Pericles

Policy recommendation and improved communication tools for law enforcement and security agencies preventing violent radicalization

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D.6.7. European Union Legal Harmonisation of Counter-Radicalisation Report

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Result Report

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Policy recommendation and improved communication tools for law enforcement and security agencies preventing violent radicalization

European Union Legal Harmonisation of Counter-Radicalisation Report

CRÍMINA

Centro para el estudio y prevención de la delincuencia

UNIVERSITAS Miguel Hernández

This report compares the national legal frameworks of the European Member States and analyses the feasibility of harmonising anti-radicalisation legislation in the EU. Based on this comparison, recommendations for legal harmonisation of anti-radicalisation legislation are proposed.

Specifically, the report firstly conducts a comparative analysis of substantive and procedural legislation in two areas of anti-radicalisation legislation. On the one hand, it compares counter-terrorism legislation in nine Member States. On the other hand, it contrasts hate speech legislation in these states and the obligations of Internet service providers to remove or block this illegal content. This analysis provides two main findings. The first is the high level of harmonisation in the criminalisation of the analysed conducts among the selected States. The second shows that, from a procedural point of view, although the regulations do not have such a high level of harmonisation, there is great similarity between the investigative instruments in the respective processes, as well as between the sanctioning responses to radicalisation.

The second part of the report addresses the viability of harmonisation of legislation against radicalisation in the EU. Thus, based on the coherence of the legal responses to radicalisation in the Member States and with the aim of ensuring a joint strategy to combat the issue, the present report proposes a potential substantive and procedural harmonisation that at the same time guarantees the rights of the citizens of the EU States.

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INTRODUCTION

Following the European Union's commitment to step up the fight against terrorism at the Extraordinary European Council meeting on 21 September 2001[1], a large number of legal instruments were introduced, which have been increasing in number as the various attacks in various Member States of the European Union have become more acute. In this regard, the various States have tackled the fight against violent radicalisation and terrorism with the intention not only of dealing with violent acts, but also of trying to tackle the causes of terrorism as soon as possible. In this regard, certain preparatory acts have been criminally punished which, although they are not strictly terrorist offences, because they are acts prior to these offences, have been considered dangerous in themselves and therefore worthy of being criminalized in various laws. An example of this can be found in laws against the publication of content that glorifies and justifies violence and whose precise content could potentially incite the commission of violent acts or those acts that imply an impact on fundamental rights; or conduct such as indoctrination or recruitment (Hare & Weinstein, 2010). The cornerstone of this European fight can be found in the Framework Decision 2002/475/JHA, which harmonized terrorist behavior in all Member States, but on which many legal instruments related to the creation of intelligence, investigation, and international judicial and police cooperation teams also revolved, among many others that aimed at prevention in terrorist matters (Tinoco Pastrana, 2016).

The process of radicalization that precedes terrorist acts is complex and it was essential that certain behaviours, such as extremism in groups and individuals, be criminalized as soon as possible in order to prevent them from committing acts of terrorist violence through interventions. In this regard, following a transposition of the aforementioned Framework Decision six years later, Framework Decision 2008/919/JHA entered into

[1] European Parliament (2001). Extraordinary European Council of September 21st, 2001. Available on: http://www.europarl.europa.eu/meetdocs/committees/afet/20011108/04a_es.pdf

force, which made amendments especially to incorporate the criminalisation of certain conduct carried out through ICTs, including terrorist recruitment and training. This is because it is beginning to be understood that today's terrorism cannot be understood without the Internet as a fundamental element of its operational (Miró Llinares, 2012; Miró Llinares, 2017; Weimann, 2008).

ICTs then moved from the margins to become the focus of political and legal debate, especially after it became clear that terrorists used this medium not only to communicate, but also to spread propaganda, hate, recruit and train. In this regard, the report of the United Nations General Assembly, entitled "Uniting against terrorism: recommendations for a global counter-terrorism strategy"[2], in its section C, paragraphs 58 and 59, it explained that "terrorist networks depend on communication to generate support and recruit members. We must deny them this access, particularly to counter their use of the Internet: a fast vehicle for recruitment and dissemination of information and propaganda', bearing in mind that in a 1998 report there were less than 20 radical websites, and in 2005 there were thousands of them.

In doing so, the EU committed itself to containing radicalisation and the advance of terrorism and Member States chose to criminalise in practice the use of new technologies, the Internet or publicly available electronic communication services for the purpose of preparing, collaborating or carrying out terrorist acts. Therefore, these measures could no longer be understood as measures to prevent radicalisation, but as measures to prevent crime and suppress radicalisation. Thus, these new criminalisations also represented a change of approach in the fight against terrorism, insofar as, in contrast to the markedly reactive nature of the previous Framework Decision, the preventive nature now prevails in the criminalisation of conduct (Díaz Fernández, 2018), with acts of terrorism stricto sensu becoming criminal offences rather than merely preparatory acts such as public incitement, recruitment or training.

[2] Available in: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terr%20A60%20825.pdf).

However, from a substantive rather than a procedural point of view, it is a reality that the success of the fight against violent radicalization is a task in which Member States must collaborate (receive assistance) with the private sector. This is clearly seen in the implementation of procedural measures of technological research. In these measures, the blocking of websites and the preservation and transfer of data is impossible without private collaboration. However, in the Report on the legal analysis of counter-radicalisation in the selected EU States (D.6.3), we assumed that regulation in this area is the least harmonised of those that have been analysed, so this report will place particular emphasis on this point.

On the other hand, the important issue of the consequences that the aforementioned measures may have on human rights will be expressed throughout the report, especially from the point of view of the possible conflicts that may exist between these measures and the right to privacy and private life. It is true that, in the European context of being subject to the jurisdiction of the ECtHR, the Member States justify intervention in the essential core of these rights in the very fact that this intervention is carried out in the context of the investigation of terrorist offences; however, differences have been identified between the various Member States examined, between the type of terrorist offences that may give rise to the application of the measures or the conditions for implementing the measures and between the rules for understanding what prima facie evidence allows these rights to be intruded upon. Therefore, throughout this report, special emphasis will be placed on the need to harmonise the regulations from this perspective as well.

1 APPROACH

The main goal of this document is to present the recommendations for legal harmonisation of anti-radicalisation legislation in the field of European Union criminal law. This will be done on the basis of a comparative analysis of the national legal frameworks of the European Member States, which have made it possible throughout the report to analyse the feasibility of this legal harmonisation of anti-radicalisation legislation. In this regard, it is important to point out that, although in a broad sense, different security policies and strategies can be included in the framework of counter-radicalisation, this report has a strictly legal approach. In other words, it aims to analyse and propose, from a legal perspective, the legislative measures that should be adopted in a harmonised manner to tackle the phenomenon of radicalisation. This is done from a substantive point of view (i.e. criminalisation of behaviour), or from a procedural point of view (criminal persecution), in order to fulfil the ultimate aim of preventing criminal behaviour in the area of radicalisation, as well as its prosecution and repression in those cases where the prevention of such behaviour has failed.

Most of Pericles' findings are based on contents and concepts related to the concept of radicalization, so knowing how this phenomenon should be treated from a normative point of view, both from a substantive and a procedural perspective, is crucial, not only to provide the LEAs with the necessary legal information on the issue, but also to know the best way to address the legal intervention of the problem.

In accordance with these purposes, this report is composed of four distinct parts:

1. In the first part, a comparative analysis of substantive and procedural legislation in two areas of anti-radicalization legislation is

carried out. On the one hand, a comparison is made of the legal regulations for the fight against terrorism in nine Member States. On the other hand, a comparative analysis is made of the anti-hate speech legislation of these States and the obligation of the providers of intranet services to block or remove this illegal content. Two main facts will be explained in this analysis. Firstly, the high level of harmonisation in the criminalisation of the analysed conducts among the selected States. Secondly, it will be shown that from a procedural point of view, despite the fact that the regulations do not have such a high level of harmonisation, it can be said that there is a great similarity between the punitive responses to radicalising behaviour

2. The second part is devoted to the analysis of the feasibility of harmonising anti-radicalisation legislation in the European Union, based on the coherence of the legal treatment of radicalisation in the Member States.

3. The third part proposes a possible harmonisation from the point of view not only of substance but also of procedure, while guaranteeing the rights of the citizens of the Member States, in order to ensure a joint strategy to combat the phenomenon of radicalisation.

4. Finally, the fourth part offers the conclusions of this report, as well as highlights of the legislation analysed and the legislative proposal to facilitate understanding of the analysis and the measures proposed for legal harmonization.

2 COMPARATIVE ANALYSIS OF COUNTER-RADICALISATION LEGISLATION

2.1 COMPARATIVE ANALYSIS OF TERRORIST OFFENCES AND ITS PROCEDURAL MEASURES OF TECHNOLOGICAL RESEARCH

2.1.1 Criminalization of terrorism conducts

In the Legal Analysis of Counter-Radicalisation in a selected European Union Member States Report (D.6.3.) a description of the terrorist behaviour that is criminalised in the selected Member States was carried out. Once this descriptive examination has been carried out, we can make a brief comparative analysis as a necessary step in order to be able to subsequently study the possible feasibility of a legislative harmonisation regarding the criminalisation of terrorist conducts in the European Union.

With regard to terrorist offences in the strict sense, we have seen that all countries except Germany and the United Kingdom punish common offences with terrorist purposes. The fact that the vast majority of countries punish this type of behaviour makes it easy to achieve harmonisation on this point between the different countries. On the other hand, with regard to offences related to a terrorist group, in all the States that were selected, punishment was given to directing a terrorist group, participating in the activities of a terrorist group or to be a member, which already represents progress in legislative harmonisation in this sense.

The same is not true of offences related to terrorist activities, in which we have to think differently about different behaviours in order to be able to analyse them comparatively. Since these types of crimes belong to a phase prior to the actual terrorist act, the justification for their criminalization is more complex. This is because it is not always going to be easy to draw the line between conduct constituting this type of crime and the legitimate exercise of rights and freedoms. What is interesting about this type of crime is that it manages to identify different phases of the processes of radicalization and/or preparation of the terrorist offences

according to its most recent phenomenology. Therefore, these are phases in which, from an instrumental and strategic perspective, it is necessary to intervene through security policies to fight violent radicalization leading to terrorist acts. It is perhaps for this reason that criminal law still has a residual preventive role to play in the fight against terrorism. Continuing with the comparative analysis with regard to these types of crimes, firstly, while public provocation to commit a terrorist offence is punished in all the selected countries, the same is not true of recruitment for terrorism in its active dimension (which is not punished in Germany), much less in its passive dimension, which is only punished in Denmark, Italy and the Netherlands. In this sense, there would be some difficulty in harmonizing legislation on the punishment of these conducts. A more homogeneous response to the criminalisation of providing training for terrorism has been detected, which is punished in all selected Member States, but not with respect to the punishment of receiving training for terrorism, which is not punished in France. With regard to self-training, no homogenous response to its punishment by selected States has been detected either. The penal response to travelling for the pupose of terrorism is clear from the States: it is punished in all. Finally, it is punished in almost all States facilitating terrorist activities (with the exception of the United Kingdom and Ireland) and the preparing of terrorist acts (with the exception of Denmark, Belgium, Italy and the Netherlands).

2.1.2 Procedural measures of technological research

From a more procedural point of view it is also important to make a comparative analysis, in order to have a first approximation of the legislative landscape before studying the feasibility of establishing joint strategies of technological research. We refer to the instruments or measures designed to enable the successful investigation and prosecution of terrorist offences. Their provision is often found in the codes of criminal procedure. Most of these measures have been laid down in the European and national legislation of the Member States in recent years. Their regulation is due to new forms of crime, but also to new ways of presenting more traditional crimes. As is well known, new communication systems and new technologies are, in many cases, enables of this new phenomenology of crime and its necessary to law enforcement agencies to have proper measures to investigate these crimes.

Terrorist attacks are focused on finding an audience, whether they are detractors to be frightened of or like-minded people to justify their purposes. For this reason, it is very important to take into account the technological context and, especially, ICTs, which have transformed the structure and dynamics of interpersonal communication, without any signs of return (Miró Llinares, 2012). As a result, it is very important to analyse in comparison what the forecasts are in each State of measures to the investigation of terrorist offences for the prevention and mitigation of the dissemination of terrorist content in social networks or online communities with the capacity to radicalise and recruit new members.

Most of the Member States have the following measures to the investigation of terrorist offences. In this sense, we can say that in all the selected States, except the United Kingdom, there are procedural measures of technological research legally required. In particular, all of them provide for the interception of communications, capturing and recording of oral communications using electronic devices, use of technical devices for tracking, locating and capturing images, registration of mass information storage devices and remote computer equipment records, obligation of storage and maximum period of storage of traffic data.

On the other hand, in all the selected States, with the exception of the United Kingdom, there are measures against online content that constitutes public provocation, as is also provided for by law the retention obligation and maximum retention period for traffic data.

2.2 *Comparative Analysis of* hate speech crimes

As we have seen throughout the Legal Analysis of Counter-Radicalisation in a selected European Union Member States Report (D.6.3.), It is true that so far it may appear that the Member States, and the European Union as a whole, are focusing their concern on radicalisation and violent extremism of a jihadist nature. However, it is also necessary to address radicalisation motivated by extreme left or extreme right-wing ideologies, which can not only deny fundamental rights of people but also lead to hate-motivated acts of terrorism. In their less serious but no less important forms, they may include assaults, rapes and/or the many less serious incidents such as insults, harassment or vandalism that threaten and degrade the quality of life of citizens". In this sense, a large part of national legislation contains a series of taxed grounds, which are mostly grounds

related to intolerance and discrimination, and therefore the denial of the dignity of the subjects and the groups to which they belong merely by virtue of belonging to them. For all of these reasons, we will have to start from the different behaviours that are punished by the different States so that, on the basis of a comparative vision, we can analyse the viability of harmonising the crimes of Hate Speech within the framework of the European Union.

Usually, criminal protection refers to groups that have historically suffered multiple acts of effective discrimination (Miró-Llinares, 2017), but actually at a minimum, crimes based on racial prejudice; national or religious; gender; disability; sexual orientation; gender identity are often criminalized.

National legislations tend to opt for two avenues of criminalisation: by establishing a general aggravating factor applicable to any offence. in other words, a circumstance that allows to aggravate the punishment of any crime if the ground of its commission corresponds with a motive of hatred; or through the concrete criminalization of hate speech. As a consequence of the importance that the Internet has assumed for the dissemination of hate content and incitement to violence, also usually include this means.

Approaching the comparative analysis of each of the behaviours, while in United Kingdom, the crime of hate speech punishes threatening, abusing and/or insulting by means of use of words or behaviour or display written material, publishing or distributing written material, public performance of play, distributing, showing or playing a recording, broadcasting or including programme in cable programme service. At the same time, Spain is punishing publicly promote or incite directly or indirectly hatred, hostility, discrimination or violence against a group, a part of it or against a specific person, produce, prepare, possess for the purpose of distributing, facilitate access by third parties, distribute, disseminate or sell writings or deny, seriously trivialize or glorify the crimes of genocide, against humanity or against protected persons and property in the event of armed conflict or glorify their perpetrator, injury to the dignity of persons through actions that involve humiliation, contempt or discredit of any of the protected groups, and the exaltation or justification by any means of public expression or diffusion of the crimes that have been committed against a group, a part of it, or against a specific person.

Simpler is the German wording that punishes those incites hatred against parts of the population or incites to take violent or arbitrary action against them or ttack the human dignity of others by insulting, malevolently despising or slandering part of the population. On the other hand, in

France the provocation of crimes against life, physical integrity and sexual aggression, theft, extortion and destruction, damage and dangerous deterioration for people, incite the commission of a crime that affects the fundamental interests of the French Nation, justify the previous crimes, war crimes, crimes against humanity, genocide, slavery or exploitation of persons, even if these crimes have resulted in the no conviction of their perpetrators, cause discrimination, hatred or violence against a person or a group of persons, non-public provocation to discrimination, hatred or violence or non-public defamation of a person or group of persons.

Among the behaviours punished by Italy that could be categorised as hate speech are to disseminate ideas based on racial superiority or hatred or ethnic hatred, or incites acts of discrimination, to commit acts of violence or provoking violence against person, organization, association, movement or group whose purpose includes incitement to discrimination or violence on such grounds, the external manifestations or ostentatious problems or symbology of previous organizations, associations, movements or groups, publicly exalts exponents, principles, facts or methods of fascism or its antidemocratic objectives or publicly instigates the commission of crimes of genocide or anyone who publicly defends (apology) crimes of genocide. Denmark's punishment in this regard comes down to punishing the public dissemination of statements that constitute a threat, insult or humiliation.

On the other hand, Netherlands punishes the publicly, orally or in writing or in pictures, deliberately offends a group of people and the public, orally or in writing or by means of image, incites audio or discrimination against persons, or incites acts of violence against persons or the property of these persons. However, in Ireland they must be punished who threatening, abusing and/or insulting by means of use words, behave or display written material in any place, distribute, show or play recording of visual images or sounds, if the written material, words, behaviour, visual images or sounds, to prepare or be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, or to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published.

Finally, among the behaviours punished in Belgium as hate speech are the incitement to hatred or violence in meetings or public places; in the presence of several individuals in a non-public place, but open to a number of people having the right to assembly or association there; in any place in the presence of the offended person and before witnesses; in writing, printed or not, through images or emblems displayed, distributed

or sold, offered for sale or exhibited to public view; or in writings not available to the public but sent or communicated to several people.

2.3 COMPARATIVE ANALYSIS OF THE INTERNET SERVICES PROVIDERS DUTIES

The investigative measures enjoyed by the investigative powers to detect and prevent hate crimes will be the same as those analysed in each country for the prevention of radicalisation and terrorism, provided that it is known that the crime being committed is serious and justified according to the legal presuppositions of each national procedure. However, regarding the role of the Criminal Justice system, it is possible that criminal and procedural measures are not effective in preventing the phenomenon. Possibly the most effective way is the detection, blocking and/or removal of the contents through Internet. In this sense, United Kingdom oblige to the ISP or the host have to expeditiously remove or make no access to illegal content as soon as they find out that the content of the material is threatening and was intended to stir-u hatred. ISP according to this regulation are no liable for the illegal content if they acquire actual or constructive knowledge about it (This regulation is a consequence of the E-Commerce Directive). However, UK Government has recently proposed new regulations of online content to impose certain duties to the communication companies as Facebook, Twitter, etc., in order to take more care about illegal content to remove it.

On the other hand, in Spain, Article 16 of Law 34/2002, of 11 July, on information society and electronic commerce services, provides that ISP are not responsible for illegal content when they have no effective knowledge that the activity or information is unlawful or that it injures property or rights of third-party subject, and in the case they acquire effective knowledge of this content act diligently to remove the data or make access to it impossible. For this law purposes, it shall be understood that the service provider has effective knowledge when a competent authority has delineated the unlawfulness of the data, or-denying their withdrawal or that access to them is impossible, or the existence of the lesion has been declared, and the provider is aware of the corresponding resolution, without prejudice to the procedures of detection and withdrawal of contents that the providers apply by virtue of voluntary agreements and other means of effective knowledge that may be established.

In Germany they have for this type of measures, Social Networks Law (NetzDG), popularly known as the Facebook Law. To those social networks that have more than 2 million registered users in Germany and receive more than 100 complaints about illegal content (reported by their own users) in a year must report on the handling of these complaints and publish it in the Federal Bulletin. Besides they are obliged to remove or block apparently illegal content within 24 hours of receiving. This is regardless to the fact that the suppliers themselves have their own mechanisms for detecting and eliminating illegal content. However, this self-monitoring must be approved by the State and supervised by the Federal Office of Justice. If social network providers do not comply with these obligations the law provides for the penalty of a fine of up to five million euros, which under the Administrative Offences Act can be multiplied by ten.

In France, as in the case of Spain and United Kingdom, according to the article 6 of the Law No 2004-575 of 21 June 2004 for confidence in the digital economy, ISP are not criminally liable for illegal content if they had no actual knowledge of the illegal activity or content or if, from the moment they became aware, they acted immediately to remove this information or to make access impossible. In the same way, in Italy, the ISP are not responsible of the illegal content when they is not aware that the activity or the content is illegal, and as soon as he become aware of these content, communicate this to the competent authorities and take immediate steps to remove the information or to disable access. In addition, the competent judicial or administrative authority may require, even as a matter of urgency, that the ISP prevent or eliminate the illegal content or activities.

The same goes for Denmark: the ISP are not liable for the illegal content if they have not actual knowledge of illegal activity or information and, and at the moment they become aware of the illegal content, acts expeditiously to remove or to disable access to the information. As in the other Member States they must remove or block the illegal content when the authorities require it. And in Netherlands, ISP are not liable for illegal information transmitted if as soon as he becomes aware he quickly takes the necessary steps to remove the information or impede access to it, or deletes it or blocks it when ordered to do so by a competent authority.

Finally, in Ireland, ISP may not have liability for illegal content if the intermediary service provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network or access to it has been disabled, or that a court or an administrative authority has ordered such removal or

disablement. The same applies an intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service. This is similar to what happens in Belgium: the ISP are not liable for the illegal content when the provider does not have actual knowledge of illegal activity or information, and the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, provided he acts in accordance with the procedure. According to that, when the service provider obtains actual knowledge of illegal activity or information, he shall expeditiously communicate this to the Public prosecutor, who shall take measures in accordance with Article 29 bis of the Code of Criminal Proceedings. Providing the public prosecutor has taken a decision in relation to the coping, the disablement of access and removal of information stored in an information system, the service provider may only take measures to prevent access to the information.

With all this, as we have seen in the comparative analysis of each country's investigative measures, most of them have articles in their laws about the obligation of service providers to block and remove radical content from the Internet because of the E-Commerce Directive. However, it is possible that some of the laws do not expressly refer to this measure against hate content on the Internet, but in these cases the jurisprudence of the European Court of Human Rights would apply. However, it must be recognized that much remains to be done in this area and it will be up to Member States to establish laws that oblige Internet service providers to put in place measures to quickly identify radical content on networks and to be able to remove it quickly. This is without prejudice to the possible dangers to rights such as freedom of expression.

3 VIABILITY OF COUNTER-RADICALISATION LEGISLATIVE HARMONISATION IN THE EUROPEAN UNION

As we have seen in the previous section dedicated to the comparative analysis of counter-radicalisation legislation in the European Union, in contrast to the markedly reactive approach of the fight against radicalisation by the Member States of the European Union that existed years ago, currently, the emphasis is on the preventive approach of the criminalisation of behaviour, with acts of terrorism in the Member States becoming criminal offences not only in the strict sense of the word, but also in purely preparatory acts such as public incitement, recruitment or training. However, from a substantive rather than a procedural point of view, it is a reality that the successful fight against violent radicalisation is a task in which Member States must work (with assistance) with the private sector. This is clearly seen in the implementation of procedural measures of technological research. In these measures, the blocking of websites and the preservation and transfer of data is impossible without private collaboration. However, in the Legal Analysis of Counter-Radicalisation in a selected European Union Member States Report, we assume that regulation in this area is the least harmonised of those that have been analysed, so special emphasis must be placed on the homogenisation of this regulatory area. However, we must be careful when taking measures in this area for legislative harmonization, as these may involve possible conflicts with the right to privacy and private life. In this respect, differences have been detected between the various Member States examined, between the type of terrorist offences that may motivate the application of the measures or the conditions of execution of the measures and between the nomas to understand what prima facie evidence allows the intrusion in these rights. Therefore, it is viable and it is recommended to harmonise the rules also from this perspective.

From the substantive point of view - of criminalisation of conduct - it is viable that all Member States should make it a terrorist offence to commit a common crime when it is committed for terrorist purposes. It is also viable to maintain the criminalization in all Member States, as it has been done so far, defining the conduct of belonging to a terrorist group or organization (directing, creating, promoting, participating, etc.) as an offence related to a terrorist group.

With regard to offences that seek to address new forms of terrorism, because there is, on the one hand, a set of conducts that have generally been introduced as offences in the legislation under consideration (provocation or public incitement to commit terrorist offences, recruitment and training of terrorists in their active dimension), and on the other hand, a set of conducts that have not yet been introduced as offences in a general way (passive recruitment and receipt of training, self-instruction or self-learning and travel abroad for terrorist purposes, both to undertake and to facilitate travel), it is viable and it is strongly recommended that clauses be introduced in Member States to help delimit the legitimate exercise of rights and freedoms, from manifestations with a terrorist content that may publicly incite the commission of terrorist offences.

With regard to criminal sanctions, it is viable in the first place to the Member States that terrorist purposes be qualified (by aggravating) the penalty corresponding to the common crime, both in its attempt and in its realization. Secondly, it is viable and it is recommended that specific attenuating circumstances for terrorist offences include abandonment of terrorist activity or collaboration with the authorities to prevent the offences or prosecute those responsible.

After a general analysis of the feasibility of legislative harmonisation against radicalisation in the European Union, based on a certain consistency in the legal treatment of radicalisation in the Member States, in the following section we will focus on proposals in the form of recommendations for better harmonisation from a legislative point of view. It is true that from a substantive point of view, the work of the States will be easier, given that, as we have seen, the classification of the different behaviours to combat radicalisation is similar in many aspects. The task of achieving harmonisation in the procedural field will be more difficult, and will require greater commitment among the Member States, as will be explained below, since it is absolutely obligatory that the measures carried out are guaranteed with the rights of the citizens of the States, in order to ensure a joint combat strategy against the phenomenon of radicalisation.

4 EUROPEAN UNION LEGAL HARMONISATION OF COUNTER-RADICALISATION

4.1 HARMONISATION OF SUBSTANTIVE COUNTER-RADICALISATION LEGISLATION

From the substantive point of view of the homogenisation of legislation, we have to take into account that there are two normative areas that have to be taken into account: on the one hand, the criminalisation of terrorism conducts, and on the other hand, the crimes of hate speech. This is because, if we want to fight against terrorism not only in a reactive way, but also in a preventive way, we must not lose sight of the need to punish behaviour prior to committing terrorist crimes.

4.1.1 Criminalization of terrorism conducts

Beginning with the criminalization of terrorism conducts, we have seen how this type of crime is punished in one way or another in all Member States, so the recommendations will go towards giving greater homogeneity to the treatment of these conducts by the different States. We will now make some recommendations with respect to these terrorist conducts:

1. **It is recommended to all Member States to maintain the criminalization of terrorism conducts in all Member States, defining the conduct of belonging to a terrorist group or organization, as an autonomous offence.**

2. **It is also recommended that the commission of an ordinary offence when committed for terrorist purposes be made a terrorist offence.**

3. **It is recommended to Member States that terrorist purposes be qualified (aggravated) by the penalty for the common crime, both in its attempt and in its execution.**

4. **It is recommended that specific attenuating circumstances for terrorist offences include the abandonment of terrorist activity or collaboration with the authorities to prevent the offences or prosecute those responsible.**

5. **It is recommended that common offences with terrorist purposes be made punishable in all Member States.** We have seen that all countries except Germany and the United Kingdom punish common offences with terrorist purposes. The fact that the vast majority of countries punish this type of behaviour makes it easy to achieve harmonisation on this point between the various countries.

6. **It is recommended that the following conducts be punished as offences related to a terrorist group: directing a terrorist group, participating in the activities of a terrorist group or to be a membership.**

7. **It is recommended that the following conduct be punished as offences related to terrorist activities:**

    i) Public provocation to commit a terrorist offence.

    ii) Recruitment for terrorism in its active dimension.

    iii) Recruitment for terrorism in its passive dimension.

    iv) Providing training for terrorism.

    v) Receiving training for terrorism.

    vi) Travelling for the pupose of terrorism.

    vii) Faciliting terrorist activities

    viii) Preparating of terrorist acts.

4.1.2 Criminalization of hate speech

In this type of crimes, usually criminal protection refers to groups that have historically suffered multiple acts of effective discrimination but actually at a minimum, crimes based on racial prejudice; national or religious; gender; disability; sexual orientation; gender identity are often criminalized. For this, The recommendation in this area is as follows:

1. **It is recommended that Member States make provision in their national legislation the hate speech based on racial prejudice; national or religious; gender; disability; sexual orientation or gender identity when the public dissemination of statements that constitute a threat, insult or humiliation.** As a consequence of the importance that the Internet has assumed for the dissemination of hate content and incitement to violence, also usually include this means.

As we have seen in the comparative analysis of hate speech legislation, the regulations punishing these behaviours are very disparate in all Member States, but hate speech is punished in all of them. The aim of this proposal or recommendation is, at the very least, to homogenise the minimum requirements of all Member States in terms of punishing hate speech and preventing behaviour that could lead to other much more serious problems.

4.2 HARMONISATION OF PROCEDURAL COUNTER-RADICALISATION LEGISLATION

In this area, there are two aspects that we must take into account in order to achieve a joint strategy in the fight against radicalisation. On the one hand, the instruments or measures designed to enable the successful investigation and prosecution of terrorist offences, and on the other hand,

the Internet services providers duties. The regulation of procedural counter-radicalisation legislation is the least harmonised of those that have been analysed, so special emphasis must be placed on the homogenisation of this regulatory area. However, we must be careful when taking measures in this area for legislative harmonization, as these may involve possible conflicts with the right to privacy and private life. In this respect, differences have been detected between the various Member States examined, between the type of terrorist offences that may motivate the application of the measures or the conditions for their enforcement and among the rules for understanding what prima facie evidence allows for the intrusion of these rights. Therefore, it is recommended to harmonise the rules also from this perspective.

The recommendations for the harmonisation of procedural counter-radicalisation legislation are therefore as follows

1. **It is recommended in order to take procedural measures that may conflict with the right to privacy and private life, it should be taken into account, as a condition of their execution, that there is reasonable evidence of crimes that allow for the intrusion of these rights**.

2. **It is recommended that all Member States establish measures to the investigation of terrorist offences. In** this regard, it is recommended that the following measures be put in place with full guarantees for the safeguarding of rights:

   i) Interceptions of communications.

   ii) Capturing and recording of oral communications using electronic devices.

   iii) Use of technical devices for tracking, locating and capturing images.

   iv) Registration of mass information storage devices and remote computer equipment records.

   v) Obligation of storage and maximum period of storage of traffic data.

3. **All Member States are recommended to establish Internet Service Providers duties for to removal and block the illegal content.** In these measures, the blocking of websites and the preservation and transfer of data is impossible without private collaboration, and it is therefore recommended that the cooperation of such providers be sought, while guaranteeing the fundamental rights that may conflict with the application of these measures.

4. CONCLUSIONS

Throughout the present report we have been evincing the extensive both substantive and procedural standards with regard to the treatment of anti-radicalization legislation in Member States. This report compares the national legal frameworks of the European Member States and analyses the feasibility of harmonising anti-radicalisation legislation in the EU. Based on this comparison, recommendations for legal harmonisation of counter-radicalisation legislation are proposed. Specifically, the report firstly conducts a comparative analysis of substantive and procedural legislation in two areas of anti-radicalisation legislation. On the one hand, it compares counter-terrorism legislation in nine Member States. On the other hand, it contrasts hate speech legislation in these states and the obligations of Internet service providers to remove or block this illegal content. This analysis provides two main findings. The first is the high level of harmonisation in the criminalisation of the analysed conducts among the selected States. The second shows that, from a procedural point of view, although the regulations do not have such a high level of harmonisation, there is great similarity between the investigative instruments in the respective processes, as well as between the sanctioning responses to radicalisation. The second part of the report addresses the viability of harmonisation of legislation against radicalisation in the EU. Thus, based on the coherence of the legal responses to radicalisation in the Member States and with the aim of ensuring a joint strategy to combat the issue, the present report proposes a potential substantive and procedural harmonisation that at the same time guarantees the rights of the citizens of the EU States.

1. NECESSARY HARMONISATION OF SUBSTANTIVE COUNTER-RADICALISATION LEGISLATION

1. **It is recommended to all Member States to maintain the criminalization of terrorism conducts in all Member States,**

defining the conduct of belonging to a terrorist group or organization, as an autonomous offence.

2. **It is also recommended that the commission of an ordinary offence when committed for terrorist purposes be made a terrorist offence.**

3. **It is recommended to Member States that terrorist purposes be qualified (aggravated) by the penalty for the common crime, both in its attempt and in its execution.**

4. **It is recommended that specific attenuating circumstances for terrorist offences include the abandonment of terrorist activity or collaboration with the authorities to prevent the offences or prosecute those responsible.**

5. **It is recommended that in all Member States the common offences with terrorist purposes should be punished.**

8. **It is recommended that the following conducts be punished as offences related to a terrorist groupe: directing a terrorist group, participating in the activities of a terrorist group or to be a membership.**

9. **It is recommended that in all Member States the offences related to terrorist activities should be punished.**

10. **It is recommended that Member States make hate speech a punishable offence under their national legislation, based on racial prejudice; national or religious; gender; disability; sexual orientation or gender identity when the public dissemination of statements that constitute a threat, insult or humiliation.**

2. NECESSARY HARMONISATION OF PROCEDURAL COUNTER-RADICALISATION LEGISLATION

1. **It is recommended in order to take procedural measures that may conflict with the right to privacy and private life, it should be taken into account, as a condition of their execution, that there is**

reasonable evidence of crimes that allow for the intrusion of these rights.

2. **It is recommended that all Member States establish measures to the investigation of terrorist offences.**
3. **It is recommended that all Member States establish Internet Services Providers duties for to removal and block the illegal content.**

REFERENCES

Díaz Fernández, A. M., “Terrorismo: entre el derecho penal y la seguridad nacional”, en VV. AA., *Liber Amicorum. Estudios Jurídicos en Homenaje al Prof. Dr. Dr. H. c. J. M. Terradillos Basoco*, Tirant lo Blanch, Valencia, 2018.

European Parliament (2001). Extraordinary European Council of September 21st, 2001. Available on: http://www.europarl.europa.eu/meetdocs/committees/afet/20011108/04a_es.pdf

Hare, I. & Weinstein, J. (Eds.) (2010). *Extreme speech and democracy*. Oxford University Press. Oxford University Press.

Miró Llinares, F. M. (2012). *El cibercrimen Fenomenología y criminología de la delincuencia en el ciberespacio*, Marcial Pons.

Miró-Llinares, F. (2017). Derecho penal y 140 caracteres. Hacia una exégesis restrictiva de los delitos de expresión. In Miró Llinares, F. (Dir.). El Derecho penal ante el odio y la radicalización en Internet, Marcial Pons.

Tinoco Pastrana, A. (2016). The Fight Against Terrorism in the European Union from a Procedural Perspective. *Araucaria. Revista de Filosofía Política y Humanidades*, 18(36), pp. 439-463.

Weimann, G. (2015). Terrorism in Cyberspace. The next Generation. New York: Columbia University Press University.