or weighs one against another, or it applies only a context-based assessment.¹⁷³

It will be argued that the Court gives more protection to political expression by concentrating less on the inflammatory nature of the expression and more on the different elements of the contextual evaluation of the speech under scrutiny.¹⁷⁴ The contextual evaluation is the only way to carefully to distinguish between expression protected under article 10 and expression

¹⁷¹ Scheinin (n. 158) 438

¹⁷² Zana v. Turkey App 69/1996/688/880 (ECtHR, 25 November 1997) para 51; Sürek v. Turkey (no. 1) App no 26682/95 (ECtHR, 8 July 1999) para 58; Saygılı and Falakaoğlu v. Turkey (no. 2) App no. 38991/02 (ECtHR, 17/05/2009) para 25; Üstün v. Turkey App no. 37685/02 (ECtHR, 10/08/2007) para 31; Saygılı and Falakaoğlu v. Turkey Application no. 39457/03 (ECtHR, 21/01/2009) para 21

¹⁷³ Brind and Others v. The UK App no 18714/9118714/91 (EComHR Decision, 09/05/1994); The interference with the right to freedom of speech was held to prevent the members of para-military organisations and their lawful political wings from accessing the broadcast media, radio and television programmes in terms of commenting on economic and political issues. In this case, the administrative ban is related to the way the speech is delivered, and not to any speech. As a result, the Commission could not apply a content-based assessment.

¹⁷⁴ Joint Concerning Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve in cases of Sürek v. Turkey (no. 4) App no 24762/94 (ECtHR, 8 July 1999), Erdoğan and İnce v. Turkey App no 25067/94 and 25068/94 (ECtHR, 8 July 1999), Başkaya and Okçuoğlu v. Turkey App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999), and Arslan v. Turkey App no 23462/94 (ECtHR, 8 July 1999)

restricted for the sake of a democratic society.¹⁷⁵ This analysis is important because there are many cases from Turkey where the Court approved the interference on grounds of direct incitement to terrorism. Yet in its various judgments, the Court has been critical of Turkey, identifying the crucial difference between the responses of the European Court and Turkish Courts as this: “Turkey attaches too much weight to the form of words used in the speech and focuses less on the general context in which the words were used and their possible impact”.¹⁷⁶ In this regard, the Court applies a highly context based evaluation in its case law. In addition, the explanations, persuasive evidence and justifications of the restrictions brought by government are crucial elements for the Court as part of the process of evaluating the content or/and context of expression in order to determine whether there is a violation of Article 10 or not.¹⁷⁷ For instance, in the Üstün case, the Government was unable to explain why the second edition of a book was banned, whereas the first edition was not,¹⁷⁸ and how the second edition of the same book could have caused more concern to the judicial authorities than the first one.¹⁷⁹ For that reason, the European Court holds that there has been a violation of Article 10. Likewise, in the case of Çetin and Others v. Turkey while it was possible that the expression in question (here it was an article published with a newspaper) would have exacerbated an already tense situation, the national authorities did not identify any reasons and made no reference to the seizure warrants issued by the judges in the decision to seize the newspapers.¹⁸⁰ Without a detailed reasoning conveyed by proper judicial scrutiny, restriction on such expression would be simply regarded as a response to heavy criticism of government policies.¹⁸¹ As a result, explanations and justifications submitted by the government play a significant role leading the Court to reach a different conclusion when taking them into consideration as part of content- and context- based evaluation.¹⁸² For that reason, the elements such as men’s rea of speaker, and the content and context based evaluation will be analysed in order to understand how the Court responds to ‘terroristic speech’.

5.3.1) The Content of Expression

The Court evaluates the words used in an entire expression to decipher its meaning; this gives the real meaning of the words in their content. The content evaluation alone provides the basis for the Court and national authorities to hold restrictions on expression but in itself it is not adequate to restrict expression. The aim of the European Court is to find the meaning of words used in an expression, something which involves considering the whole meaning of the

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Üstün v. Turkey App no. 37685/02 (ECtHR, 10/08/2007) paras 33, 84; Yılmaz and Kılınc v Turkey App no: 68514/01 (ECtHR, 17 July 2008) (Turkish Translation) p.9; Ulusoy and others v. Turkey App no: 34797/03 (ECtHR, 03-05-2007) p.7

¹⁷⁸ Üstün v. Turkey App no. 37685/02 (ECtHR, 10/08/2007) para 33

¹⁷⁹ Ibid

¹⁸⁰ Çetin and Others v. Turkey App no 40153/98 and 40160/98 (ECtHR, 13 February 2003) para 63

¹⁸¹ Ibid

¹⁸² Demirel and Ateş (no. 3) v. Turkey App no. 11976/03 (ECtHR, 9 December 2008) at 24; Kalın v Turkey App no: 31236/96 (ECtHR, 10 November 2004) (Turkish Translation) p.2; Varlı and Others v Turkey App no 57299/00 (ECtHR, 27 April 2006) (Turkish Translation) p.3

expression in order to determine whether it advocates violence. Not only is the overall message given to the audience by the expression considered, but also a specific part of the expression must be evaluated. The content of expression is an element required to decide if the expression in question is a mere criticism - a legitimate political expression or 'terroristic speech'.

Case law demonstrates many cases where the Court has concluded that the words constitutes harsh criticism of government policies and anti-terror measures, after taking the content of expression into consideration.¹⁸³ For instance, the author of an article regarding the Kurdish problem was convicted by the national authorities based on evaluation of only one particular part of the expression. Yet, the Court interpreted the applicant's expression as containing offensive phrases in an aggressive tone but reached the view that the article as a whole did not glorify violence and did not incite people to armed resistance or insurrection.¹⁸⁴ Instead, the article as whole was constructed as an intellectual analysis of the Kurdish question.¹⁸⁵ In another case, the Court evaluated the content of two letters which mentioned two massacres committed intentionally by the authorities to annihilate Kurds and was critical of the attitude shown by the authorities to imprisonment, killings and torture of dissidents for the sake of the state.¹⁸⁶ The Court held that the impugned letters contained words that aimed at defining the PKK as a national liberation movement.¹⁸⁷ The words used in these letters were essential for deciding whether that speech was a permissible criticism or not. In these letters, the Court found that the applicant intentionally labelled one side of the conflict as "the fascist Turkish army", "the TC murder gang" and "the hired killers of imperialism" alongside references to "massacres", "brutalities" and "slaughter".¹⁸⁸ After evaluating the content of the statement here, the Court noted that the applicant overstepped the limits of permissible criticism and his letters were deemed to incite violence against an individual, a public official or a sector of the population.¹⁸⁹ This is because, as the Court noted, the letters in question sought to provoke a bloody revenge by arousing emotions and to connect themselves with deadly violence.¹⁹⁰ As we saw earlier in this chapter, Leroy published a cartoon which represented the attack on the twin towers of the World Trade Centre, with a famous brand slogan: "We have all dreamt of it... Hamas did it".¹⁹¹ The cartoonist identified himself with the attack through his use of the first person plural "we" and idealized this lethal project through the use of the verb "to dream"

¹⁸³ Sürek v. Turkey (no. 1) App no 26682/95 (ECtHR, 8 July 1999) para 60; Kalın v. Turkey App no 31236/96 (ECtHR, 10 November 2004) (Turkish Translation) p.3; Varlı v. Turkey (No.2) App no 38586/97 (ECtHR, 19 October 2004) (Turkish Translation) p.2; Karkin v Turkey App no 43928/98 (ECtHR, 23 September 2003) (Turkish Translation) p.3; Leroy c. France App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 42

¹⁸⁴ Şener v. Turkey App no. 26680/95 (ECtHR, 18 July 2000) para 45

¹⁸⁵ Ibid

¹⁸⁶ Surek v. Turkey (No:1) App no 26682/95 (ECtHR, 8 July 1999) para 60

¹⁸⁷ Ibid para 15, 60

¹⁸⁸ Ibid para 62

¹⁸⁹ Ibid para 61

¹⁹⁰ Ibid para 62

¹⁹¹ Leroy c. France App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 6

by using these words in this content, the Court considered them an indirect encouragement for the potential reader to evaluate positively the successful commission of a criminal act.¹⁹²

Particular sections or phrases are understood in the overall content of expression. For instance, the Court found no violation of the right to freedom of speech with these words "*We will die but we will not enter the cells!*" However, when looking at it overall and situated within the whole content of the speech, they conveyed the message to the readers to resort to violence rather than get incarcerated.¹⁹³ This was at a time of serious disturbances in several prisons which resulted in several deaths and injuries.¹⁹⁴ Thus, the Court considered the content of this speech as incitement to political violence rather than as mere criticism of a new prison system.¹⁹⁵ In addition to this, another noteworthy case regarding content evaluation is *Çamyar and Berktaş v Turkey*. Here, the national courts did not claim that any specific passages or pages of the speech (the book) were presumed to incite violence.¹⁹⁶ The applicant in this case was convicted based on a complete analysis of the book as a whole without making reference to any specific passages or pages.¹⁹⁷ As a result, the Court concluded that the domestic courts gave insufficient reasons to justify the interference with the right to freedom of expression.¹⁹⁸ The Court's review on national judgments addressed the fact that an evaluation of the content is required in assessing both the 'words' used in the expression and the 'expression as a whole'. If one is absent in the domestic courts' judgment, the Court might consequently note that the domestic authorities have failed to give sufficient reasons in a matter that could possibly violate the right to freedom of expression. It can be noted that the Court consistently considers the content of expression in its case law. The same consideration is assigned as a responsibility to contracting states. By doing this, they can justify their interference with the right to freedom of speech by referring to specific words, or parts of expression and to an entire expression that might advocate violence. Thus, it can be argued within this analogy that Turkey has failed to adopt this measure into its related case law.

Moreover, the tone of expression whether it is aggressive, provocative or hostile etc. might be understood differently based on the legal bodies' perception of particular issues. There are some cases in which the European Court ascribes a different meaning to the expression in question than the domestic authorities ascribed. For instance, the Turkish national authorities pointed to a specific view which referred to a part of the country as "belonged to Kurdistan" and which advocated for the dismantling of the nation and glorified the acts of the PKK as a "national liberation struggle".¹⁹⁹ The domestic authorities regarded these words as provocative

¹⁹² Ibid para 42

¹⁹³ *Saygılı and Falakaoğlu v. Turkey* (no. 2) App no. 38991/02 (ECtHR, 17/05/2009) para 28

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ *Çamyar and Berktaş v. Turkey* App no 41959/02 (15 February 2011) para 41

¹⁹⁷ Ibid

¹⁹⁸ Ibid

¹⁹⁹ *Erdoğan v. Turkey* App no 25723/94 (ECtHR, 15 June 2000) paras 12, 17, 64; *Karatas v. Turkey* App no 23168/94 (ECtHR, 8 July 1999) para 52, *Ulusoy v. Turkey* App no 52709/99 (ECtHR, 31 July 2007) para 44

in nature and an incitement to armed struggle against the State.²⁰⁰ The Court noted that the government did not submit any further arguments or facts that would indicate the expression encouraged violence, armed resistance or an insurrection in order to convince the Court for wider deference.²⁰¹ Yet, the national authorities failed to prove that any specific passages, pages or parts of expression evaluated under the whole meaning of expression, sought to advocate terrorism and political violence. This implies that the Court considered that the national authorities failed to provide enough evidence or explanation to justify the restriction.²⁰² Domestic authorities must provide persuasive and convincing evidence and explanation regarding the expression in question that it advocates terrorism or political violence through the words, passages, or parts of expression, as well as whole meaning of expression. However, in the case of banning the publication of an entire newspaper for a certain time, the Court does not examine the content of the impugned articles and news reports as a necessary step in the process.²⁰³ The Court noted that such prior restraints on the media were not *per se* incompatible with the Convention.²⁰⁴ However, the European Court was examining here not the content of the expression itself, but the nature of the restriction (here it was ban on future publication of entire periodicals) to determine whether or not it complied with article 10.

5.3.2) the Context of Expression

The Court conducts further evaluation of the expression in question, paying particular attention to the context in which expression was published or spoken. Contextual evaluation of expression might consist of ‘who the speaker is’, ‘how expression was delivered to audience’, ‘where expression was published or made’, ‘the time when the expression was delivered’ or ‘what the background of the case is’.²⁰⁵ All of these might be required by the Court to determine whether the restriction on expression is necessary and proportionate. In some cases, the Court has considered such particular views as a threat *per se* to Convention rights and values. For instance, with a National Socialist background, and past experience of the Third Reich were factors felt to be quite a real threat by the Court.²⁰⁶ They felt there was a possibility of re-

²⁰⁰ *Erdođdu v. Turkey* App no 25723/94 (ECtHR, 15 June 2000) paras 12, 17, 64; *Karatas v. Turkey* App no 23168/94 (ECtHR, 8 July 1999) para 52, *Ulusoy v. Turkey* App no 52709/99 (ECtHR, 31 July 2007) para 44

²⁰¹ *Ulusoy v. Turkey* App no 52709/99 (ECtHR, 31 July 2007) paras 45-48

²⁰² *Ibid* para 46

²⁰³ *Urper and Others v. Turkey* App nos 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07) 20/01/2010 (ECtHR, 20/01/2010) para 38

²⁰⁴ *Ibid* para 41

²⁰⁵ The Court takes the background of the cases into consideration. see these cases: *İncal v. Turkey*, App no 41/1997/825/1031 (ECtHR, 9 June 1998) para 58; *Ireland v. the United Kingdom*, App no. 5310/71 (ECtHR, 18 January 1978) para 11; *Aksoy v. Turkey*, App no 21987/93 (ECtHR, 18 December 1996) paras 70 and 84; *Zana v. Turkey* App 69/1996/688/880 (ECtHR, 25 November 1997) paras 59-60; *United Communist Part of Turkey and Others v. Turkey* App no 133/1996/752/951 (ECtHR, 30 January 1998) para 59; *Surek v. Turkey (No:1)* App no 26682/95 (ECtHR, 8 July 1999) para 62; *Sürek v. Turkey (no. 2)* App no 24122/94 (ECtHR, 8 July 1999) para 37; *Sürek v. Turkey (no. 3)* App no 24735/94 (ECtHR, 8 July 1999) para 40; *Sürek v. Turkey (no. 4)* App no 24762/94 (ECtHR, 8 July 1999) para 58

²⁰⁶ *Erdel v Germany* App no. 30067/04 (ECtHR, 12 August 2004); *Otto v Germany* App no 27574/02 (ECtHR, 11 July 2002); *Kern v. Germany* App no 26870/04 (EComHR Decision, 29 May 2007)

experiencing what was experienced in the time of the Third Reich, if the National Socialist ideology was advocated.²⁰⁷ This ‘past experience’ can be evaluated as having its background in the context of the expression. In addition, the context of the security situation such as in South East Turkey where there have been serious disturbances between the PKK members and the security forces leading to severe loss of life since the 1980s.²⁰⁸ Within such contextual framework, the expression in question could be more capable of advocating further violence in the region.²⁰⁹ The Court considers background of the cases where the national authorities are aware of the dissemination of views which might exacerbate the serious disturbances occurring at the time.²¹⁰ Another example of the criminalisation of incitement is the case of *Kern v. Germany*.²¹¹ There, the Court declared the application inadmissible where the local chairman of the right-wing extremist association published a press release in the press and on the internet right after the terrorist attack in 9/11. The Court noted that the applicant’s statements and cartoon approved the ‘terrorist’ attacks 9/11 incidents, published just right after the 9/11 attacks.²¹² The Court drew attention to the timing of such publications. In this regard, time plays an important role in evaluating when particular views are published.²¹³ For instance, both the content of the expression in the *Zana* and *Leroy* cases were contextually assessed by the Court under the prevailing circumstances in south east Turkey, when serious disturbances were raging, and the unique timing immediately after the September 11 attacks. The timing of expression in these cases was important in terms of their contextual evaluation to decide whether they incited terrorism or not. This implies that in order to commit ‘terroristic speech’, it must be published, spoken or broadcast at a critical time when an act of terrorism or political violence has recently been committed.

5.3.2.1) Audience-Publicity

A further point was highlighted by the Court regarding the way in which an expression was delivered in relation to the number of people that the expression possibly reached. The size of the audience or its potential size is important to justify for interfering with the expression. This is an important factor in the European Court, influencing whether the expression is deemed outside or within the protection of Article 10. As follows, broadcasting has a more immediate and powerful impact than the printing press.²¹⁴ For instance, a ministerial order imposing

²⁰⁷ *B.H., M.W., H.P. and G.K. v. Austria* App No. 12774/87 (EComHR, 12 October 1989) p.4; *Herwig Nachtmann v. Austria* App no. 36773/97 (EComHR, 2 July 1997) p.5; *Schimanek v Austria* App no. 32307/96 (ECtHR, 1 February 2000) p.7

²⁰⁸ *Süreç v. Turkey* (no. 3) App no 24735/94 (ECtHR, 8 July 1999) para 40; *Zana v. Turkey* App 69/1996/688/880 (ECtHR, 25 November 1997) para 10

²⁰⁹ *Süreç v. Turkey* (no. 3) App no 24735/94 (ECtHR, 8 July 1999) para 40

²¹⁰ *Ceylan v. Turkey* App no 23556/94 (ECtHR, 8 July 1999) para 35

²¹¹ *Kern v. Germany* App no 26870/04 (EComHR Decision, 29 May 2007) p.2

²¹² *Ibid* 8; *Leroy c. France* App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 45

²¹³ *Ceylan Ceylan v. Turkey* App no 23556/94 (ECtHR, 8 July 1999) para 35; *Leroy c. France* App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 45

²¹⁴ *Çetin and Others v. Turkey* App no 40153/98 and 40160/98 (ECtHR, 13 February 2003) para 62

restrictions on broadcasting media was declared inadmissible by the European Commission.²¹⁵ Yet, the Court found a violation of the right freedom of expression in an administrative ban on publication and its distribution.²¹⁶ The Court considered the power and influence of radio and television, which have a more immediate impact than the print media.²¹⁷ The broadcaster is limited in his ability to correct, qualify, interpret or comment on any statement made on radio or television in comparison with those made in the press.²¹⁸ Live statements carry a special risk which even conscientious journalists cannot control within the exercise of their professional judgment.²¹⁹ For instance, the Court considered that the applicant had no possibility of reformulating, refining or retracting his speech at a press conference before making his speech in public.²²⁰ The publication written by private individuals would most likely reach a much narrower readership than expressions made by well-known persons in the mass media.²²¹ The European Court considers the potential impact of written publications or the mass media on matters of public order and national security a substantial degree.²²² As a result of this, it can be claimed that the Court found the ban on written materials disproportionate due their lesser and limited impact on society. In the case of Zana, the mayor, the most important city in south-east Turkey, was interviewed by a major national daily newspaper and his words reported.²²³ The European Court took the applicant's position and his views' possible impact on the circumstances into consideration.²²⁴

5.3.2.2) The Probability of Harm

European Court case law, 'the probability of harm' is not always required as an element. Yet, it has been evaluated as part of context of expression to determine whether such expression causes such a danger that a terrorist offence might be committed. Ronen argues that the European Court case law does not set a strict probability threshold, but it does require consideration of the significance and credible nature of the danger, the author and the addressee of the message, as well as the context in which the offence is committed.²²⁵ The Court is up to date in preparation for and guarding against threats that could undermine the principles of the Convention and democracy by feeling and considering particular views as a

²¹⁵ Purcell and Others v. Ireland, (App no. 15404/89), EComHR Inadmissibility Decision 16 April 1991, p.14-5, Brind and Others v UK (Application No. 18714/91) EComHR Inadmissibility Decision 9 May 1994 p.11

²¹⁶ Çetin and Others v. Turkey App no 40153/98 and 40160/98 (ECtHR, 13 February 2003) para 10

²¹⁷ Purcell and others v Ireland (Application No. 15404/89) EComHR Inadmissibility Decision 16 April 1991 p.14

²¹⁸ Ibid

²¹⁹ Ibid

²²⁰ Otegi Mondragon v. Spain App no 2034/07 (ECtHR, 15 March 2011) para 54

²²¹ Çamyar and Berktaş v. Turkey App no 41959/02 (ECtHR, 15 February 2011) para 42; Alinak v. Turkey, App no. 40287/98 (ECtHR, 29 March 2005) para 45

²²² Ibid

²²³ Zana v. Turkey App 69/1996/688/880 (ECtHR, 25 November 1997) para 60

²²⁴ Ibid

²²⁵ Yaël Ronen, 'Incitement to Terrorist Acts under International Law' (2010) 23 Leiden Journal of International Law 645, 668, see in Council of Europe Convention on the Prevention of Terrorism - Explanatory Report - [2005] COETSER 2 (16 May 2005) para 100; For instance, Demirel and Ateş (no. 3) v. Turkey App no. 11976/03 (ECtHR, 9 December 2008) para 24; Kalin v. Turkey App no 31236/96 (ECtHR, 10 November 2004) (Turkish Translation) p.2; Varlı and Others v Turkey App no 57299/00 (ECtHR, 27 April 2006) (Turkish translation) p.3

threat to the Convention era. Expression in relation to communism, Nazism, fundamentalism or terrorism would be treated as threat by the Court due to their possible harm to the Convention rights and values. Thus it can be argued that the Court responds to such expression with no deference if it constitutes a probability of harm (threat).

5.3.3) Mens Rea of the Speaker

The Court does not require the speaker's intention as an element to determine unprotected expression no matter whether it is direct or indirect incitement to terrorism or not. Even the Court did not consider the applicant's claim about what he intended by his expression. In *Leroy*, the Court found that the content of the expression (here, a cartoon) taken as a whole supported the idea of destroying American Imperialism by means of violence.²²⁶ Yet, the applicant stated that his true intention was to express his anti-Americanism through satirical cartoon that showed the weakening of US imperialism.²²⁷ The Court reached the conclusion that the speaker supported and was in solidarity with perpetrators of the 9/11 attacks and that he glorified the destructions caused by the attacks of 11 September 2001. The Court did not require element of intention in general but there are rare cases where the Court checked it whether existed or not. For instance, in the case of *Zana*, the national authorities decided that this constituted a direct incitement to terrorism and the European Court gave wider deference to national authorities. There were strong dissenting opinions which disagreed with the majority, concluding that the Court did not take an indispensable element of the applicant's intention into account.²²⁸

5.4) Conclusion

Since the end of the Second World War, the Convention as an instrument has provided an early warning of authoritarianism in weak democracies in order to prevent authoritarian regimes. The case law of the European Court strongly focuses on the idea of defining the 'democratic spirit' through guaranteeing respect for human rights and ensuring that its members adhere to the standards of 'an effective political democracy' and the rule of law. Under the light of such political philosophy, the doctrinal principles have been used as primary considerations while reviewing whether interferences with the right to freedom of speech are a necessity of democratic society. In this regard, over time the Court examined the restrictions imposed on expressions related to communism, National Socialism and the Islamic sharia system; as well as 'terroristic speech' related to PKK, IRA, ETA, and Al-Qaida. This chapter analysed the European Court's response to 'terroristic speech' and its echo of the past 'sedition' laws due to their close

²²⁶ *Leroy c. France* App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 43

²²⁷ *Ibid* para 42

²²⁸ *Zana v. Turkey* App 69/1996/688/880 (ECtHR, 25 November 1997) para, PARTLY DISSENTING OPINION OF JUDGE LOPES ROCHA, PARTLY DISSENTING OPINION OF JUDGE VAN DIJK, JOINED BY JUDGES PALM, LOIZOU, MIFSUD BONNICI, JAMBREK, KÜRIS AND LEVITS and, DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSOHN p.24-30

resemblance. Contracting states, especially here Turkey, have applied broad restrictions on political dissenting expression through using these offences. This resemblance has reflected a deeper-level problem concerning the invocation of 'terrorism' as the basis for restricting freedom of speech.

The European Convention as a human rights instrument has resulted in progressive developments in domestic free speech jurisprudence through a number of progressive Constitutional and criminal law amendments. The European Court allows a lower level of deference for national authorities when criminalising a wide range of expressions that are critical and dissenting to the state and its economic, security, and societal policies. The European Court, in its early case law, examined expressions or views related to communism and National Socialism as part of its role in defending democracy from ideologies and threats undermining it. This is because, at that time, due to horrific experience of the Second World War, the Court believed that it was possible that such political parties and other types of associations or expression, might advocate practices or activities likely to destroy the democratic rights and freedoms set forth under the Convention. In other respects, the Strasbourg Court has examined an increased number of cases related to certain public-political expressions where national authorities convicted the speaker due to those expressions being 'terroristic speech'. The European Court differed, regarding most of the offences as not related to 'terroristic speech' and thus as interfering with freedom of expression where the speech, properly viewed, was simply a different perspective or constituted hard-hitting criticism of government policy. The Court uphold the decision of the national authorities only in cases where expression is examined contextually as having the potential to escalate or being useful for an act of terrorism. In these cases, the Strasbourg Court is convinced that there is a (direct) connection between expressions and terrorism after taking the context and content of expression into consideration. While it can be argued that the Court has contributed to the dismantling of the offence of sedition at the national level, (since it tended to criminalise expression without any definite link to 'political violence' or 'terrorism'). Yet there remains a contradictory development after the 9/11 attacks, the Committee of Ministers of the Council of Europe agreed to take steps using the international instruments within the Council of Europe to enhance the fight against terrorism including criminalising indirect incitement. This international trend has led to the criminalisation of a wide, indeed, even wider, range of expression, this time with the backing of international law.

In addition, the elements such as the content and context of speech, mens rea, the likelihood of harm, and publicity are analysed under the case law of the Court. They are essential to determine whether restriction on expression constitutes a violation of human rights or not. The content and context evaluation shows the focus of the national authorities, whether they prioritise free speech or restrictions on freedom of speech. Indeed, the European Court has been imported, to some degree, into the reasoning of the domestic courts from its well-established case law in this regard. This has, at a minimum, served to enhance the rigour with which restrictions on speech are scrutinized at the national level. For instance, the main

difference between the Court's and Turkish authorities' approaches is that Turkey attaches too much weight to the form of the words used in the speech and lack attention to the general context in which the words were used and their possible impact. The Court gives wide protection to political speech by focusing less attention upon the inflammatory nature of the speech and more on the different elements of the contextual evaluation of the speech. The case law analysis here indicates that national authorities must bring explanations and justifications regarding the restriction on expression. The link between expression and acts of terrorism must be clearly shown through these explanations to the Court for wider deference. The audience/publicity is also a key element in terms of preventing a wide range of expression. This has been taken seriously into consideration by the Court which I assume is what distinguishes modern-day offences related to 'terroristic speech' from sedition. Yet, the Court has failed to bring the same level of rigour to the question of the speaker's mens rea. This might be useful in terms of preventing abuse of 'terroristic speech' offences. Overall, the interpretation of these elements under the case law has provided an opportunity for contracting states to dismantle sedition offences under these laws as well as those found in case law so as to comply with human rights obligations.

CHAPTER 6: INTERNATIONAL HUMAN RIGHTS LAW'S RESPONSE TO 'TERRORISTIC SPEECH'

6.1) Introduction

International human rights law appeared as a reaction to the horrific experience of Nazi Germany during the World War II. Since the 1960s, the UN system has worked to ensure the enforcement of universally-recognized human rights norms, including (for the purposes of this Chapter) the promotion of the implementation of 'the International Covenant on Civil and Political Rights' (ICCPR) and 'the International Convention on the Elimination of Racial Discrimination' (ICERD). The primary purpose of human rights treaties is to protect the basic rights of individual human beings, regardless of their nationality, against arbitrary and disproportionate State interference.¹ The right to freedom of expression is protected under the Article 19 of the Covenant on Civil and Political Rights and its scope has been detailed by the Human Rights Committee (henceforth 'the Committee'). The Committee's views on individual communications (through the individual complaints procedure), the Committee's Concluding Observations on periodic State reports, and the General Comments drafted by the Committee in relation to particular rights together provide authoritative interpretations of the Covenant.²

As the third chapter described, the doctrinal categories at the heart of human rights based analysis are important foundations which determine the scope of the right to freedom of expression. The doctrinal principles that structure the reasoning of the Committee might be imported into the reasoning of the domestic courts. In the UN era, international human rights law sets obligations not only for democratic societies but also for societies governed by oppressive and authoritarian governments that have ratified the Covenants. These state parties are not like-minded and have various political and legal traditions, ideals, and governance systems. Nonetheless, Human Rights Bodies' jurisprudence provides comprehensive guidance about how to respond to the challenges that the right to freedom of expression faces in these differing political atmospheres. Under oppressive and authoritarian systems, a greater range of expression is more likely criminalised by state parties so as to oppress any political opposition and to silence dissenting speech (of media professionals, human rights activists, academics, artists and the like).

One role of the Human Rights Committee is to encourage national legislatures and judicial institutions to interpret offences relating to 'sedition' in a way that neither conflicts with nor undermines the State's obligations arising from Article 19.³ As previous chapters have

¹ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (CUP, 2002) 24

² Human Rights Committee's General Comment No 33 (2008); (CCPR/C/GC/33) para 13

³ *Ibid* para 30

demonstrated, national courts (particularly in Turkey) have all too readily treated dissenting expression as seditious through reliance upon public order and national security provisions. In addition, as Sorial argues, more recently, sedition laws have been modernised under the guise of counter-terrorism, to extend the criminalisation of expression that purportedly advocates violence against the state.⁴ Sorial is rightly critical of such laws for being too broad and for imposing unjustifiable limits on the right to freedom of expression.⁵ As has also been noted (see especially, Chapter 2) there is a clear tension between the ratification of human rights treaties protecting speech, and reliance on 'anti-terror' laws to impose far-reaching restrictions upon it. As Chapter 2 highlighted, this tension has been exacerbated by the absence of a definition of 'terrorism' at the international level, and corresponding expansive interpretations of 'terrorism' at the national level. The result is an overly-broad legal and administrative discretion for authorities to misuse their power: one which constitutes, as Ronen states, a new set of conflicts between the fight against terrorism and freedom of expression.⁶

The UN has sought to enhance international cooperation in countering terrorism. Until the late 1990s, it did so primarily by means of urging the criminalisation of specific forms of conduct (e.g. the hijacking of planes and taking hostages) and also by encouraging States to take pre-emptive measures such as criminalising the financing of terrorism.⁷ In the aftermath of the 9/11 attacks, however, the background motivation underlying acts of 'terrorism' and the social processes that lead individuals to involve in 'terrorist' activity have become a central concern of the international community. The international consensus about the need to take concerted action against 'terrorism', and indeed, to prevent individuals from being drawn into 'terrorism', was manifested in UN Security Council Resolution 1624 (2005) which urged States to criminalise 'terroristic speech'.

This chapter, in section 6.2, analyses International Human Rights Law's response to 'terroristic speech', bearing in mind the close resemblance of such modern-day offences with historical offences of 'sedition'. It does so by examining some relevant complaints brought to the Human Rights Committee and the Committee on the Elimination of All Forms of Racial Discrimination. These cases involve the States' criminalization of ideologically-driven speech, including speech relating to National Socialism and communism. In addition, several cases are concerned with the criminalization of political dissent due to its purported link with suspected insurgent activities (especially, for example, where the government might be likened to a totalitarian system or military junta). As will be demonstrated, the Committee plays a key role in

⁴ Sarah Sorial, 'Can Saying Something Make it so? The Nature of Sedition Harm', (2010) 29 *Law and Philosophy* 273, 275

⁵ Sarah Sorial, *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism* (Routledge, 2013) 2; Geoffrey Palmer, 'Political Speech and Sedition' (2008-2009) 11-12 *Yearbook of New Zealand Jurisprudence*, 36, 49-51

⁶ Yael Ronen, "Incitement to Terrorist Acts and International Law" 23 (2010), *Leiden Journal of International Law*, 645, 646

⁷ For instance, International Convention for the Suppression of the Financing of Terrorism (1999)

encouraging greater protection for the right to freedom of expression. However, while national counter-terrorism provisions have brought the right to freedom of expression into sharp conflict with national security and public order policies, the Committee has not yet satisfactorily drawn up legitimate parameters for what measures States may take against 'terroristic speech'. Even though there are very few cases specifically involving 'terroristic speech', the Committee has monitored the systematic violation of the right to freedom of expression under military regimes or one-party systems where individuals were charged with the offence of sedition. It is fair to say that the Committee has shown some degree of effort to encourage the elimination of the concept of 'sedition' from national law.

Section 6.3 further considers the jurisprudence of the Committee and its analysis of the elements of these crimes (including actus reus, content and context of expression, publicity and audience exposure, probability of specific harm, and mens rea of the speaker). The analysis of these elements is important to know how the Committee has sought to differentiate legitimate political expression from 'seditious' and 'terroristic' expression. It is argued that the Committee has not done well in bringing methodological rigour to its analysis of these elements. Unfortunately, the Committee has sometimes been prepared to accept the State's reliance on a presumption that particular expression presents an inherent threat to the state and its system. Yet the Rabat Plan of Action proposes the six-part threshold test of: (context, speaker, intent, content and form- extent of the speech act, and likelihood, including imminence) to identify unlawful incitement. If such test is applied by the Committee, lack of mythological rigour might be defeated.

6.2) The UN Human Rights System's Response to 'Terroristic Speech'

This thesis takes as a basic premise that criminalising a wide range of expression is incompatible with the right to freedom of expression under Article 19 ICCPR. At the outset of this section, however, it is worth charting the core parameters of this right, as established by the Human Rights Committee. Article 19 comprises three main elements: "1) the right to hold opinions without interference; "2) the right to seek and receive information and the right of access to information; and 3) the right to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice."⁸ For the purpose of this thesis, the right to freedom of expression entails (at a minimum) being able to express critical and dissenting views about government policies without fear of interference or punishment.⁹ In this regard, individuals must also be free to

⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue (A/HRC/14/23) 20 April 2000 at 26, see also in, *Avon Lovell v. Australia*, CCPR/C/80/D/920/2000, (Human Rights Committee, Communication 2004-03-24) para 9.2; *Kim Jong-Cheol v. the Republic of Korea*, CCPR/C/84/D/968/2001, (Human Rights Committee, Communication 2005-07-27) para 8.2

⁹ *Aduayom et al. v. Togo*, 422/1990, 423/1990 and 424/1990, (Human Rights Committee, Communication 1996-07-12) para 7.4; *Rafael Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002 (Human Rights Committee,

receive information about alternatives to the political system and parties in power,¹⁰ as well as to have public debate concerning political figures and issues.¹¹

In terms of limiting freedom of expression, more specifically, the Johannesburg Principles were adopted as an indication of how expression may be legitimately punished as a threat to national security, if state parties can demonstrate: if "(a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."¹² In this regard, expression that: "(i) advocates non-violent change of government policy or the government itself; (ii) constitutes criticism of, or insult to, public officials, or a foreign nation, state or its symbols, government, agencies or public officials" are protected.¹³

As highlighted by Ambeyi Ligabo, the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, there has been a trend among member states to adopt or to consider adopting national security measures which interfere with the right to freedom of expression.¹⁴ In fact, some state parties have applied systematic violation of the right to freedom of expression by silencing speakers who express opposition to the incumbent government. These measures have targeted in particular media professionals, political opponents and human rights defenders.¹⁵ Such a trend indicates that a number of state parties have prioritized national security over the protection of freedom of expression.¹⁶ The adoption of such legal measures clearly restricts the free flow and exchange of information.¹⁷ It also invariably leads to indirect forms of restriction, not least means to self-censorship by media professionals, human rights defenders, or political opponents.¹⁸ Speakers are most likely to be convicted of denigrating and defaming public officials, propagating extremist and disruptive ideas, gathering dissident news, disturbing public order, causing threats to the unity and best interest of the country, or treason.¹⁹ As the former Special Rapporteur, Ambeyi Ligabo,

Communication 2005-03-29) para 6.2; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

¹⁰ Aduayom et al. v. Togo, 422/1990, 423/1990 and 424/1990, (Human Rights Committee, Communication 1996-07-12) para 7.4; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

¹¹ Zeljko Bodrožić v. Serbia and Montenegro, CCPR/C/85/D/1180/2003 (Human Rights Committee, Communication 2005-10-31) para 7.2

¹² The Johannesburg Principles on National Security, Freedom of Expression and Access to Information: Principle 6: Expression That May Threaten National Security

¹³ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information: Principle 7: Protected Expression

¹⁴ Report of the Special Rapporteur Mr. Ambeyi Ligabo on the right to freedom of opinion and expression (submitted in accordance with Commission resolution 2002/48) (E/CN.4/2003/67) para 57

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid para 59

¹⁸ Ibid

¹⁹ Report of the Special Rapporteur Mr. Abid Hussain on the promotion and protection of the right to freedom of opinion and expression, (submitted in accordance with Commission resolution 2001/47) (E/CN.4/2002/75) 30 January 2002 para 43

noted (based on the cases he received) these cases involved threats, assault, harassment, murder or other forms of physical and psychological attacks on journalists, students, human rights activists and unionists due to exercising their freedom of speech.²⁰ In addition to facilitating harsh censorship of all forms of communication, counter-terrorism and national security provisions have also been misused by states to intimidate or arbitrarily detain speakers, to close down media outlets, to ban specific publications, or to program and prohibit public gatherings or particular groups and associations.²¹ Worse still, some particularly egregious cases have involved 'censorship by killing', committed by agents of states or persons informally affiliated with the government.²² In light of these trends, it is perhaps unsurprising (but no less important) that General Comment 34 emphasizes that sedition and treason laws should be regarded as something that state parties must give special care to eliminate. Such laws can be misused to suppress or to prevent the free flow of public information and to prosecute journalists, researchers, environmental activists, and human rights defenders despite there being no (objectively) demonstrable harm to national security.²³

Nonetheless, 'terrorism' (especially after the events of 9/11) remains a key challenge to freedom of expression due to the broad discretion which counter-terrorism laws generally confer on national authorities.²⁴ Anti-terrorism laws impose broad and vague restrictions on expression including the criminalization of indirect incitement, for example, by making it an offence to glorify or promote terrorism or extremism, and by strictly regulating critical speech or media reporting of matters relating to 'terrorism'.²⁵ As a result, the Committee has emphasized that any restrictions should be clearly and precisely defined so as to prevent

²⁰ Report of the Special Rapporteur Ambeyi Ligabo on the promotion and protection of the right to freedom of opinion and expression, (A/HRC/7/14) 28 February 2008 at 6

²¹ Report of the Special Rapporteur, Mr. Abid Hussain, on promotion and protection of the right to freedom of opinion and expression (submitted pursuant to Commission on Human Rights resolution 1997/26)(E/CN.4/1998/40) 28 January 1998 at 46; see also, Report of the Special Rapporteur Mr. Abid Hussain on the protection and promotion of the right to freedom of opinion and expression, (E/CN.4/1999/64) 29 January 1999 para 21: see also, Report of the Special Rapporteur Mr. Abid Hussain on the promotion and protection of the right to freedom of opinion and expression (submitted in accordance with Commission resolution 2000/38) (E/CN.4/2001/64) 13 February 2001 paras 28, 31, 33; see also Report of the Special Rapporteur Ambeyi Ligabo on the promotion and protection of the right to freedom of opinion and expression, (A/HRC/7/14) 28 February 2008 at 6; see also, Report of the Special Rapporteur Frank La Rue on the promotion and protection of the right to freedom of opinion and expression, (A/HRC/11/4) 30 April 2009 para 8

²² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, (submitted in accordance with Commission resolution 2000/38) (E/CN.4/2001/64) 13 February 2001 para 28, Report of the Special Rapporteur Mr. Abid Hussain on the promotion and protection of the right to freedom of opinion and expression (submitted in accordance with Commission resolution 2001/47) (E/CN.4/2002/75) 30 January 2002 para 48

²³ Human Rights Committee, General Comment No 34 (2011); (CCPR/C/GC/34), para 30 See also, for instance: Concluding observations of the Human Rights Committee on Hong Kong (CCPR/C/CHN-HKG/CO/3) 29 April 2013 para 14 and (CCPR/C/79/Add.117) 15 November 1999 para 18 and; the Russian Federation (CCPR/CO/79/RUS) 1 December 2003 para 21

²⁴ Report of the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression Addendum: Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade (A/HRC/14/23/Add.2) 25 March 2010 p.6-7

²⁵ Ibid

unnecessary or disproportionate interference with the right to freedom of expression.²⁶ Despite these broad principles, however, it will be argued that the Committee is far from establishing a comprehensive, consistent and well-developed free speech jurisprudence regarding 'terroristic speech'. International human rights law ought to provide effective protection against any violation of basic democratic rights.²⁷ The following section turns to analyse how the jurisprudence of the Committee has responded to 'terroristic speech' (and indeed, its past echo 'sedition').

6.2.1) Expressions that Advocate Political Violence

There have been many violations of the right to freedom of expression in the cases from countries that have experienced a military coup d'état, one-party system or totalitarianism. In such cases, State parties established only an abstract and remote link between the authors' speech and political violence, consequently often charged speakers with the offence of 'sedition'. These restrictions have broadly been rejected by the Committee. Disproportionate convictions and vaguely-framed restrictions on expression have been found in violation of Article 19. The Committee has disapproved many restrictions imposed on political expression, such as political activities relating to communism-socialism or dissenting expression against a military junta or the governing party. State parties did not seek to establish a concrete causal link between expression and acts of political violence while restricting such expression.

In this regard, it is crucial to ask whether the Committee itself has sought to establish such a link when reviewing these restrictions. There are a number of significant cases (discussed below) where the Committee has clearly highlighted its rejection of sedition laws which silenced and repressed dissenting and unwanted expression by means of linking them with political violence. It can be argued that while the Committee does seek evidence of a link, its jurisprudence has not yet established a clear and generally applicable threshold test for the relationship between speech and purported violence. Inevitably, the Committee relies heavily on the information, explanation and justifications provided by the parties. Yet, insufficient information provided by applicants has been one of the main challenges for the Committee in its examination of individual communications. In several cases (also discussed below) insufficient information submitted by the applicant has prevented the Committee from finding a violation of freedom of expression. I would argue that declaring these complaints inadmissible only serves to encourage these state parties to undermine the protection and promotion of the right to freedom of expression. While this argument is one that highlights the procedural constraints operating on the work of the Committee, it highlights a particular (and recurring) problem in the scrutiny afforded by the Committee to sedition-based restrictions on speech. On the one hand, the Committee rejects restrictions based on sedition, but on the other hand,

²⁶ Human Rights Committee's general comment No. 34 (2011) on Freedoms of Opinion and Expression (CCPR/C/GC/34) para 46

²⁷ Michael Head, *Crimes against the State from Treason to Terrorism* (Ashgate, 2011) 278

sedition continues unchallenged due to the Committees' declaration that it has been provided with insufficient information.²⁸

A series of complaints were brought to the Committee for convictions under the National Security law of South Korea.²⁹ This National Security Law criminalised the dissemination of ideas, and being a member of organisations, deemed to benefit the enemy. Based on this law, a number of academics, artists and members of opposition organisations who criticised the government, the military regime,³⁰ their allies, foreign interventions to South Korea, and the support for national unification were convicted.³¹ In particular, the author distributed pamphlets criticizing the regime, dissident publications covering numerous political, historical, economic and social issues and made an unauthorized (criminal) visit to North Korea.³² The State party considered that expressing the view that the military dictatorship in South Korea is controlled by the US,³³ as deserving of prosecution under the "*crime of praising, encouraging or siding with anti-State organisation*" which amounted to espionage.³⁴ Yet, the State party failed to explain how the speech in question posed a threat to national security. On the basis of this failure by the State party (on whom the evidential burden rests), the Committee provided a ruling for the applicant giving protection for political speech. The Committee noted that the author had been subjected to the 'ideological conversion system'³⁵ which is discriminatory by nature and incompatible with Article 19.³⁶ In another communication, the painting entitled "Rice Planting" was described (by an "expert witness" chosen by the national authorities) as representing the "socialist realism" and a "class struggle". According to the

²⁸ Concluding observations on Hong Kong (CCPR/C/CHN-HKG/CO/3) 29 April 2013 para 14; Concluding observations on Cameroon (CCPR/C/CMR/CO/4) 4 August 2010 para 25; Concluding observations South Korea (CCPR/C/79/Add.114) 01 November 1999 para 9 and CCPR/C/KOR/CO/3 28 November 2006 para 18; Concluding observations on Tajikistan (CCPR/C/TJK/CO/2) para 22; Concluding observations on Uzbekistan (CCPR/CO/83/UZB) 26 April 2005 para 21

²⁹ Concluding observations of the Human Rights Committee on Republic of Korea CCPR/C/79/Add.114, 1 November 1999 at 9

³⁰ Yong Joo-Kang v. Republic of Korea, CCPR/C/78/D/878/1999 (Human Rights Committee, Communication, 2003-07-15) para 2.1

³¹ Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20) para 2.2-2.3; Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 2.1; Hak-Chul Shin v. Republic of Korea, CCPR/C/80/D/926/2000 (Human Rights Committee, Communication 2004-03-16) para 3.1

³² Yong Joo-Kang v. Republic of Korea, CCPR/C/78/D/878/1999 (Human Rights Committee, Communication, 2003-07-15) para 2.2

³³ Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20) para 4.1

³⁴ Yong Joo-Kang v. Republic of Korea, CCPR/C/78/D/878/1999 (Human Rights Committee, Communication, 2003-07-15) para 2.3

³⁵ Korean law produced the "ideology conversion system" that was designed to change a prisoner's political opinion by the provision of favourable benefits and treatment in prison. If a prisoner failed in this system, then he is classified as communist, and commits "confident criminal" which was not clearly defined and appears from the context of the communication. This system was abolished in 1998. See in; Yong Joo-Kang v. Republic of Korea, Communication, CCPR/C/78/D/878/1999

³⁶ Yong Joo-Kang v. Republic of Korea, CCPR/C/78/D/878/1999 (Human Rights Committee, Communication, 2003-07-15) para 7.2

expert witness, the farmers portrayed in this painting sought to incite the overthrow of the government of the Republic of Korea (because of its close relationship with the US and Japan) and to replace it with the 'happy lives' provided by North Korean doctrine.³⁷ In another communication, the author was convicted for organizing illegal demonstrations and instigating acts of violence on several occasions.³⁸ The State party claimed that the demonstration was illegal and during these demonstrations, participants "*threw thousands of Molotov cocktails and rocks at police stations, and other government offices*".³⁹ The Korean authorities explained that the speech and demonstration in question resulted in public disorder and presented a clear danger to the existence of the state and its free-democratic order, by means of propagating and encouraging North Korean ideology in order to make the Korean Peninsula communist by force.⁴⁰ The state party even requested special treatment from the Committee due to Korea's security situation, without having officially declared a derogation from certain rights (such as Article 19), but the Committee was not prepared to approve such an undeclared derogation.⁴¹

What is striking about this series of communications, is that the Committee found a violation of freedom of expression because the state party failed to specify the precise nature of the threat posed by the author's speech.⁴² The State parties failed to justify adequately their claim that the convictions were necessary for the protection of one of the legitimate purposes.⁴³ For instance, the Committee noted that the state party had neither explained how the speech in question might benefit the enemy nor demonstrated how the speech created a threat to national security.⁴⁴ It was unclear what was the nature and extent of any such risk.⁴⁵ Moreover, the national courts neither addressed these issues, nor given any consideration of influence of the speech upon its audience (in order to determine whether there was actually a threat to public security).⁴⁶ In light of these communications, the Committee noted in its Concluding Observations on the periodic report of the Republic of Korea that restrictions based on the

³⁷ Hak-Chul Shin v. Republic of Korea, CCPR/C/80/D/926/2000 (Human Rights Committee, Communication 2004-03-16) para 3.3

³⁸ Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 4.2

³⁹ Ibid para 4.2, 8.4

⁴⁰ Ibid para 8.4

⁴¹ Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20), para 10.4

⁴² Yong Joo-Kang v. Republic of Korea, CCPR/C/78/D/878/1999 (Human Rights Committee, Communication, 2003-07-15) para 7.2; Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20) para 10.3; Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.5; Hak-Chul Shin v. Republic of Korea, CCPR/C/80/D/926/2000 (Human Rights Committee, Communication 2004-03-16) para 7.3; Jong-Kyu Sohn v. Republic of Korea, CCPR/C/54/D/518/1992 (Human Rights Committee, Communication 1994-7-7) para 10.4

⁴³ Ibid

⁴⁴ Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.4

⁴⁵ Ibid

⁴⁶ Ibid

national security law did not meet the requirements of Article 19(3) due the absence of evidence demonstrating their necessity for reasons of national security.⁴⁷

Another series of communications, also regarding the rising trend mentioned by the Special Rapporteurs earlier in this chapter, concern the arbitrary detention and/or torture, even killing, of those who criticise administrative organs and governments in certain jurisdictions. This trend was most discernible amongst authoritative and repressive governments in African and Central Asia.⁴⁸ State parties involved in such practices, when seeking to justify a limitation, commonly claimed a link between the expression in question and political violence. In fact, these state parties themselves committed violence or arbitrary detention against individuals. Such governments have not tolerated the expression of alternative political views, and individuals have been prosecuted for publishing articles denouncing corruption and reporting violence committed by the security forces.⁴⁹ Indeed, prominent political figures have been arrested and imprisoned in order to prevent the expression of their political views;⁵⁰ authors have been arrested and detained on the basis of membership of and activities for a political party opposing the governing party (in a one-party system);⁵¹ and books advocating a new political party and seeking to introduce multi-party democracy, have been banned and their circulation prohibited.⁵² In each of these cases, violations of Article 19 were found by the Committee.

By way of another example, the Committee decided that silencing and suppressing encouragement of multi-political democracy, democratic principles and human rights cannot be a legitimate objective, even in order to protect national unity.⁵³ Arbitrary arrest, torture and threats to life of authors in order to silence unwanted expression can never be a legitimate restriction on the exercise of freedom of expression, and such restrictions clearly do not meet the necessity test.⁵⁴ The Committee found these limitations to be disproportionate to the value that the restriction aimed to protect, and strongly condemned such practices.⁵⁵ It can thus be argued that the Committee has encouraged the promotion of freedom of expression.

⁴⁷ Concluding Observations of the Human Rights Committee on Republic of Korea, CCPR/C/KOR/CO/3, 28 November 2006 at 18

⁴⁸ There are a number of complaints from Cameroon, Senegal, Guinea and Algeria, Libya and from Central Asian countries such as Kyrgyzstan, Uzbekistan, and Tajikistan. These countries have a similar political atmosphere in terms of having a one-party system.

⁴⁹ Njaru v. Cameroon, CCPR/C/89/D/1353/2005; (Human Rights Committee, Communication 2007-03-19) para 6.4

⁵⁰ Umarov v. Uzbekistan, CCPR/C/100/D/1449/2006 (Human Rights Committee, Communication 2010-10-19) para 8.8

⁵¹ Miha v. Equatorial Guinea, CCPR/C/51/D/414/1990 (Human Rights Committee, Communication 1994-7-10) para 6.8

⁵² Mukong v. Cameroon, CCPR/C/51/D/458/1991 (Human Rights Committee, Communication 2007-10-26) para 2.1

⁵³ Ibid para 9.7

⁵⁴ Njaru v. Cameroon, CCPR/C/89/D/1353/2005; (Human Rights Committee, Communication 2007-03-19) para 6.4; Mukong v. Cameroon, CCPR/C/51/D/458/1991 (Human Rights Committee, Communication 2007-10-26) para 9.7-8; M.T. v. Uzbekistan CCPR/C/114/D/2234/2013 (Human Rights Committee, Communication 2012-12-18) para 2.1-3; Al-Rabassi v. Libya, CCPR/C/111/D/1860/2009 (Human Rights Committee, Communication 2008-12-16) para 2.1-3

⁵⁵ Njaru v. Cameroon, CCPR/C/89/D/1353/2005 (Human Rights Committee, Communication 2007-03-19) para 6.4

In another case, *Kone v. Senegal*, the state party did attempt to explain the link between the impugned expression and political violence. Indeed, precisely because the espousal of violence was much more clearly explained by the state party, but the author failed to explain how his expressive political activities did not pursue violent causes. The Committee treated this case differently from those discussed above. In *Kone v. Senegal*, the state party justified the lengthy pre-trial detention, which restricted the author's political activities (namely, his membership of Marxist and Maoist revolutionary groups which the government maintained aimed to overthrow several governments in Western Africa including that in Senegal).⁵⁶ The evidence showed that the author had visited neighbouring countries to meet both members of this 'revolutionary network' and foreign governmental officials.⁵⁷ He had also previously participated in an unsuccessful coup attempt in Gambia and in destabilising the government in Guinea.⁵⁸ He was arrested and questioned about violent incidents during the general election in Senegal in 1988.⁵⁹ The author was detained again, suspected of sympathizing with the Movement of Casamance's Democratic Forces, which was considered to be a separatist organisation and which was in violent conflict with government forces.⁶⁰ The Committee noted that the author was detained and arrested on the basis of his expressive activities supporting the Movement of Casamance's Democratic Forces,⁶¹ but found no violation of his freedom of speech because this was tantamount to showing support for a violent separatist organisation. Such speech, the Committee held that such speech does not fall under the scope of protected speech under Article 19.

Similarly, in a series of communications from Belarus, the Committee distinguished intimidation and coercion from persuading voters to boycott an election.⁶² Expression that encourages the boycott of an election without intimidation and coercion on voters falls under the protection of freedom of expression.⁶³ However, speech that advocates violence or uses intimidation or coercion does not fall under the right to freedom of expression. The Committee did not, therefore, find a violation of Article 19. These examples demonstrate that if a state party adequately explains and justifies its restrictions on expression by establishing a clear link between expression and political violence, then such expression will not be protected under Article 19.

However, as noted above, there have also been a number of communications where the Committee approved restrictions on expression (or at least, found no violation of Article 19) because of insufficient information provided by the authors. In a series of communications

⁵⁶ *Kone v. Senegal*, CCPR/C/52/D/386/1989 (Human Rights Committee, Communication 1994-10-5) para 6.8

⁵⁷ *Ibid*

⁵⁸ *Ibid*

⁵⁹ *Ibid* para 7.5

⁶⁰ *Ibid* para 7.7

⁶¹ *Ibid* para 8.5

⁶² *Leonid Svetik v. Belarus*, CCPR/C/81/D/927/2000 (Human Rights Committee, Communication 2004-07-08) para 7.3; *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.4

⁶³ *Leonid Svetik v. Belarus*, CCPR/C/81/D/927/2000 (Human Rights Committee, Communication 2004-07-08) para 8; *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.4

against Algeria, for example, the authors did not provide sufficient information for the Committee to conclude there was a violation of Article 19.⁶⁴ In these communications, the authors were the founders and leaders of the Islamic Salvation Front (Front Islamique du Salut (FIS)). This was a legal political party, and the authors organized a protest and general strike with the support of all other opposition parties against a new electoral law introduced by the government.⁶⁵ After a few days, they ended the protest and strike, and the opposition parties and the government agreed to revise the electoral law in the near future.⁶⁶ Yet, the government cleared protesters from the squares by means of the Algerian army. Thereafter, the authors were convicted for “*jeopardizing State security and the smooth operation of the national economy*”.⁶⁷ The state party claimed that the authors called for mass violence and attempted uprising to establish theocratic regime by violent means.⁶⁸ Yet, the authors claimed that they were charged for purely political reasons and that their speech had been deemed subversive by the military, not by the civil legal authorities. They claimed that a military tribunal bringing charges clearly aimed to eliminate the president of the main opposition party from the Algerian political arena.⁶⁹ Additionally, the Committee noted in its Concluding Observations that the Algerian authorities systematically restricted political activities of opposition groups.⁷⁰ Yet, in the communications of Benhadj, and Abbassi, the Committee stated that there was insufficient information to find a violation of Article 19.⁷¹ The Committee recalled that in a democratic society, citizens are free to seek information concerning how to replace political system or governing parties and to criticise their government openly and publicly with no fear of retaliation and repression by their government; yet such information or criticism might be subject to restrictions set forth by 19(3).⁷² Insufficient information submitted by authors creates a significant challenge for the Committee and its work in scrutinizing restrictions on political expression.

⁶⁴ Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 8.10; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

⁶⁵ Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 2.2; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 2.2

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 4.1; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 4.2

⁶⁹ Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 3.2; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 3.2

⁷⁰ Consideration of Reports Submitted by State Parties Under article 40 of the Covenant: Concluding Observation of the Human Rights Committee, Algeria (CCPR/C/79/Add.95) 18 August 1998 at 17

⁷¹ Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 8.10; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

⁷² Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

Similarly, the Committee was satisfied to declare the communications of M.N; Kulov; and Al-Rabassi inadmissible due to very general (and thus insufficient) information provided by the authors.⁷³ In this case, the first president of the Socialist Party of Tajikistan (SPT) was allegedly murdered in a ‘terrorist attack’, and others who assumed the presidency of the party were also persecuted and oppressed by the regime.⁷⁴ The authors claimed that their right to hold opinions had been violated by the state party by means of discrimination on the grounds of political opinion and by not providing protection against violent acts.⁷⁵ The state party did not deny that a number of violent attacks had been committed against the members of the party, but the state party claimed it was not the State party who had committed the attacks.⁷⁶ Yet, the Committee was unable to conclude that the authors had sufficiently substantiated these claims because the information they provided in support of their claims was very general.⁷⁷

Similar outcomes occurred in two further cases – in both *Kulov v. Kyrgyzstan* and *Al-Rabassi v. Libya*, the communications were rejected on the basis that author had provided insufficient evidence. In the first case, the founder of the Ar-Namis political party was subjected to persecution for having publicly criticized presidential policy and propounding an alternative policy for the country.⁷⁸ The author claimed that he was arrested, charged and sentenced for political reasons in order to prevent him from participating in the forthcoming presidential election.⁷⁹ In the second communication, the author was held in incommunicado detention due to his e-mail to a newspaper for assistance to publish a book criticising the political leadership of Libya.⁸⁰ Al-Rabassi attached limited information to the file which did not allow the Committee to conclude that his arrest and subsequent conviction were linked to the message he sent to the newspaper.⁸¹ In the third communication, Kulov failed to provide ‘any further information’ to insufficiently substantiate admissibility.⁸²

In the communications of M.N; Kulov; and Al-Rabassi, there was no indication by the state parties that the expression in question was connected to violence or advocated the use of force to implement their political aims. Despite the failure of the state parties to provide such information, the Committee declared these communications inadmissible. It can, however, be

⁷³ M.N at all v. Tajikistan, CCPR/C/89/D/1500/2006 (Human Rights Committee, Communication 2012-10-29) para 6.5; Kulov v. Kyrgyzstan, CCPR/C/99/D/1369/2005 (Human Rights Committee, Communication 2010-07-26) para 7.3; Al-Rabassi v. Libya, CCPR/C/111/D/1860/2009 (Human Rights Committee, Communication 2008-12-16) para 6.4

⁷⁴ M.N at all v. Tajikistan, CCPR/C/89/D/1500/2006 (Human Rights Committee, Communication 2012-10-29) para 2.1

⁷⁵ Ibid para 3.4

⁷⁶ Ibid para 4.1-3

⁷⁷ Ibid para 6.5

⁷⁸ Kulov v. Kyrgyzstan, CCPR/C/99/D/1369/2005 (Human Rights Committee, Communication 2010-07-26) para 2.1

⁷⁹ Ibid para 3.14

⁸⁰ Al-Rabassi v. Libya, CCPR/C/111/D/1860/2009 (Human Rights Committee, Communication 2008-12-16) para 2.1-3

⁸¹ Ibid para 6.4

⁸² Kulov v. Kyrgyzstan, CCPR/C/99/D/1369/2005 (Human Rights Committee, Communication 2010-07-26) para 7.5

argued that declaring these complaints inadmissible encourages these states to undermine the protection and promotion of the right to freedom of expression. While failing to provide compelling evidence of the alleged violation may sometimes justify their complaint being deemed inadmissible, when insufficient information is provided by State parties, the rejection of these communications can lead the international human rights system to neglect serious violations of freedom of expression. The resulting absence of any strong rejection or criticism in international human rights jurisprudence allows for the possibility that sedition (and similar) laws will remain unchallenged in many countries.

6.2.2) Incitement to Hatred or Violence/Racial Violence:

Consideration of the Committee's response to 'incitement to hatred or violence' must be kept in mind that there is a coherence between Articles 19 and 20.⁸³ Article 20 does not set forth an individual right but rather mandates states to restrain the exercise of freedom of expression that advocates 'national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' McGonagle has stated that Article 20 can essentially be regarded as a fourth paragraph of Article 19 and the two must be understood as being closely intertwined.⁸⁴ This stance was also approved by the Committee in the communication of *Ross v. Canada*. Here, the Committee emphasized that restrictions imposed in light of Article 20 must also be permissible under Article 19.⁸⁵ The directive aspect of Article 20 is not interpreted by States in ways that might fundamentally undermine the protections of Article 19. In this regard, the Rabat Plan of Action (2012) highlighted that national 'legislation that prohibits incitement to hatred uses variable terminology and is often inconsistent with Article 20 of the ICCPR.'⁸⁶ This document importantly cautioned that 'the broader the definition of incitement to hatred in domestic legislation, the more likely it is to open the door for arbitrary application of laws.'⁸⁷

Also relevant is Article 4⁸⁸ of the CERD which aims to prevent racial violence, and mandates the penalization of "(1) dissemination of ideas based upon racial superiority or hatred; (2)

⁸³ Article 20. 1. "Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

⁸⁴ Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms", in Louis Henkin, Ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981) 227. see also, Agnes Callamard, *Article 19: Expert Meeting on the Links Between article 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* (UN HCHR, Geneva, October 2-3, 2008) 9

⁸⁵ *Ross v. Canada*, Communication, CCPR/C/70/D/736/1997, 18 October 2000 at 10.6. See also Manfred Nowak, *The UN Covenant on Civil and Political Rights* (2005, Engel, Germany) 468; see also, Ian Cram, *Terror and War on Dissent: Freedom of Expression in the age of Al Qaeda* (Springer-Verlag Berlin Heidelberg 2009) 37

⁸⁶ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence: 'Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012', para 15

⁸⁷ Rabat Plan of Action, October 2012, para 15

⁸⁸ The International Convention on Elimination of All Forms Racial Discrimination Article 4: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or

incitement to racial hatred; (3) acts of violence against any race or group of persons of another colour or ethnic origin; and (4) incitement to such acts."⁸⁹ Any national, racial or religious hatred that constitutes incitement to violence is prohibited.⁹⁰ Unlike the inter-relationship between Articles 19 and 20 ICCPR, however, less attention has been focused on the coherence between Article 4 of CERD and the ICCPR.⁹¹

The former Special Rapporteur, Abid Hussain, has noted that physical or psychological harm can result from hate speech; this is particularly true where such speech involves incitement to violence, provoking hostility between different cultural, racial and religious groups, and endorsing stereotypes.⁹² There have been a number of communications brought to the Committee regarding purported discriminatory, hateful or violent speech against Jewish, Muslim or Roma groups. Here, such expression was deemed to be a possible cause of political violence against targeted groups – contributing to and fomenting a will or desire to eliminate or oppress them.

The link between discriminatory or hateful speech and possible violent acts has been more easily established where expression has sought to stimulate and reinvigorate (in the present) pre-existing ideologies which used violence against particular groups (in the past). In particular, the CERD Committee has considered expressive support for anti-Semitism, for figures and symbols of Nazism, and denial of the Holocaust to be incitement to racial hatred or violence.⁹³ For instance, in a communication submitted by the Jewish Community in Oslo, the author complained about the inability of national law to protect persons against dissemination of racial discrimination, hatred, and violence.⁹⁴ The complaint originated after the organiser of a far-right march made a speech stating that: his *"people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-*

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

⁸⁹ General Recommendation 15 on article 4 of CERD; see also in *The Jewish community of Oslo v. Norway*, CERD/C/67/D/30/2003 (Human Rights Committee, Communication 2005-8-15) para 3.7; *TBB-Turkish Union in Berlin v. Germany*, CERD/C/82/D/48/2010; (Human Rights Committee, Communication 2013-2-26) para 4.4

⁹⁰ CCPR Article 20 para 2

⁹¹ Callamard (n. 84) 10

⁹² Report of the Special Rapporteur Mr. Abid Hussain on the promotion and protection of the right to freedom of opinion and expression, (submitted in accordance with Commission resolution 2001/47) (E/CN.4/2002/75) 30 January 2002 para 63

⁹³ *The Jewish community of Oslo v. Norway*, CERD/C/67/D/30/2003 (Human Rights Committee, Communication 2005-8-15); *Ross v. Canada*, CCPR/C/70/D/736/1997; (Human Rights Committee, Communication 2000-10-18); *Faurisson v. France*, CCPR/C/58/D/550/1993 (Human Rights Committee, Communication 1996-11-08)

⁹⁴ *The Jewish community of Oslo v. Norway*, CERD/C/67/D/30/2003 (Human Rights Committee, Communication 2005-8-15) para 3.2

*Norwegian thoughts.*⁹⁵ In his speech, he referred to Rudolf Hess and Adolf Hitler and their principles, and emphasised that his group will follow their principles and fight for their beliefs.⁹⁶ The CERD Committee noted that showing respect to Hitler and his principles must be considered as incitement to racial discrimination, if not to violence.⁹⁷ The speech and the march in question had a serious effect on those who survived the concentration camps during the war and they had received threats on their life.⁹⁸ These statements were manifestly offensive and not protected by Article 19.⁹⁹ The effects of – and dangers presented by – the dissemination of ideas of racial superiority, and of incitement to racial hatred and violence, were especially pronounced in Norway where violent Nazi groups exist.¹⁰⁰ The Committee approved the author's claim that the march and speech in question were in the nature and roots of Nazi rhetoric, and that the State had failed to provide protection against such dissemination. The case thus disclosed a violation of Article 4 of ICERD.¹⁰¹

A similar line of reasoning – where weight was placed on the existence of violent neo-Nazi groups, and the corresponding strength of Nazi ideology, in the country as a means of assessing the imminence of the threat presented – was followed by the Human Rights Committee in the well-known case of *Faurisson v France*. In this case, the author gave an interview to a monthly journal and was convicted and fined on the basis of having exclaimed that there were "no homicidal gas chambers for the extermination of Jews in Nazi concentration camps,"¹⁰² that "... the myth of the gas chambers is a dishonest fabrication ...",¹⁰³ and for asserting that the Nuremberg Tribunals were fallible. The Committee took the full context of speech into consideration and noted that, by its very nature, it encouraged and raised anti-Semitic feelings, ultimately finding that France had not violated Article 19 in prosecuting Mr Faurisson under the 1990 Gayssot Act.¹⁰⁴

In the previously mentioned case of *Ross v Canada*, the Human Rights Committee also found that penalizing speakers for holocaust denial did not violate Article 19 of the Covenant. The claimant was the author of a number of books (entitled, 'Web of Deceit', 'The Real Holocaust', 'Spectre of Power and Christianity vs. Judeo Christianity'). He was a teacher who was placed on leave of absence without pay for a period of eighteen months and demoted to a non-teaching position due to his books.¹⁰⁵ The state party claimed that these books clearly were not the presentation of scholarly research; they contained attacks on "the truthfulness, integrity,

⁹⁵ Ibid para 2.1

⁹⁶ Ibid para 10.4

⁹⁷ Ibid para 10.4

⁹⁸ Ibid para 3.5

⁹⁹ Ibid para 10.5

¹⁰⁰ Ibid para 3.4

¹⁰¹ Ibid para 3.9

¹⁰² *Faurisson v. France*, CCPR/C/58/D/550/1993 (Human Rights Committee, Communication 1996-11-08) para 2.1

¹⁰³ Ibid para 2.6

¹⁰⁴ Ibid para 9.6

¹⁰⁵ *Ross v. Canada*, CCPR/C/70/D/736/1997; (Human Rights Committee, Communication 2000-10-18) paras 2.1 and 4.2

dignity and motives of Jewish persons" and contributed to the creation of a "poisoned environment" for Jewish students in the school.¹⁰⁶ The Human Rights Committee was satisfied that there was a causal link between the expression and the poisoned environment. The Committee concluded that the measures against the author taken by the state party were necessary to protect the Jewish children's right to have a school system free from bias, prejudice and intolerance.¹⁰⁷

In these cases, the restrictions on speech were upheld because it was accepted, on the evidence, that the speech was likely to cause national, racial or religious hatred (constituting incitement to discrimination, hostility or violence). In spite of this, other examples of expression in similar contexts were not regarded in the same way. It can at least be argued that while the Treaty bodies have been willing to accept a link between anti-Semitic speech and racial violence after the horrific experience of Nazi Germany, treating individuals of the Jewish community as potential victims of such expression, a different approach has been taken in relation to anti-Muslim expression. In two notable Danish cases (*Andersen v. Denmark* and *A.W.P v. Denmark*), anti-Muslim expression did not provide victim status for the authors of the complaints. The petitioners claimed that the State party had failed to provide an effective remedy against anti-Muslim speech. In *Andersen*, a member of the Danish parliament (the leader of the Danish People's Party (DPP)) compared "the Muslim headscarves with the Nazi symbol of the swastika".¹⁰⁸ The author claimed that this statement, aired on National Danish Television, not only insulted and hurt her, but also heightened the risk of her being attacked.¹⁰⁹ The *A.W.P.* case concerned similarly worded statements, but in this case, published them in local newspapers. The applicants in both cases claimed that there was evidence proving the risk of such attacks, and highlighted a study which showed that several minority groups (namely, people from Turkey, Lebanon and Somalia living in Denmark) had experienced racist attacks in the streets.¹¹⁰ However, the State party argued the authors' claims should fail. In *Andersen*, the State argued the author had not shown that any attacks had been committed verbally or physically at any point during the two years following the broadcast of the statement.¹¹¹ Moreover, in the *A.W.P* case, since the author was a Dane (rather than a member of one of the groups examined in the study), the State party argued that the study was irrelevant.¹¹² The Committee in each case found that the authors had failed to establish either that the impugned

¹⁰⁶ Ibid para 4.2-3

¹⁰⁷ Ibid para 11.6

¹⁰⁸ *Andersen v. Denmark*, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26) para 2.1

¹⁰⁹ Ibid para 3.4

¹¹⁰ *A.W.P v. Denmark*, CCPR/C/109/D/1879/2009 (Human Rights Committee, Communication 2013-11-01); 4.13

¹¹¹ *Andersen v. Denmark*, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26) para 4.9

¹¹² *A.W.P v. Denmark*, CCPR/C/109/D/1879/2009 (Human Rights Committee, Communication 2013-11-01); 4.13

statements had had specific consequences for them, or that the specific consequences of the statements were imminent and would personally affect them.¹¹³

When contrasted with the cases involving holocaust denial (where it was assumed that such speech caused a danger of violence), it is suggested that anti-Muslim or islamophobic speech was not regarded in the same way resulting in a denial of victim status. In another example, this time involving a case before the CERD Committee, the State's failure to prosecute the author of an anti-Roma leaflet was found not to be in violation of Article 4 ICERD. Here, the racist and xenophobic nature of leaflet was similarly held not to have directly and personally affected the author of the complaint because the leaflet instead narrowly targeted two named individuals as personal vendetta (rather than being directed against the Roma community as a whole).¹¹⁴ While the CERD Committee reminded the State party of its obligations under Articles 4 and 6 of the Convention to prosecute all statements which attempt to justify or promote racial hatred and discrimination in any form, this was held not to be such a case on its facts.¹¹⁵

In this regard, it is worth emphasizing that, in order to be a 'victim', authors must convince the Committee that they belong to a class or group of persons who might in the future be adversely affected by the conduct (expression) in question.¹¹⁶ The Committee has noted that anyone claiming to be victim of a violation according to Article 19 and 20 of the ICCPR or Article 4 of ICERD, must clearly demonstrate that they are a victim.¹¹⁷ In freedom of expression cases, this generally means that the specific consequences of speech must be shown to affect the author directly or personally as a victim.¹¹⁸ Yet if failing to successfully make this argument the Committee declares a number of communications inadmissible.¹¹⁹ Importantly, as the above discussion of the cases involving incitement to hatred reveals, it is at least possible to argue that there has been a degree of inconsistency in the way in which this test has been applied across different groups.

¹¹³ A.W.P v. Denmark, CCPR/C/109/D/1879/2009 (Human Rights Committee, Communication 2013-11-01); Andersen v. Denmark, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26)

¹¹⁴ A.S v. Russian Federation, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26) para 2.1, 7.3

¹¹⁵ Ibid para 7.4

¹¹⁶ Toonen v Australia, CCPR/C/46/D/488/1992 (Human Rights Committee, Communication 1994-03-31) para 5.1; Andersen v. Denmark, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26) para 3.4; A.W.P v. Denmark, CCPR/C/109/D/1879/2009 (Human Rights Committee, Communication 2013-11-01) para 3.3; The Jewish community of Oslo v. Norway, CERD/C/67/D/30/2003 (Human Rights Committee, Communication 2005-8-15) para 3.2

¹¹⁷ Andersen v. Denmark, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26) para 6.4

¹¹⁸ Andersen v. Denmark, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26) para 6.4; A.W.P v. Denmark, CCPR/C/109/D/1879/2009 (Human Rights Committee, Communication 2013-11-01) para 6.4; A.S v. Russian Federation, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26) para 7.2

¹¹⁹ Ibid; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

6.2.3) Expressions that Advocate Terrorism

As Chapter 2 argued, the emergence of ‘terrorism’ discourse, and the post 9/11 ‘War on Terror’, have resulted in multifaceted responses at both regional and international levels.¹²⁰ It is important for this thesis, the Security Council Resolution 1624 (2005) encourages States to criminalize incitement to terrorism.¹²¹ As argued in the second chapter, human rights instruments (primarily, the European Convention of Human Rights, but also the International Covenant on Civil and Political Rights) and their case law on freedom of expression, have gone some way to moderating the worst excesses of older offences such as ‘sedition’ and ‘treason’. They have also encouraged States to amend their legislative framework accordingly. Nonetheless, as has been shown, there remains a significant risk of retrenchment – specifically, that modern-day offences relating to ‘terroristic speech’ have broadly reinvented these age-old offences, and thus have facilitated arbitrary interferences with speech on essentially political grounds.

It is therefore important in this chapter to consider the extent to which the Human Rights Committee has begun to address these concerns. However, it must be noted that there has so far been only one individual communication that clearly involves restrictions on ‘terroristic speech’. As such, the Committee has not been able to establish a comprehensive response which establishes the parameters for speech that ought legitimately to be protected. Consequently, the Committee’s jurisprudence does not provide much guidance for member States in terms of balancing freedom of expression with national security and public order issues. That said, on a number of occasions the Committee has highlighted the negative influence of anti-terror legislation in its Concluding Observations. A number of examples are worth highlighting.

In relation to Russia, the Committee was critical of a Federal counter-terrorism law which consists of provisions that provided restrictive ground for a wide range of infringements on fundamental rights.¹²² Similarly, the Committee’s Concluding Observations on both Turkey and the United Kingdom highlighted how anti-terrorism laws have had far-reaching effects on the Conventional rights.¹²³ In particular, as a result of the implementation of the Turkish Anti-Terrorism Law, human rights defenders, lawyers, and journalists have been convicted for

¹²⁰ Shawn Marie Boyne, ‘Free Speech, Terrorism, and European Security: Defining and Defending the Political Community’ (2010) 30 Pace L. Rev. 417, 447

¹²¹ Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offences, OSCE/CoE Expert Workshop Preventing Terrorism: Fighting Incitement and Related Terrorist Activities (Vienna, 19-20 October 2006) p.5

¹²² Concluding observations of the Human Rights Committee on Russian Federation, CCPR/C/RUS/CO/6, 24 November 2009 at 7

¹²³ Concluding observations of the Human Rights Committee on Turkey (CCPR/C/TUR/CO/1), 2 November 2012 para 16 and Concluding observations of the Human Rights Committee on United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6) 7-25 July 2008 para 15

participating in democratic debate and exercising their right to freedom of expression.¹²⁴ There are numerous articles in the TMK and TPC with broad and vague definitions of ‘terrorism’, ‘organised crime’, and ‘propaganda’ which result in broad restrictions on the right to freedom of expression.¹²⁵ The Committee highlighted how US counter-terrorism measures have provided broad discretionary powers for the authorities in relation to political dissent (where there is deemed to be some, even minimal or speculative, connection to ‘terrorism’).¹²⁶ The Committee has emphasized that State parties should be aware of the abuse of anti-terror provisions to oppress political or critical expressions, which are irrelevant to ‘terrorism’.¹²⁷

The Committee’s General Comment 34 underscores similar concerns:

“States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.”¹²⁸

The Committee has also noted – as was argued in Chapter 2 – that the vagueness of the definition of ‘terrorism’ is itself one of the most problematic factors underlying these far-reaching restrictions on freedom of expression.¹²⁹ Indeed, observing the legitimacy, necessity and proportionality of anti-terrorism measures is relatively difficult due to the absence of a universally accepted, comprehensive and authoritative definition of terrorism.¹³⁰ In this sense, international law has failed to bring clarity and predictability to the protection of free speech, and governments are able to manipulate the definition of ‘terrorism’ to use for own interests.¹³¹ Thus, as Kent Roach argues, states can easily restrict the right to freedom of expression by claiming that they are acting in the interests of national security, public order and safety.¹³²

¹²⁴ Concluding observations of the Committee on Turkey (CCPR/C/TUR/CO/1), 13 November 2012, at 16; Human Rights Council Working Group on the Universal Periodic Review, Twenty-first session 19–30 January 2015 (A/HRC/WG.6/21/TUR/3) para 46, 50, and 70

¹²⁵ Human Rights Council, Working Group on the Universal Periodic Review, Twenty-first session 19–30 January 2015 (A/HRC/WG.6/21/TUR/3) para 8

¹²⁶ Concluding observations of the Human Rights Committee on United States of America, CCPR/C/USA/CO/3, 15 September 2006, at 11

¹²⁷ International Mechanisms for Promoting Freedom of Expression: Joint Declaration of Defamation of Religious, and Anti-Terrorism and Anti-Extremism Legislation, <http://www.osce.org/fom/35639> access on 03/03/2015

¹²⁸ General Comment 34 (CCPR/C/GC/34), September 2011, para 46

¹²⁹ Concluding observations of the Committee on Turkey (CCPR/C/TUR/CO/1), 13 November 2012, at 16; Concluding observations of the Committee on Spain CCPR/C/ESP/CO/5, 5 January 2009, at 10

¹³⁰ The right to freedom of opinion and expression Report of the Special Rapporteur Mr. Ambeyi Ligabo, (submitted in accordance with Commission resolution 2002/48) (E/CN.4/2003/67) 30 December 2002 para 66

¹³¹ *Ibid* para 66

¹³² K Roach, ‘The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive’ in (eds. A Lynch, E McDonald, & G Williams) *Law and Liberty in the War on Terror* (The Federation Press, Sydney, 2007)

However, on one occasion only, the Committee did consider, what might be characterized as ‘terroristic speech’. This case consists of ‘keeping of books, magazines and leaflets’ that were alleged to promote a ‘terrorist organisation’ (Hizb ut-Tahrir) and to propagate religious fundamentalism and extremism.¹³³ The Committee held that legal restrictions on distributing materials that contain Hizb ut Tahrir's ideology were compatible with Article 19 and that there had been no violation of freedom of expression.¹³⁴ The Committee relied on the experts’ report (on the books, magazines, leaflets and other prohibited literature) which had been requested by the national courts. This report stated that the author sold these materials and used them for teaching to his students as anti-constitutional activities to demolish order in Uzbekistan and to disseminate ideas, which is counter to Uzbek law.¹³⁵ The report also added that these materials called for the establishment of an Islamic state based on religious fundamentalism by using ideological struggle, and that *“the entire Islamic world must become a single community; all Muslims must be as one body and one spirit, regardless of their ethnic group, nationality or race. Beyond obstacles and artificial borders, all States must join together in a single ‘Islamic State’.*¹³⁶ The report concluded that the content of the materials was characteristic of religious fundamentalism and extremism.¹³⁷ The Committee noted that the national courts had convicted the author for disseminating the ideology of Hizb ut-Tahrir,¹³⁸ which was deemed to be a threat to national security and the rights of others by using violence to overthrow the constitutional order.¹³⁹ The Committee was persuaded that the State party had established a direct link between expression and ‘terrorism’.

In conclusion, while the Committee has certainly tried in its Concluding Observations and General Comment 34 to discourage States from criminalising a wide range of expression through anti-terrorism laws, it is difficult to argue that the Committee has achieved much clarity in this regard through its jurisprudence. Undoubtedly, there will be further communications involving ‘terroristic speech’. But until further guidance and the strong international consensus on ‘terrorism’ will enable States to use anti-terrorism laws to perpetuate sedition-like offences, and domestic courts are left with a relatively weak jurisprudential answer to such measures. A universally (or at least widely) accepted definition of ‘terrorism’ would be helpful in providing yardstick against which measures against terrorism could be monitored.¹⁴⁰

¹³³ A.K. and A.R. v. Uzbekistan, CCPR/C/95/D/1233/2003; (Human Rights Committee, Communication 2009-03-31) para 2.3-4

¹³⁴ Ibid para 7.2

¹³⁵ Ibid para 2.4

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid

¹³⁹ Ibid para 7.2

¹⁴⁰ The right to freedom of opinion and expression Report of the Special Rapporteur Mr. Ambeyi Ligabo, (submitted in accordance with Commission resolution 2002/48) (E/CN.4/2003/67) 30 December 2002 para 84

6.3) The Elements Required by the Committee in Terms of ‘Terroristic Speech’

In criminal law it is crucial to define the precise elements of an offence. This is to prevent law enforcement bodies from using vagueness in the law to prohibit a multitude of harmless acts and words and thereby impose overly-broad prohibitions on freedom of expression. For that reason, it is important to identify the elements that the Committee takes into consideration while examining interferences with freedom of speech imposed by national authorities. The Committee examines communications in the light of all the information provided by the state party and the authors.¹⁴¹ Perhaps unsurprisingly the Committee (as a supra-national, quasi-judicial body) is highly dependent on this information, and its conclusions often rely solely on the information, judgments or explanations provided by State parties¹⁴² and authors.¹⁴³ Indeed, in some cases, the Committee has simply repeated the contracting State’s argument, and relied on the investigation or evaluation conducted by the national authorities.¹⁴⁴ The Committee has pointed out that if a State party fails to specify the precise nature of the threat allegedly posed by the author’s expression, the restriction on the expression will not be regarded as compatible with Article 19.¹⁴⁵ By the same token, in some communications, the Committee has noted that the authors have not provided sufficient concrete information about the alleged violation.¹⁴⁶ Consequently, the Committee declares such communications inadmissible or finds no violation of freedom of expression due to insufficient information. For instance, in the communication

¹⁴¹ Yong Joo-Kang v. Republic of Korea, CCPR/C/78/D/878/1999 (Human Rights Committee, Communication, 2003-07-15) para 7.1; Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20) para 10.1; Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.1; Hak-Chul Shin v. Republic of Korea, CCPR/C/80/D/926/2000 (Human Rights Committee, Communication 2004-03-16) para 7.1; Jong-Kyu Sohn v. Republic of Korea, CCPR/C/54/D/518/1992 (Human Rights Committee, Communication 1994-7-7) para 10.1; Umarov v. Uzbekistan, CCPR/C/100/D/1449/2006 (Human Rights Committee, Communication 2010-10-19) para 8.1; Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.1; Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 8.1; Kone v. Senegal, CCPR/C/52/D/386/1989 (Human Rights Committee, Communication 1994-10-5) para 8.1

¹⁴² See for instance: Faurisson v. France, CCPR/C/58/D/550/1993 (Human Rights Committee, 1996-11-08) para 9.5; A.S v. Russian Federation, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26) para 7.2; A.K. and A.R. v. Uzbekistan, CCPR/C/95/D/1233/2003; (Human Rights Committee, Communication 2009-03-31) para 7.2

¹⁴³ See for instance: The Jewish community of Oslo v. Norway, CERD/C/67/D/30/2003 (Human Rights Committee, Communication 2005-8-15)

¹⁴⁴ See for instance; A.S v. Russian Federation, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26)

¹⁴⁵ Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.5; Jong-Kyu Sohn v. Republic of Korea, CCPR/C/54/D/518/1992 (Human Rights Committee, Communication 1994-7-7) para 10.4; Tae Hoon Park v. Republic of Korea, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20) para 10.3; Yong Joo-Kang v. Republic of Korea, CCPR/C/78/D/878/1999 (Human Rights Committee, Communication, 2003-07-15) para 7.2

¹⁴⁶ Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20) para 8.10; M.N at all v. Tajikistan, CCPR/C/89/D/1500/2006 (Human Rights Committee, Communication 2012-10-29) para 6.5; A.W.P v. Denmark, CCPR/C/109/D/1879/2009 (Human Rights Committee, Communication 2013-11-01); Andersen v. Denmark, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26)

of Andersen, the author failed to demonstrate that she was a victim for the purposes of the Covenant.¹⁴⁷

The Committee has not developed a rigorously precise methodological approach to matters of interferences with freedom of expression. This implies that the Committee has not been prescriptive about what aspects of expression must be taken into account.¹⁴⁸ In this regard the Rabat Plan of Action (RPA) is a milestone for the understanding and implementation of international law on freedom of expression and incitement to hatred.¹⁴⁹ This might be considered as a type of international soft law, even though the text is a product of workshops.¹⁵⁰ As Parmar argues, the (RPA) is a 'critical turning point', providing the clearest guidance for states to criminalise expression (advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).¹⁵¹ One of the most striking features of the RPA is to suggest a high threshold for defining restrictions on freedom of expression (specifically on incitement to hatred) by proposing a six-part threshold test of: context, speaker, intent, content and form- extent of the speech act, and likelihood, including imminence.¹⁵² This six-part threshold test is a major breakthrough which is especially helpful for prosecutors, lawyers and, in particular for judges who make the judgment.¹⁵³ This test would be applied on 'terroristic speech' to be identified by the Committee where there is a lack of methodological rigour on elements of the offence of 'terroristic speech'. Again, creating such a test aims to allow states parties to avoid vague and broad prohibitions on incitement, and to provide a consistent and less restrictive interpretation of 'incitement'.¹⁵⁴ Here, the six-part threshold test is a critical proposition for the Committee itself to overcome its lack of methodological rigour and to be consistent in examining 'terroristic speech'. For that reason, in this part, the focus firstly is given to the elements which the Committee took into consideration and secondly to the six-part threshold test proposed by the RPA.

6.3.1) Actus Reus

The elements of the offences often appear to be accepted by the Committee, although, it is not the role of the Committee to review domestic legislation 'in abstracto'. In the case of *A.S. v*

¹⁴⁷ Andersen v. Denmark, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26) para 6.4; Similarly, the Committee relied on the elements of the offence provided investigation of national Prosecutor's office in the communication of *A.S. v Russia*.

¹⁴⁸ In this regard, see further the six broad categories identified in the Rabat Plan of Action (para 22): Context; Speaker; Intent; Content or form; Extent of the speech; and Likelihood of risks materialising.

¹⁴⁹ Sejal Parmar, 'The Rabat Plan of Action: a global blueprint for combating "hate speech"' (2014) 1 *European Human Rights Law Review* 21-31, 25

¹⁵⁰ *Ibid*, 26

¹⁵¹ See Further; Sejal Parmar, 'The Rabat Plan of Action: A Critical Turning Point in International Law on "Hate Speech"' in Molnár Péter (Ed), *Free speech and censorship around the globe* (Central European University Press, 2015) 211-231; Parmar (n. 149) 22

¹⁵² Rabat Plan of Action, October 2012, para 29

¹⁵³ Parmar (n. 151) 228-9

¹⁵⁴ Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 47

Russia (which the Committee declared inadmissible), the national authorities noted that the expression in question did not have the elements of the offence of incitement to hatred or enmity. The actus reus of this offence involved a call to others, defined as “an active influence upon mind and will of people with the aim of encouraging them to commit violent acts of seizure of power, retention of power or change of the constitutional system, etc.”.¹⁵⁵ Similarly, the Committee gave a high level of importance to the report and evidence provided by the national authorities as to whether restriction was a violation of article 19. For instance, Uzbek authorities prepared a report which identified the aim and motivation of the organisation of Hizb ut-Tahrir.¹⁵⁶ This organisation is an extremist religious organisation and was banned. Written materials related to this organisation’s ideology were seized in the applicant’s house, he was convicted on account of them.¹⁵⁷ The Committee decided based on the argument in the report that a perceived threat to national security (violent overthrow of the constitutional order) and to the rights of others had arisen.¹⁵⁸

6.3.1.1) Evaluation of Content & Context of Expression

In the case of *Tae Hoon Park v Republic of Korea*, the Committee disapproved the contextual evaluation of the expression made by the State party. The author had been convicted on the basis of the government’s claim that Korea had a very sensitive security situation (evidenced also by the National Security Law which prioritised security over certain rights of individuals).¹⁵⁹ The Committee rejected the Government’s claim, viewing its assessment of the context as one that unjustly prioritised the application of its national law over its obligations under the Covenant.¹⁶⁰

The Committee pays close attention to contextual-based evaluation, which may serve instead to reinforce the State’s argument in favour of the restriction. This was so in the *Faurisson* case in which the Committee considered the arguments in favour of restricting the anti-Semitic statements in their full context. Their evaluation of this context was that the raising or strengthening of anti-Semitic feelings was not merely a remote, but rather a real possibility.¹⁶¹ Interference with such expression thus served to ensure the right of the Jewish community to live free from fear and free from an atmosphere of anti-Semitism.¹⁶² Likewise, in *Salim Abbassi v. Algeria*, contextual evidence adduced by the State party was regarded as persuasive factor by the Committee, justifying the interference with the author’s rights. The state party claimed that the author had been enjoying all his rights and had been resident abroad since the relevant

¹⁵⁵ A.S v. Russian Federation, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26) para 6.12

¹⁵⁶ A.K. and A.R. v. Uzbekistan, CCPR/C/95/D/1233/2003; (Human Rights Committee, Communication 2009-03-31) para 4.1

¹⁵⁷ Ibid para 4.1-2

¹⁵⁸ Ibid para 7.2

¹⁵⁹ *Tae Hoon Park v. Republic of Korea*, CCPR/C/64/D/628/1995 (Human Rights Committee, Communication 1998-10-20) para 10.4

¹⁶⁰ Ibid

¹⁶¹ *Faurisson v. France*, CCPR/C/58/D/550/1993 (Human Rights Committee, 1996-11-08) para 9.6

¹⁶² Ibid

time. In this communication, the Committee did not consider the author's claims as refuting the state party's claims.¹⁶³ In another case, the author drew attention to the timing the leaders' (of an opposition group) arrests and the fact that he was arrested at around same time.¹⁶⁴ The Committee considered the author's explanation as substantive information, proving that his arrest and conviction directly resulted from his political views.¹⁶⁵

The Committee did not evaluate the content of expression in any great detail. Indeed, there are a very few cases where the Committee did thoroughly evaluate the content of expression, as in the case of *Mavlonov v Uzbekistan*. Here the Committee noted that author's published article contained educational and other materials for Tajik students and young persons, and reported there were particular difficulties facing the continued provision of education to Tajik youth in their own language, including shortages of Tajik-language textbooks, low wages for teachers and the forced opening of Uzbek-language classes in some Tajik schools.¹⁶⁶ In another communication, the Committee considered the state party's evaluation of content of expression (a leaflet) which was specifically related to the representatives of the Roma community rather than its members.¹⁶⁷ After evaluation of content of this leaflet, it is understood that two persons wrote it who wished to harm only specific persons. Thus the leaflet did not aim to stir up conflict between State and Roma community.¹⁶⁸

The Rabat Plan of Action proposes 'context' and 'content' of speech to be critical elements of incitement and focus of the court's deliberations. Ideally, any analysis of the context of speech should rely on the social and political context prevalent at the time the speech was made and disseminated.¹⁶⁹ Assessing the social and political spectrum means considering the relative peace and prosperity of the area, and having a level of indicating conflict and the potential for the occurrence of discrimination, hostility or violence occurring.¹⁷⁰ This includes 'existence of conflicts', 'existence and history of institutionalised discrimination', 'history of clashes and conflicts', 'the legal framework' and 'the media landscape'.¹⁷¹ The RPA evaluates the speaker as a separate element. However, as the ECtHR considers 'the speaker' as a factor under the element of context. Thus, the speaker test implies here the identity of the speaker or originator of the communication, particularly their position or status in society and their standing or influence. Particular matters should be considered such as "the official position of the speaker

¹⁶³ *Salim Abbassi v. Algeria*, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28) para 8.8

¹⁶⁴ *Umarov v. Uzbekistan*, CCPR/C/100/D/1449/2006 (Human Rights Committee, Communication 2010-10-19) para 8.8

¹⁶⁵ *Ibid*

¹⁶⁶ *Mavlonov v. Uzbekistan*, CCPR/C/95/D/1334/2004 (Human Rights Committee, 2009-3-19) para 8.7

¹⁶⁷ *A.S v. Russian Federation*, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26) para 6.13

¹⁶⁸ *Ibid*

¹⁶⁹ Rabat Plan of Action (5 October 2012) para 22; See Further, Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 29

¹⁷⁰ Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 29

¹⁷¹ *Ibid* 29-30

– whether he/she was in a position of authority over the audience; the level of the speaker’s authority or influence over the audience and his/her charisma; whether the statement was made by a person in his/her official capacity, in particular if this person carries out particular functions”.¹⁷² ‘Content’ of speech might be analysed as ‘what was said’, ‘the form (such as artistic, academic, religious or statements of facts and value judgements), ‘the style’, ‘whether the expression contained direct calls for discrimination or violence’, ‘the nature of the arguments deployed or the balance struck between the arguments’.¹⁷³

6.3.1.2) Publicity

The Committee does not prescribe its own threshold for publicity, rather using the State party’s evaluation of publicity, *if* a State party considers it. This was, for example, explained in the communication of *A.S v. Russia* where some exposure to the ‘general public’ (whether through speeches and presentations held in meetings, rallies and other public activities, or proclaiming extremist slogans during demonstrations, processions, pickets and etc.) was a requirement.¹⁷⁴ In this regard, the impugned expression did not meet with this ‘publicity’ threshold because the expression (the leaflet) which consisted of anti-Roma/racist views, was distributed in a place predominantly populated by the Roma.¹⁷⁵ The leaflet was received by no other individuals; only by the Roma people who lived in this area.¹⁷⁶ Here, the Committee relied on the national authorities claim that publicity cannot be limited to a few people who hear or see the expression in question, the number of people who hear or see that expression is also pertinent. If only Roma people saw this leaflet then, no harm could be committed. The leaflets in this communication had been written by a girl who wished to cause harm to two guys in particular.¹⁷⁷ Thus, the application was declared inadmissible as the applicant did not qualify to be a victim since the content of the leaflets had not directly or personally affected him.¹⁷⁸

Publicity of speech under the RPA is considered as the ‘extent of the speech’ which includes the range of the speech, its public nature, magnitude and the size of its audience. The authorities may also examine the medium of communication by considering whether the message was disseminated through the press, audio-visual media, a piece of art or a book. The frequency, the amount and the extent of the communications, and size of audience are also crucial for analysis of ‘extent of speech’. This examines whether the speech was circulated within a limited circle or widely accessible to the general public.¹⁷⁹ It is crucial to highlight here

¹⁷² Ibid 30

¹⁷³ Ibid 34-36

¹⁷⁴ *A.S v. Russian Federation*, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26) para 6.12

¹⁷⁵ Ibid para 6.13

¹⁷⁶ Ibid para 6.15

¹⁷⁷ Ibid para 6.15

¹⁷⁸ Ibid para 7.2

¹⁷⁹ Rabat Plan of Action (5 October 2012) para 22; See Further, Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 37-39

that audio-visual media often have a much more immediate and powerful effect on individuals than print media.¹⁸⁰

6.3.1.3) The Probability of Harm

In the Committee's jurisprudence, the element, 'the probability of harm' is not consistently considered by the Committee in each communication as it is not always required.¹⁸¹ However, information, justifications and explanations still play a key role in determining whether there is a link between expression and violent act. The Committee required sufficient explanation of how the expression in question created a threat to national security.¹⁸² For instance, the Committee drew specific attention to the encouraging of a boycott of an election, yet without intimidation or coercion. Call for boycott here falls under the protection of freedom of expression, whereas if the exhortation had imposed intimidation and coercion, then it would not be protected.¹⁸³ In another instance, disseminating violent ideology (Nazism)¹⁸⁴ or propagating extremism (Hizb ut-Tahrir)¹⁸⁵ constituted a possible threat to national security.¹⁸⁶ Such ideologies were regarded as a sufficiently substantial reason for the Committee to establish the link. However, there are communications where the authors failed to provide sufficient information for the Committee to be convinced that the expression in question was likely cause acts of violence, or alternatively, was likely to lead to violent consequences for applicants as victims.¹⁸⁷ Again, the Committee relies on evaluation of the probability of harm which was conducted by both parties.

The Rabat Plan of Action proposes probability of harm as an element reflects some degree of risk. The courts have to determine that there was a reasonable probability that the speech would succeed in inciting actual action, and that such causation should be direct (the possibility of harm should be imminent).¹⁸⁸ This risk can be identified on a case-by-case basis with consideration of such questions as; "was the speech understood by its audience to be a call to

¹⁸⁰ Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 37-39

¹⁸¹ M.N at all v. Tajikistan, CCPR/C/89/D/1500/2006 (Human Rights Committee, Communication 2012-10-29); Kulov v. Kyrgyzstan, CCPR/C/99/D/1369/2005 (Human Rights Committee, Communication 2010-07-26); Al-Rabassi v. Libya, CCPR/C/111/D/1860/2009 (Human Rights Committee, Communication 2008-12-16)

¹⁸² Keun-Tae Kim v. Republic of Korea, CCPR/C/64/D/574/1994 (Human Rights Committee, Communication 1998-11-03) para 12.4; Kone v. Senegal, CCPR/C/52/D/386/1989 (Human Rights Committee, Communication 1994-10-5) para 6.8; The Jewish community of Oslo v. Norway, CERD/C/67/D/30/2003 (Human Rights Committee, Communication 2005-8-15) para 3.4; A.K. and A.R. v. Uzbekistan, CCPR/C/95/D/1233/2003; (Human Rights Committee, Communication 2009-03-31) para 7.2

¹⁸³ Leonid Svetik v. Belarus, CCPR/C/81/D/927/2000 (Human Rights Committee, Communication 2004-07-08) para 8; Shchetko v. Belarus, CCPR/C/87/D/1009/2001 (Human Rights Committee, Communication 2006-7-8) para 7.4

¹⁸⁴ Ali Benhadj v. Algeria, CCPR/C/90/D/1173/2003 (Human Rights Committee, Communication 2007-07-20); Salim Abbassi v. Algeria, CCPR/C/89/D/1172/2003 (Human Rights Committee, Communication 2007-03-28)

¹⁸⁵ A.K. and A.R. v. Uzbekistan, CCPR/C/95/D/1233/2003; (Human Rights Committee, Communication 2009-03-31) para 2.4

¹⁸⁶ Ibid para 7.2

¹⁸⁷ A.W.P v. Denmark, CCPR/C/109/D/1879/2009 (Human Rights Committee, Communication 2013-11-01); Andersen v. Denmark, CCPR/C/99/D/1868/2009 (Human Rights Committee, Communication 2010-07-26)

¹⁸⁸ Rabat Plan of Action (5 October 2012) para 22

acts of discrimination, violence or hostility?”, “was the speaker able to influence the audience?”, “did the audience have the means to resort to the advocated action, and commit acts of discrimination, violence or hostility?” and “had the targeted victim group suffered or recently been the target of discrimination, violence or hostility?”.¹⁸⁹ There should not be any particular time limit because the imminence must be established on a case-by-case basis.¹⁹⁰

6.3.2) Mens Rea

The Committee does not require the speaker's intention as an element in determining unprotected expression rather considering the State party's evaluation of the intention of speaker. For instance, in the communication of *A.S v. Russia*, here only direct intent was prescribed, (the Russian law required direct intent for this offence) but it did not prescribe any incidental emotional manifestation of discontent or pursuit of other aims.¹⁹¹ For that reason, the leaflets were seen as being distributed with the aim of informing the Roma and not the general public about their content because they were distributed in the area predominantly populated by the Roma.¹⁹² Therefore, the actions were not intended to address non-Roman people and did not invoke acts of violence against the Roma.¹⁹³ Thus it can be argued that mens rea does not play a crucial role in determining whether the restriction is in compliance with freedom of expression under Article 19.

The RPA clarifies the ‘intent’ of speaker by explaining that negligence and recklessness are not sufficient. It requires “advocacy” and “incitement” rather than mere distribution or circulation.¹⁹⁴ For that reason, this ‘intent’ test requires activator impact and a relationship between the object and subject of the speech as well as the audience. However, it is a complex matter to prove the existence of intent, unless the speaker confesses or admits to it. Even then, his/her intent is always difficult to prove.¹⁹⁵ The courts have the flexibility to make their own judgments whether the actions indisputably indicate a speaker's intent to incite.¹⁹⁶ For instance, the European Court determines ‘intent’ by considering of the case and its circumstances as a whole.¹⁹⁷

¹⁸⁹ Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 39-40

¹⁹⁰ Ibid 40

¹⁹¹ *A.S v. Russian Federation*, CERD/C/79/D/45/2009, (Human Rights Committee, Communication 2011-8-26) para 6.11

¹⁹² Ibid para 6.12

¹⁹³ Ibid

¹⁹⁴ Rabat Plan of Action (5 October 2012) para 22; Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 31

¹⁹⁵ Policy Brief, Prohibiting incitement to discrimination, hostility or violence (ARTICLE 19 Free Word Centre, December 2012) 31

¹⁹⁶ Ibid 32

¹⁹⁷ See Further, *Jersild v. Denmark* App no 15890/89 (ECtHR, 23/09/1994) 31

6.4) Conclusion

International human rights treaties have been constituted to protect individual rights from arbitrary State interference. Basic human rights were annihilated during World War II as seen in the horrific experience of Nazi Germany. These treaties are thus reactionary instruments, premised on the idea that atrocities of such a magnitude should never be allowed to recur. The Human Rights Committee has examined restrictions imposed on communist, National Socialist and anti-Semitic, fundamentalist, and dissenting/critical expression directed against democratic governments, military dictatorships and one-party state systems. There have, however, been a very limited number of individual communications dealing directly with 'terroristic speech', and in the most directly germane case, the Committee approved the criminalisation of *direct* incitement to terrorism.

That said, in its Concluding Observations, and indeed in General Comment 34, the Committee has been attentive to the dangers of counter-terrorism legislation, and the potential for states to unduly expand the category of 'terroristic speech' to include those they wish to restrict. Through such pronouncements, it can be surmised that the ongoing work of the Committee plays an important role in encouraging state parties to repeal sedition laws, or at least, to interpret them in compliance with Article 19. It is argued, however, that there is a crucial tension at the heart of the international human rights system. This tension derives from the fact that States themselves are at once the primary threat to, and the primary guarantor, of the same rights. Moreover, the state-centricity of the international system in the context of the 'War on Terror' has given strength to UN Security Council Resolution 1624, which expressly mandates State parties to criminalise 'incitement to terrorism'. As Chapter 2 emphasized (drawing in particular on the work of Sarah Sorial), such laws have tended to reinvent sedition-like offences under a new guise.

Given that it is generally not the Committee's role to review domestic legislation 'in abstracto' (unless, perhaps, a State is failing to meet its the General obligation to protect rights under the Covenant), relatively little can be gleaned from the Committee's free speech jurisprudence about its view on the precise framing of inchoate offences relating to 'terroristic speech'. Nowhere does the Committee prescribe a model offence, or elaborate on specific thresholds in relation to the probability or harm, the degree of imminence required, the requisite mens rea, or the degree to which a particular expression must first have gained widespread audience exposure. What can at least be ascertained from the case law is that the Committee places significant weight on the evaluation of the relevant context – and this can work either in favour of the State's case for restricting speech, or in favour of the individual's argument against State restriction. The RPA's six-part threshold test is a promising development in the International Human Rights System, proposing an accurate methodology for prosecutors, lawyers and judges to use these considerations to determine unlawful incitement.

Furthermore, due to the Committee's position as a supra-national, quasi-judicial body, it evidently attaches significant weight to the sufficiency of information or justification presented to it. The Committee is highly dependent on the parties' evaluation of the facts and on any underlying evidence cited in support. Finally, the chapter alluded to the fact that the Committee's admissibility decisions regarding victim status could arguably be said to work against certain groups where the general level of persecution (present or historical) has not been well-documented or proven. At the same time, the relative paucity of evidence in such admissibility decisions obviously makes it difficult to reach generalizable conclusions.

CHAPTER 7: CONCLUSION

The objective of this thesis was to critically analyse the case law of Turkey's Yargıtay (Court of Cassation) and Constitutional Court on 'terroristic speech' in the light of regional (the European Court of Human Rights), and international (Human Rights Committee and CERD) standards. Its overarching finding was that Turkey's contemporary legal response to 'terroristic speech', by criminalising certain forms of freedom of expression, resembles the now outmoded offence of 'sedition'. In the past, sedition offences were used for tight controls on political dissent. Ironically, as noted at the outset of the thesis, this development (from 'sedition' to 'terroristic speech') has occurred at the behest of international human rights law and the positive obligations which it imposes on States (specifically here on Turkey).

This thesis has identified an undeniable tension alongside this seamless thread, with both old ('sedition') and new ('terroristic speech') laws operating to criminalise those who express views at odds with the ideology of national unity and secularism. However, we discerned in Chapter 4, a liberalising counter-narrative. Turkey's human rights commitments, especially those in accordance with the European Court's case law, have resulted in progressive developments in domestic free speech jurisprudence. Indeed, in the last two decades, and in light of the State's obligations under ICCPR, ICERD, and the ECHR, Turkish legislature has passed a number of legal amendments on speech-related provisions. A number of progressive Constitutional amendments as well as amendments on TMK and TPC have been passed conferring greater protection on freedom of speech. The doctrinal principles that structure the reasoning of both the Strasbourg court and the UN Human Rights Committee have also been imported, to some degree, into Turkey's Constitutional Court and Yargıtay case law reasoning.

Nonetheless, this sets up a further tension that has been identified throughout the thesis. States can, apparently without contradiction, ratify human rights treaties protecting speech, whilst at the same time relying on 'anti-terror' laws to impose far-reaching restrictions upon it. The tension arises, on one hand, human rights obligations push states to provide real and effective protection for the human rights, including of course the right to freedom of expression, on the other, terrorism pulls states to give effect to the positive obligation to protect life (in article 2 of the ECHR and article 6 of the ICCPR) – to adopt measures against expression related to terrorism, as part of the 'war on terror'. International instruments such as the UN Security Council Resolution 1624 (2005), Article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism, and the Council of the European Union Framework Decision on Combating Terrorism of November 28, 2008 have been behind the drive to impose sweeping restrictions (especially through indirect incitement) on freedom of expression, reflecting the widely-acknowledged preventive turn in criminal law. It also reflects the problem of state-centricity inherent in any scheme for protecting human rights.

The thesis also addressed the fact that while both political violence and terrorism have provided a considerable challenge to the hegemony of human rights discourse over the past half century or so, it is the latter of the two which, it was argued, had the more significant and detrimental impact by criminalising, or having the potential to criminalise (and thus inhibit) a far wider range of expression. While both are hard to define with precision, this leaves unstable boundaries and unclear contours to freedom of expression. The term 'terrorism', as it is used today, is profoundly politically loaded and contentious in Chapter 2 that it implies deeply subjective and moralistic characterisations of the 'enemy' (so as to deprive them of legitimacy) rather than any neutral definition of a method. The process of defining speech as 'terroristic' – just as proscribing an organisation as 'terrorist' – is thus a political, rather than a judicial, process. This presents us with a further tension. The political construction of terrorism, and thus the political conferring of that epithet on 'terroristic speech' stands in direct conflict with the right of freedom of expression's legal construction of and adjudication. They are in short incommensurable. Terrorism is binary – best reflected perhaps in the George Bush's declaration that "you're either with us or against us in the fight against terror" – presenting violence as self-evidently illegitimate. Political violence on the other hand can more easily, and better, be viewed on a spectrum. The whole notion of terrorism entering into legal discourse and reasoning is inherently problematic. Judicial resolution of the lawfulness of any restriction on freedom of expression under the ECHR and before the ICCPR and increasingly in Turkey revolves around questions of balance and proportionality. That necessarily involves judges making assessments of gradations of harm and of benefit. It would also involve consideration of the various free speech rationales discussed in chapter 3, since each might provide differing weight for any restriction. That is obviated where a counter-terrorism justification is deployed, something articulated more starkly as follows, with a simple contrast. The multifaceted nature of 'political violence' offers a far more nuanced consideration of the gains and losses. The concept of 'terrorism' thus serves as a rhetorical device. It not only blurs the many distinctions that might properly be drawn between different types of 'political violence', but also shrouds them, falsely offering an organising criterion against which to measure restrictions on freedom of expression (and thus to structure argument). The end result, where restrictions are imposed on 'terroristic speech', is a clear deficit in the level of constitutional scrutiny given, in comparison to that afforded to other restrictions on speech, and on rights more generally.

This move from political violence to terrorism, and the lack of clarity which that brought, is matched by the very marked shift in ideological backdrop. We can plot a clear change in how states articulate risks to security and integrity, from discrete ideological '-isms' of the past such as 'communism' and 'national socialism' or 'anti-secularism' replaced by vaguer, but more comprehensive '-isms' – 'fundamentalism', 'radicalism' and 'extremism,' all closely related to 'terrorism'. In this regard, some specific forms and modes of expressions have been treated by states as a source of evil and as (almost) per se advocating recourse to violence in particular

periods, what Blasi referred to as different pathological perspectives¹ referring to political violence such as rebellion, revolution; and recently to terrorism. Speakers who engage in expressive activity in relation to these ideological backdrops are then punished for what they say or believe simply because their views are regarded as unorthodox increasing the likelihood of harm. This ideological re-siting has led the reinvention, during the modern 'human rights era', of archaic offences such as sedition in the form of 'terroristic speech', leading us to this observation. Just at the time sedition was on the wane, unable to withstand the incoming tide of human rights norms and values, similar, and greater, restrictions on freedom of expression were being ushered in under the guise of the need to deal with the terrorist threat, founded on the new ideologies.

Measures taken to confront the terrorist threat lack certainty in two linked ways. The first stems from the politically-laden construction of terrorism, (that we adverted to above). The second, which can be traced to the underlying failure to narrowly define the nature of the risk posed. This, in fact, emerges through the inability of the international community to agree upon a satisfactory and workable definition of 'terrorism'. Both create a clear tension. 'Terrorism' conspires against the successful attainment of a precise, predictable and clear criminal law doctrine. Constructing 'terrorism' as a concept of indiscernible breadth and scope offers lawmakers considerable latitude in criminalising oppositional and dissenting speech, something that in turn creates obvious problems for the rule of law, even in its more limited formalistic conception. The danger, or the tension, is that in seeking to defend against terrorist threats – and thus to preserve a state guided by rule of law principles – a state may in fact confound the very principles it seeks to maintain by laying claim to the nebulous uncertain concept of 'counter-terrorism' and outlawing 'terroristic speech'.

The arguments throughout this thesis focus less on the development and entrenchment of human rights norms and emphasizing instead the critical importance of precise and narrowly-drawn definitions in criminal law. In particular, the thesis points to the importance of incorporating constraining requirements as constituent elements of the various offences. The European Court and the Human Rights Committee have shared very similar doctrinal principles including the requirement that restrictions have a clear and prospective legal basis, that they pursue a legitimate purpose, and that they are necessary and proportionate. These doctrinal principles have been applied to organise and give structure to legal reasoning. As such, they function as tools through which an appropriate balance may be struck between the right to freedom of expression and any other state interest (legitimate aims). These shared principles reflect and give effect to the fundamental importance of freedom of expression to a democratic polity, and offer jurisprudential support for contracting states to repeal or gradually remove the offences of sedition from the legal lexicon. These doctrinal principles (set out in chapter 3) have led to a softening in Turkey's legal response (as we saw in chapter 4) which historically

¹ Vincent Blasi, *The Pathological Perspective and the First Amendment*, (1985) 85/3 *Columbia Law Review*, 449, 450

had relied on an unspoken background principle of militant democracy when confronted with the need to deal with 'terroristic speech'. Turkey's militant democracy reflects the notion of 'precautionary legality' which prioritized risk aversion and self-preservation in the face of incalculable harms. This has led to the criminalisation of a wide range of expression regardless of any actual demonstrable link between expression and harm.

The three bodies of case-law under consideration – Turkey, the ECtHR and the Human Rights Committee – have dealt with very similar views in relation to ideologies of communism, socialism, National Socialism (Nazism), fundamentalism, ethno-national terrorism or fundamentalist terrorism, all of which are regarded as backdrops or precursors to political violence or terrorism in various different 'pathological' periods. In this regard, the Turkish courts interpreted both the Turkish Penal Code (TPC) and the 'Law on the Fight against Terrorism' (TMK) vaguely and broadly as a restrictive tool on political dissent. This allowed them to convict those who espoused any purportedly 'unorthodox views', such as communism, anti-secularism, or more recently pro-Kurdish-PKK related expression, due to their supposed link with political violence or terrorism. Turkey's Constitutional Court and Yargıtay did not actually seek any precise link between the expression and acts of terrorism or political violence in their case law. Consequently, these courts have not attentively distinguished legitimate political, intellectual and academic expressions from seditious expression and 'terroristic speech'.

This resemblance was maintained through keeping particular offences in later provisions or through continuing to attribute particular offences with a specific interpretation even though the law has been amended. There are clear indications of a particular judicial mind-set, evident; steadfastly sticking to its previous case law, despite later amendment or repeal. For instance, articles 142 and 163 of the previous TPC – containing various offences of or relating to propaganda - played a significant role in criminalising a broad range of political expression but even when these articles were repealed, the Courts interpreted them under article 312 of TPC (incitement to hatred and animosity) so as to fill the purported gap left by their repeal. As Kuzu stated, the Ankara State Security Court spoke of the "daringness and courage caused by repealed article 163 of TPC". The Court felt the gap left required filling with restrictions not liberties, so it did that interpreting the offence under article 312 of TPC.² Or, 'indirect incitement to terrorism' has been kept under the offences of propaganda for, 'inciting', 'justifying', and 'praising' terrorism, all prosecuted under TMK since 1991. The vague and fluid boundaries of these offences has led to the suppression of legitimate political, intellectual and academic expression. Similarly, new TPC was introduced in 2004, with offences of articles 215 and 216 broadly retaining the former offence in article 312 of the previous TPC, with minor changes.³ While it is true that some legal amendments have been passed in order to open up

² Burhan Kuzu, 'Gündemde Yine 312 Var' 12/06/2013 <http://arsiv.zaman.com.tr/2001/12/08/yorumlar/yorum2.htm>, An example for such decision, YCGK, K.2004/8-130 K.2004/206, 23/11/2004, p.14, Y (8)CD E.1999/12715 K.1999/14981, 03.11.1999

³ Article 215 of 5237 TPC, "Any person who openly praises an offense or the person committing the offenses is punished with imprisonment up to two years." Article 216 of 5237 TPC, "Any person who openly incites a group

more space for the right to freedom of expression, yet the political purpose of the Constitutional and criminal norms have remained static: to preserve the state and its institutions as priority concerns over the right to freedom of expression. For that reason, the flood of prosecutions under TPC and TMK show that the authorities actually use these provisions to suppress dissenting and critical expression to the state, in turn highlighting the disproportionate restrictive effect on democratic debate.

Chapter 4's analysis of Turkish case law showed a significant lack of methodological rigour in the courts' approach as they continued to rely on the presumption that particular ideas presented an inherent threat to the state and its system. In the earlier cases, there was an obvious lack of judicial attention to whether any acts of violence or terrorism was imminent, though later cases did show some signs that the judiciary had sought to address this deficiency. The lack of methodological rigour in the judicial reasoning process not only caused legal uncertainty but led to the authorities enjoying a broad discretion to criminalise politically oriented speech without the need for tangible evidence. For instance, Yargıtay gave far too expansive a meaning to the element of 'publicity', a requirement of certain offences related to 'terroristic speech'. 'Publicity' is required for the offence of 'incitement to hatred and animosity' but is defined vaguely as a place where anyone is able to see and hear the expression in question. However, the strict interpretation given meant there was no requirement that anyone actually saw or heard the expression; only that they could have seen or heard it. Another example is that the requirement of element of mens rea for the offences related to 'terroristic speech' remains undecided. Under TMK and TPC it is only required as an element for the offence of propaganda, but it was defined simply by the Constitutional Court as "an intention to spread an idea to others in order to attract supporters in any place at any time".⁴

Such a definition of 'intention' surely reflects very vague boundaries for the offence of propaganda. There has also been insufficient evidential basis for the prosecution of such expressions regarding their content and context. The elements of offences related to 'sedition' and 'terroristic speech' in Turkish law analysed in chapter 4 have shown marked similarity to the elements of sedition discussed in chapter 2. For these reasons, judicial bodies tend to apply broad restrictions on freedom of expression. We also noted how there has been insufficient evidential basis for the prosecution of 'terroristic speech' regarding its content and context. In short, there is little to demarcate the 'old' sedition offence from the 'new' terroristic speech offence in terms of the judicial construction of their elements.

By contrast, Turkey's human rights commitments under the ICCPR and especially the European Convention have pushed Turkey's legislative bodies to repeal and amend relevant laws and its judicial bodies to gradually render the offence of sedition obsolete. Both the European Court

of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years in case of such act causes risk from the aspect of public safety."

⁴ The Constitutional Court, E.1979/31 K.1980/59, 27/11/1980

and the Human Rights Committee have allowed a wider space to be available for expression in public debate. Turkey's legal response to 'terroristic speech' has been reformulated under the influence of the European Court's free speech standards and doctrinal principles. Some positive developments began to show from the late 1990s when Turkish law began to be re-cast in accordance with Strasbourg jurisprudence so as to enhance constitutional protection of rights. An increased number of cases relating to public-political expression where the speakers were convicted due to their purported link with advocacy of terrorism or political violence, were re-examined by the European Court. Most of these were viewed quite differently, as no more than dissenting and hard-hitting criticism of public authorities, or offering a different perspective on issues related to 'terrorism' or the security situation. Turkey has engaged in a comprehensive reform process in the last two decades with a view to further strengthening democracy, consolidating the rule of law and ensuring protection for the right to freedom of expression. These positive legal developments have contributed in some measure to breaking the evolutionary link from sedition to modern-day offences relating to 'terroristic speech', and thus to preventing criminalisation of too wide a range of expression.

In this regard, special attention should be paid to the introduction of the right of individual petition to the Constitutional Court (from 2012) as a cornerstone development. This laid the ground yet further for the undermining of the concept of sedition in Turkish law by giving more room for freedom of expression. The European Court gives very limited deference to national authorities who excessively criminalise expression, while the Human Rights Committee plays a key role in encouraging state parties to guarantee greater protection for the right to freedom of expression in order to ensure that dissenting and hard-hitting criticism of governmental policies is allowed. The Committee and the European Court found Many restrictions imposed by national authorities were violations of freedom of expression because state parties failed to explain why the expression in question was a threat to national security or justify how it could cause acts of political violence. Ultimately, the Court or Committee discerned that there was no actual link between the expression and any act of political violence or terrorism. This well-developed case law has provided the impetus and incentive for Turkey's judicial and legislative bodies to realise the offence of 'sedition'⁵ is incompatible with the European Convention.

If we turn back to discussing the elements of these offences in Turkish law, a considerable number of amendments were passed against this deficiency in order to reduce legal uncertainty and to prevent too much legitimate free expression being criminalised. After the 2012 Constitutional amendment (the introduction of individual application to the Constitutional Court), offences related to 'terroristic speech' required slightly more tangible and precise objections. For example, the Constitutional Court has started to evaluate the content and context of expression in its case law. We do not have enough data yet to know

⁵ Again I would remind that there are no offences called 'sedition' in Turkish law. Seditious offences are officially called 'offences against public peace'. Yet, they have functioned as 'sedition' offences and are included here as 'sedition'.

whether or not the Constitutional Court's new approach has effectively overcome the former lack of methodological rigour, but it does promise to yield more thorough examination of cases by, for example, considering the actual link between expression and conduct. When Turkey's courts started taking the European Court's case law as legal reasoning, and as references for their decisions, it shifted the direction of their more recent case law away from sedition and towards adopting a more ECtHR-friendly approach into their jurisprudence. These positive amendments have led the Constitutional Court and Yargıtay to focus slightly more on the right to freedom of expression in their case law. On the other hand, UN human rights bodies' failure to provide a methodological framework or jurisprudential rationales, have felt state parties, here especially Turkey's courts having to determine by themselves whether an expression advocates terrorism or not. There is nothing in Turkey's case law regarding any reference or reasoning given by the jurisprudence of the Human Rights Committee.

However, while these legal developments relating to how Turkey responds to 'terroristic speech' are clearly progressing, there still remains broad legal opportunity for Turkey's Constitutional Court and Yargıtay to criminalise a great deal expression due to vague provisions under the TPC and TMK. This is because these laws still criminalise indirect incitement to terrorism (praising, encouraging and justifying of terrorism). The broad and vague definition of terrorism in Turkey which also lacks an international consensus in international law, contributes such broad sweep of restriction on the right to freedom of expression, without a sufficiently close connection to any identifiable harm.⁶ This type of offence provides an open-ended legal basis for national authorities to criminalise almost any type of expression they choose, especially when it coincides with the current domestic pathology. Turkey's political and security situation is closely relevant to such pathology. An inverse relationship exists between the protection given to right to freedom of expression and the attention paid to security concerns. For that reason, when Turkey adopts such a pathological perspective, and if 'terroristic' activities became intense, an intolerant environment towards unwanted expressions will be inevitable to the obvious and serious detriment of its human rights commitments. In such pathological times, Turkey's judicial bodies might even widen restrictions on expressions. In the last decade, gradual increase of restrictions on freedom of expression, particularly with regard to the media, free speech and bans on social media has been noticed.⁷

As explained in the first chapter, Turkish Courts have imposed broad sweep and deeply troubling restrictions on freedom of expression especially for the reason of terrorism. Last five decades of military "guardianship" with its bureaucratic allies (early 1960s – late 2000s) and recent political elites required restraining discussion of political and security issues, ethnic identity and history outside the narrow bounds of secular nationalism. There are numerous prosecutions on journalists, writers, editors, publishers, translators, civil/political rights

⁶ See for example, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 16 August 2006, A/61/267. para 50

⁷ Universal Periodic Review – 21st Session CSW – Stakeholder Submission Turkey (June 2014) 3

activists, lawyers, elected officials and students for their dissenting expression.⁸ There are vast number of prosecutions on expression especially regarding criticism of the armed forces and critical speech regarding the Kurdish issue in the last two decades.⁹ There have been arbitrary and abusive terrorism trials of mainly Kurdish political activists, journalists, lawyers, and students. The international human rights NGOs agreed that a high number of journalist were jailed or fined in Turkey for their profession.¹⁰ In the recent years, after Gezi Park protests (2013), scores of media workers have been unjustifiably dismissed or forced to quit in retaliation for their reporting.¹¹ An increasing restriction on freedom of expression, freedom of the press, and internet as well as on television content have been imposed. For instance, in January 2016, three Turkish academics who signed and read a declaration entitled ‘We won’t be part of this crime.’ were arrested on charges of terrorism propaganda.¹² In this declaration the academics accused the Turkish government of carrying out the “deliberate massacre and deportation of Kurdish and other peoples in the region”. They also demanded “an immediate end to the violence perpetrated by the state”.¹³ International human rights NGOs has extensively reported arbitrary and abusive terrorism trials of mainly political activists, journalists, lawyers, and students who joined protests, were member of pro-Kurdish associations and worked as a journalist.¹⁴ As sedition-like offences, all those speakers have been prosecuted in broad and vague meaning. This means surely premised on a highly attenuated causal relationship between the speech concerned and any violent act. This demonstrates level of protection afforded to freedom of expression in present-day Turkey is in trouble and delicate issue.

These restrictions on expression might target not only actual ‘terroristic speech’ but also political dissent and speech that simply offers a different or counter perspective. It is precisely in such periods of alleged emergencies or dire challenges to the stability of the state, as Head

⁸ ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 11-13; See further; Human Rights Council Working Group on the Universal Periodic Review, Twenty-first session 19–30 January 2015 (A/HRC/WG.6/21/TUR/3) para 46, 50, and 70

⁹ Amnesty International, 104TH Session of the Human Rights Committee – Pre-Sessional Meeting on Turkey (22 December 2011) p.4

¹⁰ ARTICLE 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey (14 June 2014) For consideration at the 21st session of the UN working group in January/February 2015, para 14

¹¹ Joint NGO Submission to the UN Universal Periodic Review (CIVICUS and hCa) 21st Session of the UPR Working Group (15 June 2014) 4.9

¹² See, for example; those were among a group of more than 1,000 scholars who in January signed a declaration denouncing military operations against the PKK. <http://turkishmonitor.com/3-turkish-academics-arrested-over-terror-propaganda-charges-1438/>
<http://www.hurriyetdailynews.com/three-academics-arrested-on-charges-of-terror-propaganda.aspx?pageID=238&nID=96517&NewsCatID=509>

¹³ See the text of the petition here; <http://bianet.org/english/human-rights/170978-academics-we-will-not-be-a-party-to-this-crime>

¹⁴ See for instance, Human Rights Watch, Turkey’s Human Rights Rollback Recommendations for Reform, (2014) p.14

has argued that International Human Rights law is at its most ineffective.¹⁵ These are the times when it should be providing protection for basic legal and democratic rights by giving immunity from far-reaching exemptions like State restrictions which cite ‘national security’ and ‘public safety’.¹⁶ It is not only at a domestic level that we see this restrictive drive. There are international developments, as we saw above, that have led to this ‘preventive turn’ of UN Security Council Resolution 1624 (2005), the Council of Europe Convention on the Prevention of Terrorism (2005), and the Council of the European Union Framework Decision on Combating Terrorism (2008) criminalising incitement to terrorism (including indirect incitement). Even the ECtHR approved criminalisation of indirect incitement to terrorism in the case of *Leroy v. France*. Using the ideological backdrop of terrorism, these international instruments have encouraged state parties to adopt new measures leading to the assimilation of older offences of ‘sedition’ and ‘treason’ into modern-day offences relating to ‘terroristic speech’.

This, thesis adopted as a benchmark, the model offence of incitement to terrorism proposed by the UN Special Rapporteur on Terrorism, Martin Scheinin in December 2010;

“ It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.”¹⁷

This definition is more precise and more narrowly tailored: if such a definition were adopted in domestic law, speakers detained for unwanted expression would be better protected. Conviction would require not only mens rea and specific intent relating to the incitement, but also a causal connection between the speech and an identifiable and identified social harm. As we have seen throughout this thesis, Turkey’s response to ‘terroristic speech’ is far from adopting this benchmark in its case law. This is because Turkey’s courts stick to their early case law and fail to approach the elements of these offences systematically. More importantly they fail to consistently and steadily seek an actual link between speech and harm. Turkey’s courts do not address whether any harm did or could arise from ‘terroristic speech’, convicting speakers for offences under the Turkish Penal Code (‘TPC’), the Law on the Fight Against Terrorism (‘TMK’) – and even more broadly. Turkey’s legislative and judicial bodies should ensure that both TMK and TPC actively seek a clear link between expression and harm, in order to avoid criminalisation of an extensive array of expressions. Furthermore, criminalisation of indirect incitement must be reduced or removed in order to ensure more room for freedom of expression. The Rabat Plan of Action would be reliable source for Turkey to which elements (six-part threshold test) should be required in determining unlawful incitement. These make ‘terroristic speech’ offences under TMK and TPC precise and clear, and also become less

¹⁵ Michael Head, *Crimes against the State from Treason to Terrorism* (Ashgate, 2011) 278

¹⁶ *Ibid*

¹⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 22 December 2010, A/HRC/16/51.

restrictive on freedom of expression. More importantly, Turkey's Constitutional norms should be reformulated so as to aim to protect and ensure the right to freedom of expression rather than the state itself. These are the major steps that Turkey must take so as to differentiate recent 'terroristic speech' offences from sedition concept. Thus, in order to guarantee the right to freedom of expression for journalists, writers, editors, publishers, translators, civil/political rights activists, lawyers, elected officials, academics and students, democratic reforms must continue.

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