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Counter-radicalisation and the Prevent agenda in the  
University context**

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## The 'choice to challenge' extreme views in the classroom? Counter-radicalisation in the University context

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### 1. Introduction

The focus of this Chapter is on intelligence collation in a particular counter-radicalisation context, within the wider UK strategy on the same (known as 'CONTEST'<sup>1</sup>). This concerns the particular UK government policy in relation to what is known as the 'Prevent duty', now taking effect under statute across wide swathes of the British public sector. This chapter focuses in particular on the newer-model nexus between higher educational and policing bodies, as explored below. The Prevent duty is formally the duty to have due regard to the need to prevent individuals being drawn into terrorism<sup>2</sup>. In pedagogic settings, this typically boils down to an employment duty on academics to consider whether particular challenging behaviour, which is extremist and potentially radicalising, is that which might draw students into terrorism - and if so, to act upon this finding by flagging or reporting the student(s) concerned to a University hierarchy.

Our scoping research project hints toward a recommendation that academics should be placed under a stricter kind of duty to discuss extreme and challenging views with students and colleagues, just as much as they are under a duty to report concerning behaviour, or even more so. There already exists a duty in 'soft law' terms to challenge extremism in the classroom and on University campuses<sup>3</sup>. This is balanced with a duty to have a 'particular regard' for the need to protect the freedom of expression of staff and students in Universities<sup>4</sup>, but is backed with the aforementioned duty to have 'due regard' for the need to take measures to prevent individuals being drawn into terrorism while a part of university life<sup>5</sup>. In suggesting that government should create a strong(er) legal duty to both require and to empower academics to challenge students in the classroom (and to actually prefer this to triggering a possible Prevent referral to the CHANNEL programme for de-radicalisation activities), and to protect their 'choice to challenge' under the law, we agree with

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<sup>1</sup> See the CONTEST strategy, from <https://www.gov.uk/government/publications/counter-terrorism-strategy-contest> (accessed on 27.02.2018)

<sup>2</sup> S.26 Counter-Terrorism and Security Act 2015

<sup>3</sup> S.29 Counter-Terrorism and Security Act 2015 and para. 22 of the Prevent Duty Guidance for Higher Education Bodies (PDGHEB) in England and Wales

<sup>4</sup> S.31 Counter-Terrorism and Security Act 2015, discussed in Steven Greer and Lindsey Bell, 'Counter-Terrorist law in British Universities: a review of the "prevent" debate' (2018) P.L. 85

<sup>5</sup> S.26 Counter-Terrorism and Security Act 2015

Joanna Gilmore, who has called for classrooms to be "a safe space for open discussion and debate in order to resist the harmful chilling effects of Prevent":

"This could include, for example, integrating a discussion of academic freedom at the beginning of a module which makes it clear that respectful debate and discussion, and independent research beyond the set reading, are actively encouraged. Students should also be encouraged to discuss and debate the Prevent strategy in seminars and workshops, and interrogate the definitions of "extremism" and "British values" upon which the policy is based. This would require staff to introduce competing academic perspectives on Prevent in order to encourage students to express their own viewpoints and share experiences."<sup>6</sup>

This is a set of recommendations we would support. The Prevent duty, as embodied in guidance to Universities in England and Wales, focuses on joint duties to have due regard to prevent persons being drawn into terrorism, and the particular regard to protecting freedom of speech on campus. However, more specific binding duty on academics to *challenge* extremism, and to interrogate it pedagogically, would accord with the academic value of challenging contentious and unpleasant views in a rational manner, and would cut through the competing perceptions that the Prevent duty is both necessary and discriminatory (as our survey respondents told us). Using the choice to challenge extreme views in the classroom is arguably essential to protect vulnerable students on the one hand and to refrain from creating an atmosphere where students are (self) censorious on the other. We would suggest that the tentative findings of our pilot-style survey of an academic university department, presented in this chapter, bear this out as a sound recommendation, or at least one worth exploring.

## **2. The choice to challenge' extreme views in the classroom**

This chapter aims to make a practical argument in relation to the 'Prevent duty' - namely, that in operating this intelligence collation duty in higher education institutions, more support, guidance and investment should be given over to ensuring that Universities in the UK implement the duty with intellectual rigour and with pedagogic intent, as opposed to via a bureaucratic compliance culture. This would involve the supplementing of current duties (to play a role in protecting students and members of the public, and attempting to at the same time ensure freedom of speech on campus) with a specific legal duty on academic staff, in effect, to discuss and to challenge the basis of extreme views in the classroom or campus context. This duty would go beyond the recommendation

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<sup>6</sup> Joanna Gilmore (2017): Teaching terrorism: the impact of the Counter-Terrorism and Security Act 2015 on academic freedom, *The Law Teacher*, DOI: 10.1080/03069400.2017.1377025 p.9.

current found in Prevent duty guidance for Higher Education to ensure a balancing of opposing views at contentious events, for example, and the 'soft' duty to challenge extremist ideas which risk drawing people into terrorism. In effect, our view is that the legal protection of academic freedom of expression could be better enlisted through a new legal duty that entailed the Prevent duty is deployed critically and quite literally in an academic manner. This would however entail a respect for academic judgment that if an idea has been challenged when presented in an academic environment then that is the end of the matter - representing an undermining of the securitisation narrative (for once).

Implementing our recommendation would address the perception shared by at least some academics that the Prevent duty side-lines the normal process of challenging dangerous ideas and at the same time extends the work of the state in a manner that is worrisome i.e. directly into the classroom. This can be said particularly with regard to the idea that academic staff are expected to conduct teaching and student support activities with an eye or an ear open to potential extremism presented by their students<sup>7</sup>. Better steps should on the whole have been taken to ensure that Universities are not adopt piecemeal, scant or superficial training approaches in order to 'upskill' academics in turning them into intelligence officers, of sorts. The relevant government guidance places a duty on Universities in England and Wales, for example, to adopt basic Prevent training for staff<sup>8</sup>. But the template introductory training materials made available for adaptation locally in an institution place only a focus in their set of five linked case studies on detecting risk of Islamic radicalisation<sup>9</sup> - when there is good reason that foci should be placed on other sorts of extremism<sup>10</sup>. There is evidence in a report published by HEFCE<sup>11</sup> that implementation and bureaucratic compliance with the Prevent duty has been near-universal across the University sector - but the

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<sup>7</sup> Strictly speaking, university educators will be under employment law duties of contract to their institutional employers to report extremist views/worrying, potentially radicalising behaviour based on their training. A university itself may take the decision to then report the matter to the police. As Greer and Bell explain, "if the staff in a given students' welfare service think any concerns raised about a specific student may require it, they may make a formal referral to a chief police officer who may then refer to a local authority panel, but "only if there are reasonable grounds to believe the individual is vulnerable to being drawn into terrorism"" - referencing the provisions of the Counter-Terrorism and Security Act 2015 in s.36(3). See Greer and Bell, p.94.

<sup>8</sup> PDGHEB para. 22.

<sup>9</sup> See Universities UK/Safer Campus Communities, 'The Prevent duty in Higher Education: An Introduction', PowerPoint training presentation.

<sup>10</sup> For example, consider the thwarting of four far-right terrorism plots since the Islamist attack in Westminster in London in 2017: see Lizzie Dearden, 'Four far-right UK terrorist plots foiled since Westminster attack, police reveal', *The Independent*, Tuesday 27<sup>th</sup> February 2018 (accessed at 27.02.2018)

<sup>11</sup> HEFCE, 'Analysis of prevent annual reports from higher education providers for activity 2015-2016' (HEFCE 2017) [http://www.hefce.ac.uk/media/HEFCE,2014/Content/Pubs/2017/201711/HEFCE2017\\_11.pdf](http://www.hefce.ac.uk/media/HEFCE,2014/Content/Pubs/2017/201711/HEFCE2017_11.pdf) accessed 26th February 2018

main academic trade union, UCU, would have called for a complete boycott of the implementation of the Prevent duty if it had the legal ability to do so<sup>12</sup>.

### 3. The context of our recommendation for stronger duty to challenge on academics

Generally speaking, violent extremism and terrorist acts are a human rights issue globally due to the potential for human rights atrocities occurring on a large scale, or even when solely focusing on UK terror attacks within the last 12 months. The General Assembly of the UN in February 2016 adopted a resolution for the Secretary-General to create a plan to prevent violent extremism from occurring.<sup>13</sup> The report states that:

Violent extremist groups pose a direct assault on the United Nations Charter and the Universal Declaration of Human Rights.... are undermining our efforts to maintain peace and security, foster sustainable development, promote respect for human rights and deliver much needed humanitarian aid.<sup>14</sup>

Following this action, the UN held a conference over two days in April 2016 concerning the next steps to prevent violent extremism,<sup>15</sup> with the aim to expand the legal framework from the Secretary-General, and allow international members, senior experts, and heads of national international practices to share their practices and experiences to build on the SG's plan whilst retaining and respecting the State's individual sovereignty<sup>16</sup>, with the intention that states comply with these obligations under international law and the UN Charter.<sup>17</sup> Resolution 70/291 was adopted in July 2016 by the General Assembly of the UN, and was titled the United Nations *Global Counter Terrorism Strategy*, with the recommendation that Member States implement the suggestions of the plan in order to counter the growing concern of violent and non-violent extremism.<sup>18</sup>

Just over one year later, during which time there had been a number of deadly terrorist attacks in England, Home Secretary Amber Rudd noted in her speech at the 2017 Conservative Party conference that: "We all have a role to play. Prevent isn't some 'Big Brother' monolithic beast. It's

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<sup>12</sup> Steven Greer and Lindsey Bell, 'Counter-Terrorist law in British Universities: a review of the "prevent" debate' (2018) P.L. 85, 6

<sup>13</sup> UNGA Res 70/291 'The United Nations Global Counter-Terrorism Strategy Review' (1 July 2016)

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid* p. 2

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

all of us working together, through local initiatives set up by local people, schools, universities and community groups."<sup>19</sup>

It is without doubt the case that *some* men and women may be radicalised, or further radicalised, while University students as at a particular time in their lives - but it is not necessarily true that an institution itself - or student experiences within it - play a role in that radicalisation per se. Also, may indeed sometimes be the case that University educators may overhear, discuss, be confronted with or somehow learn of a student's tendency toward extremism, and might, without appropriate guidance, be unsure of how to act in such a scenario, without that guidance. But one would imagine that the amount of dangerous views and irrationally held beliefs, clung to by a particular student, that are academically and *safely* challenged on any course could number many more times over.

There are examples, too, of successes arising from the Prevent duty<sup>20</sup>, and seemingly missed opportunities<sup>21</sup>. Beyond these vague conclusions about Prevent, what can certainly be said is that as researchers new to the area of study, we are dipping our toes into an ideological battlefield. Prevent is undoubtedly seen as toxic by some commentators. Wragg has noted that..." The prevent duty - and other measures like it - are not so much a slippery slope as one long descent into darkness. They are the sort of measures on which fascism is built."<sup>22</sup> Another critical perspective on Prevent is focused on an anxiety that "voicing criticisms [of Prevent] is itself construed as evidence of extremism, or of people being influenced by extremism and therefore, perhaps, of being drawn into terrorism"<sup>23</sup>. On the other hand, there is an emerging literature that criticises the view that Prevent is truly toxic at all, and condemns attacks on the Prevent duty as hyperbole, on the basis that there is little evidence (yet) of Prevent as discriminatory, stigmatising or marginalising. As Greer and Bell have observed, for example, critics of Prevent in the University setting:

"fail to offer a viable alternative... and it is not at all clear what participation in them requires nor how success or failure is to be measured. Would, for example, a refusal by an academic

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<sup>19</sup> Rudd, Amber (Spectator, 3<sup>rd</sup> October 2017) <https://blogs.spectator.co.uk/2017/10/amber-rudds-conservative-conference-speech-full-text/> accessed 26<sup>th</sup> February 2018

<sup>20</sup> See for example anonymised case study A from Annex A to Department for Education, *Advice note: Safeguarding vulnerable individuals in Higher Education from terrorist groups*, from [http://www.safecampuscommunities.ac.uk/uploads/files/2017/05/advice\\_note\\_safeguarding\\_in\\_he\\_050517.pdf](http://www.safecampuscommunities.ac.uk/uploads/files/2017/05/advice_note_safeguarding_in_he_050517.pdf) (accessed at 27.02.2018) p.11.

<sup>21</sup> See Robert Mendick et al, 'Security services missed five opportunities to stop the Manchester bomber', *The Daily Telegraph*, from <http://www.telegraph.co.uk/news/2017/05/24/security-services-missed-five-opportunities-stop-manchester/> (accessed at 17.11.2017)

<sup>22</sup> Paul Wragg, 'For all we know: freedom of speech, radicalisation and the prevent duty', *Comms. L.* 2016, 21(3), 60-61. p.60.

<sup>23</sup> Mark McGovern (2016), 'The university, Prevent and cultures of compliance', *Prometheus*, 34:1, 49-62, DOI: 10.1080/08109028.2016.1222129, p.57, discussing Sutton, R. (2015) *Preventing Prevent: Challenges to Counter-Radicalisation Policy on Campus*, Henry Jackson Society, London.

to warn university authorities about another Andrew Ibrahim, on the grounds that she regards herself as "an educator not an informant", be regarded as a campaign triumph even if he successfully became a suicide bomber?"<sup>24</sup>

In our research for this chapter we are also entering a complex policy minefield as part of the aforementioned ideological battlefield - principally due to one salient process: 'Brexit'. Of course, the Prevent duty could hardly exist usefully alone, and it operates in policy terms as part of a wider counter-terrorism and anti-radicalisation framework in the UK<sup>25</sup>. In mid-February 2018 Theresa May, UK Prime Minister, gave a speech at a security conference in Munich that sought to outline the dimensions the UK government sought within the legal settlement for 'Brexit' in national security terms - with particular attention paid to collaboration between EU bodies, the EU 27 states, and the UK, in terms of combined information and intelligence sharing as well as military and security logistics<sup>26</sup>. The UK government had previously observed that: "The exact contours of the UK's future relationship with the EU on internal security will need to be agreed in the course of negotiations. During those negotiations, the UK considers that the focus should be on the areas of cooperation that deliver the most significant operational benefit, to ensure the best possible outcome for both the UK and its EU partners."<sup>27</sup>

European Union strategy on combatting radicalisation, as stated since 2005, needs to balance human rights duties under the European *acquis* and wider human rights commitments in international law, with rational domestic, EU-wide and collaborative commitments to fighting radicalisation and extremism<sup>28</sup>. Brexit entails that the UK relationship with the EU on national security, counter-terrorism and anti-radicalisation issues must reinvent itself against a backdrop of

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<sup>24</sup> Steven Greer and Lindsey Bell, 'Counter-Terrorist law in British Universities: a review of the "prevent" debate' (2018) P.L. 85, 102-103.

<sup>25</sup> See the CONTEST strategy, from <https://www.gov.uk/government/publications/counter-terrorism-strategy-contest> (accessed on 27.02.2018)

<sup>26</sup> Olterman, Phillip, 'Theresa May wants new security treaty with EU next year' (Guardian, 17<sup>th</sup> February 2018) <https://www.theguardian.com/politics/2018/feb/17/theresa-may-wants-new-security-treaty-with-eu-next-year>, accessed 23<sup>rd</sup> February 2018

<sup>27</sup> HM Government, *Security, law enforcement and criminal justice: A Future Partnership Paper* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/645416/Security\\_law\\_enforcement\\_and\\_criminal\\_justice\\_-\\_a\\_future\\_partnership\\_paper.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security_law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF) p.8 (accessed 23<sup>rd</sup> February 2018)

<sup>28</sup> See the EU counter-extremism strategy published at <http://www.consilium.europa.eu/en/policies/fight-against-terrorism/eu-strategy/> (accessed 27.02.2018)

withdrawal from the EU *acquis* - including, expressly, UK severance with the EU Charter for Fundamental Rights<sup>29</sup>.

In this UK-specific context, then, for a strategy such as Prevent compliance was crucial, with regard to that other vital European legal system, namely that of human rights law based upon the European Convention on Human Rights. The entering into law of a statutory Prevent duty for the University sector was always going to precipitate much debate, many clashes and ultimately one or more legal challenges. The first of these challenges to occur was in the case of *Butt*, to be addressed in a later section of this chapter.

Debate over Prevent in UK universities has elided into a tense focus on free speech on campus<sup>30</sup>. There is to be a review of Prevent, we are told<sup>31</sup>, following a series of terror attacks in the UK in 2017 - but as highlighted above, the Home Secretary at the time of writing has made it clear that Prevent is here to stay. Public pressure has now, following the Manchester and London attacks, rendered the counter-terrorism policy review more necessary and urgent than it has been previously.<sup>32</sup> In practice, Prevent has been viewed as a corrosive exercise, focused particularly on those students within Universities who are at risk of contributing to values of extremism, in an overly-sweeping manner, leaving some student-consumers in the HE sector fearing to express their opinions due to the anxiety of becoming reported as a risk.<sup>33</sup> David Anderson QC raised the point, as a former independent reviewer of UK terrorism legislation, that Prevent is creating resentment from the Muslim Community, alongside removing a stable and supportive environment for students to discuss issues regarding terrorism and extremism, leading them to discuss such issues on non-University

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<sup>29</sup> See Equality and Human Rights Commission, Brexit and the EU Charter of Fundamental Rights: our concerns, from <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union-0> (accessed at 27.02.2018)

<sup>30</sup> See details of the UK Parliamentary inquiry that is currently asking 'Is Government policy on free speech in universities coherent?', from <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/freedom-of-speech-uni-launch-17-19/> (accessed at 27.02.2018)

<sup>31</sup> See Sairah Masud, 'Rethink of Prevent strategy needed' to end radicalisation', from <https://www.easterneye.eu/rethink-prevent-strategy-needed-end-radicalisation-says-rudd/> (accessed at 27.02.2018)

<sup>32</sup> As acknowledged in Steven Greer and Lindsey Bell, 'Counter-Terrorist law in British Universities: a review of the "prevent" debate' (2018) P.L. 85.

<sup>33</sup> Hicham Yezza 'Prevent will discourage the very students who can help fight extremism', *The Guardian* (28 September 2015) <<https://www.theguardian.com/commentisfree/2015/sep/28/prevent-discourage-muslim-fight-extremism-counter-terrorism-university-school-students-suspicion>> accessed 19 December 2017



platforms outside institutional boundaries of behaviour and absent so many more safeguards online<sup>34</sup>.

So this all begs the question as to how Prevent might actually be further reformed as a policy or augmented in practice - and to answer our own question we must begin by addressing the recent reforms to the legal basis for the aspect of the Prevent duty extended into the university setting.

#### **4. The Prevent duty and controversy around human rights issues following the 2015 reforms**

The Counter-Terrorism and Security Act 2015 was adopted to accord with the CONTEST Counter-Terrorism strategy published in 2011; with the purpose being to draft a new policy to limit and prevent radicalisation.<sup>35</sup> Section 26 (1) of the 2015 Act places a general duty, more commonly known as the 'Prevent Duty' upon specified, public authorities within the UK<sup>36</sup>, since: 'A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism'.<sup>37</sup> The Act, under Schedule 6, also specifies the authorities whom the general duty to 'Prevent' then falls upon, such as local governmental authorities, criminal justice authorities, health and social care providers, the police force, and, particularly of interest given the focus of this piece, upon childcare and education providers, including Universities in England and Wales.<sup>38</sup>

Statistics published by the Home Office from April 2015 to March 2016 found that 7,631 prevent duty referrals were made overall<sup>39</sup>. One third of these overall referrals came from the education sector, with individuals referred to the police as vulnerable to being drawn into terrorism. Referrals in the education sector were made by the relevant providers, who have the duty to prevent people from being drawn into terrorism, namely organisations such as schools, colleges and universities employing teachers and lecturers. Of the total number of 7,631 referrals, 4,274 of these referrals were for individuals aged under 20.<sup>40</sup>

With the duty having a clear impact in educational settings, with the education sector accounting for one third of Prevent referrals, clearly it is important to assess whether the legislation currently complies with human rights structures. We focus here particularly upon the European Convention on Human Rights, and the rights provided in articles 8, 9, 10 and 14. Implemented in UK law via the

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<sup>34</sup> *Ibid*

<sup>35</sup> Home Office, *CONTEST, The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, July 2011) 1-125

<sup>36</sup> Counter-Terrorism and Security Act 2015, s 26(1)

<sup>37</sup> *Ibid*

<sup>38</sup> Counter-Terrorism and Security Act 2015, Schedule 6

<sup>39</sup> Home Office, *Individuals referred to and supported through the Prevent Programme*, April 2015 to March 2016 (Statistical Bulletin 23/17, 9 November 2017) 4

<sup>40</sup> *Ibid*

Human Rights Act 1998, these are the statutory rights which have the potential to be infringed upon by the Counter-Terrorism and Security Act 2015 and the operation of the Prevent duty.<sup>41</sup>

Article 10 of the Convention defines freedom of expression as a right which every person is entitled to, and includes the freedom to hold opinions, receive and impart information and ideas without interference by public authorities; albeit with considerable qualifications.<sup>42</sup> The UK is required to both positively take action to protect the right in particular circumstances, and (as a negative duty) not interfere with the right as part of the duties within Article 10. Article 10, which has been described as 'most intimately linked with the Prevent duty'<sup>43</sup>, does not specify the forms of expression which would be deemed as illegitimate per se, or define particular usages of expression which have the automatic seriousness to 'trigger' the need to gather information to be issued a referral, under the Prevent strategy, to the Channel Programme<sup>44</sup>. Rather, what is required is known as a proportionality assessment, leaving the precise application of the right, to some extent, open to the interpretation of the person recording the information. There is of course subjectivity in assessing whether a person, expressing a particular view which differs from social 'norms' concerning radicalisation or extremism, within a particular setting such as education, is an individual who is to be subsequently reported under Prevent. As such, such reporting has the potential to be a violation of article 10 of the ECHR if it were an incorrect (in the sense of being a disproportionate) referral without a reasonable basis (and which, in either case, under the Human Rights Act 1998 it is to be interpreted as a disproportionate and unfairly balanced decision overall).

A report of an individual to the Channel programme under the Prevent strategy and within the legal framework created by the 2015 Act, such as a student within University setting, also has the potential to interfere with Article 8 of the Convention, namely the qualified right to respect for private and family life<sup>45</sup>. This is since the sharing of their personal data with governmental agencies may have clashed with any 'reasonable expectation of privacy' that they may have had in relation to the context in which they expressed their extreme ideas - such as the reporting of an assumedly confidential but ultimately troubling conversation with a lecturer in a discussion about a classroom task or coursework assessment.

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<sup>41</sup> Human Rights Act 1998

<sup>42</sup> European Convention on Human Rights, article 10 (1)

<sup>43</sup> Steven Greer and Lindsey Bell, 'Counter-Terrorist law in British Universities: a review of the "prevent" debate' (2018) P.L. 84 at 90.

<sup>44</sup> See Department for Education, *Advice note: Safeguarding vulnerable individuals in Higher Education from terrorist groups*, from [http://www.safecampuscommunities.ac.uk/uploads/files/2017/05/advice\\_note\\_safeguarding\\_in\\_he\\_050517.pdf](http://www.safecampuscommunities.ac.uk/uploads/files/2017/05/advice_note_safeguarding_in_he_050517.pdf) (accessed at 27.02.2018)

<sup>45</sup> European Convention on Human Rights (1950), article 8

However, as article 8 ECHR is a qualified right in a similar vein to article 10, using the requisite proportionality analysis should an individual actually be determined to enjoy a 'reasonable expectation of privacy', an individual's right may still be interfered with *lawfully*, if upon the final application of the 'fair balance' test (as part of the analysis of the interference with the qualified human rights of that individual), it is ultimately in the greater interest of the wider population to do so.<sup>46</sup> The criteria applied within article 8 ECHR cases such as that of *Quila*, in order to determine whether a qualified right could be interfered with lawfully, in a manner which is therefore proportionate, are those stated by Lord Wilson as follows:

- (a) is the legislative objective sufficiently important to justify limiting a fundamental right?
- (b) are the measures which have been designed to meet it rationally connected to it?
- (c) are they no more than necessary to accomplish it?
- (d) do they strike a fair balance between the rights of the individual and the interests of the community?<sup>47</sup>

The proportionality analysis approach in itself is a fairly flexible, contextualisable and fact-based concept, which works alongside states being given a 'margin of appreciation' as a working principle. Under the jurisprudence of the European Court of Human Rights, the concept of the 'margin of appreciation' allows for a degree of subjectivity and flexibility of a state's interpretation of what it deems to be a legitimate and necessary interference with a Convention right, such as the nature of a referral under the Prevent duty for an expression of views within a university setting, and the retention of intelligence about that episode. Our view as to whether or not any interferences with the article 8 ECHR or article 10 ECHR rights of those subject to Prevent referrals are within the margin of appreciation afforded to the UK as a state must be informed largely, at the time of writing, by the case of *R (Butt) v Home Secretary*<sup>48</sup>, which will be discussed further in this chapter, below.

From a legal perspective, Greer and Bell make the point that the Counter-Terrorism and Security Act 2015 was not after all deliberately passed to create a direct violation of the Convention<sup>49</sup>; and Section 3 of the Human Rights Act 1998 provides that that primary and secondary legislation must be interpreted to be compatible with the rights established under the Convention 'so far as it is possible to do so', acting as a legislative safeguarding mechanism with regard to rights, to an

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<sup>46</sup> *R. (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 45

<sup>47</sup> Per Wilson LJ at para. 45.

<sup>48</sup> [2017] EWHC 1930

<sup>49</sup> Steven Greer and Lindsey Bell, 'Counter-Terrorist law in British Universities: a review of the "prevent" debate' (2018) P.L. 90

extent<sup>50</sup>. If for any reason this 'mechanism' has failed under section 3, then section 4 of the Human Rights Act allows for a 'declaration of incompatibility' to be issued by the courts following a judicial review claim<sup>51</sup>. Currently, no such declaration has been issued, nor has there been any declaration of illegality in relation to the statutory guidance issued to Universities in England and Wales, suggesting that the Counter-Terrorism and Security Act 2015 does not, as legislation and code of practice read as a whole, despite the relevant challenge in the recent *Butt* case, contravene the Convention or violate human rights.

To some authors however, harms which have been associated with Prevent have been assessed as occurring not just at a policy level but rather also at the level of educators and their individual implementation of Prevent duty policy in institutions, due to a lack of understanding, some ambiguity and a shortfall of expertise when exercising the duty within higher education.<sup>52</sup>

Three key bases for criticism of the Prevent duty are; i) the great breadth of the definition provided by the government for the concept of 'extremism'; ii) the differing sensitivities around Prevent in higher education and iii) a comparison of Prevent against the Equality Act 2010 given the potential of 'profiling' by academics to discriminate against those with protected characteristics such as 'race' or 'religion' with regard to the language of the Equality Act.

Firstly, the guidance published by the Government to be followed by the authorities required to enforce Prevent, such as universities, provides a definition for extremism which is very broad indeed, as it reads: 'Extremism is vocal or active opposition to fundamental British values, including democracy, the rule of law, and individual liberty and mutual respect and tolerance for different faiths and beliefs'.<sup>53</sup> But the phrase which has attracted most criticism is the very use of 'fundamental British Values'<sup>54</sup>, as this has the implication that any views an individual expresses which are not perceived as 'traditionally British', could then be wrongly referred to the police by an institution under their Prevent duty to have 'due regard to the need for people being drawn into terrorism'<sup>55</sup>. Suke Wolton makes the point that 'British values' and democracy within an application the Prevent duty are a direct contradiction of one another.<sup>56</sup> 'Fundamental British Values' include a key concept on tolerance of others' views, but the literal intolerance encapsulated within the

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<sup>50</sup> Human Rights Act 1998, s 3

<sup>51</sup> Human Rights Act 1998, s4

<sup>52</sup> Fahid Qurashi 'Just get on with it: Implementing the Prevent duty in higher education and the role of academic expertise' (2017) 12(3) *Education, Citizenship and Social Justice* SAGE Journals, p 210

<sup>53</sup> Home Office, *Prevent Strategy Guidance* (Cm 8092, 2011) 107

<sup>54</sup> *Ibid*

<sup>55</sup> Counter-Terrorism and Security Act 2015, s 26(1)

<sup>56</sup> Suke Wolton, 'The contradiction in the Prevent Duty: Democracy vs 'British values' (2017) 12(2) *Education, Citizenship and Social Justice* SAGE Journals, p 138

Prevent duty means that British values are clearly hard to pinpoint exactly within contemporary society in pure policy terms. While as Wolton notes, a shared moral consensus does not exist and will not exist, a clear-cut concept of 'values' does not emerge from the legislation or government guidance for Higher Education providers on how to exercise their positive duty alongside democracy, which leaves the relevant guidance open to interpretation.<sup>57</sup> Wolton also argues that the idea of democracy and 'British values' are going to remain logically opposed; due to 'British values' appearing to be a fixed concept within the Prevent strategy, while democracy 'needs to be affected and contested by the changing views of the population'.<sup>58</sup> It is also important to note that 'culture' and 'traditionalism' alongside democracy, are also evolving concepts, so what may have been 'traditionally British' when the government proposed the CONTEST strategy in 2011 and provided this definition for extremism, is likely to be different to current definitions, meaning that perhaps, due to development of what is perceived as 'traditionalism', much more detailed definitions could be more beneficial to all those whose duty it is to implement Prevent and to positively have due regard for individuals and their likelihood to being drawn into terrorism.

Secondly, there is that problem of the different standard for Prevent compliance and discretion over making referrals required of Higher Education bodies under Section 31 of the Counter-Terrorism and Security Act 2015. Section 31 of the Counter-Terrorism and Security Act 2015 provides that;

when carrying out a duty imposed by section 26(1) a specified authority to which this section applies must have particular regard [emphasis added] to the duty to ensure freedom of speech if it is subject to that duty and (b) must have particular regard [emphasis added] to the importance of academic freedom if it is the proprietor or governing body of a qualifying institution.<sup>59</sup>

Taking the 'standard' definition of Prevent to be the requisite 'due regard' shown towards preventing individuals being drawn into terrorism under section 26(1), given this requisite 'particular regard' for freedom of speech and academic freedom under section 31 of the same Act, the question is raised as to whether 'particular regard' and 'due regard' are to be equally weighted in terms of duties, or whether one of these phrases, namely 'particular regard' take precedence over the other. These concepts again will be subjective and open to interpretation, and evaluated on a case-by-case basis; however, to prevent a challenge under article 10 ECHR by students or academics in a University, section 31 may be interpreted that having particular regard toward freedom of speech is a more weighty duty as there is a crucial Human Rights Act duty to be upheld.

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<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid*

<sup>59</sup> Counter-Terrorism and Security Act 2015, s31

Thirdly, to add complexity to any analysis and application of statutory wording, in order to adhere to the Public-Sector Equality Duty found under s149 of the Equality Act, public authorities must have due regard to the need to prevent discrimination toward individuals or groups who share a protected characteristic, including religion, ethnicity, and/ or race, when as public authorities they carry out their public function. The Act also states that authorities, including higher education providers, need to have 'due regard' to the need to advance the equality of the people who possess this characteristic and those who do not, and foster good relations between societal groups as a result.<sup>60</sup> This then raises the question as to exactly how a body, such as a university, should prioritise the Prevent duty of referring an individual for Channel guidance over their Public Sector Equality Duty to have due regard to the need to advance equality of opportunity for groups of, say, Muslim students, and in particular while avoiding infringement of Convention rights that might arise from overly keen application of the Prevent duty. The Equalities and Human Rights Commission considered this a sufficiently problematic legal balancing act that it has moved to offer guidance to clarify the situation - albeit with minimal advice beyond re-iterating legal principles in the light of Home Office guidance on the Prevent duty for Higher Education bodies in England and Wales<sup>61</sup>.

##### **5. The view on Prevent, and Prevent training, from students and staff in one academic department**

Having obtained the requisite ethical approval from our institution, we designed and promoted a largely qualitative survey via e-mail, without incentives, to both staff and students in one academic Law department at an English university. The survey concerned respondents' perception of the Prevent duty itself, and, in relation to those survey responses made by university staff, also their perceptions of the internal University training on the Prevent duty offered to academics with classroom teaching and other roles. The department concerned includes around 1,500 undergraduate and postgraduate students and more than 60 staff. Overall we received 37 responses, with 6 from lecturers and 31 from students. We acknowledge that this is a small sample of responses from a large potential cohort of respondents, with a likelihood therefore that those with the strongest predisposition toward the Prevent duty as a positive or negative influence on higher education would be more likely to complete our survey as respondents; and that since this was only a single academic Department which was surveyed, it is particularly hard to generalise any finding from the small amount of qualitative data collected, but we feel that some themes emerge from the data nonetheless. In this way, our survey could be seen as a kind of pilot study, and our thematic analysis has revealed, we feel, where future research might need to be addressed.

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<sup>60</sup> See Equality Act 2010, s 149, (1)(a)(b)(c)

<sup>61</sup> See Equality and Human Rights Commission, 'Delivering the Prevent duty in a proportionate and fair way', from <https://www.equalityhumanrights.com/en/publication-download/delivering-prevent-duty-proportionate-and-fair-way> (accessed at 27.02.2018)

### *A discussion of our survey results*

First, we asked our respondents what were their views on, or experiences of the adoption of the Prevent duty in higher education, if any; we then asked of our lecturer respondents, secondly, what were their 'experiences of the Prevent duty training offered by your Higher Education Institution, if they had undertaken this, and whether they had any thoughts as to how this training could be improved. We asked all our respondents whether they thought there were any advantages or disadvantages in including the Prevent duty as a key part of law or criminology curricula, and lastly, we asked about any relevant personal experiences of our respondents in relation to the operation of the Prevent duty.

Our thematic analysis raised a mixed collection of concerns about the adoption of the Prevent duty in Higher Education, and some positive outlooks on the adoption of the duty; although it must be noted that scepticism and concern about the Prevent duty operating in the higher education predominated overall, across the responses to our survey.

### *Discrimination*

The strongest theme that emerged from our survey responses was one of the perceived potential for discriminatory treatment of some groups of students, namely Muslims, as a result of the roll-out of the Prevent duty into higher education. Respondents observed that Prevent ' Fuels suspicion and not academic discussion', '...is a blatantly discriminatory tactic' and '...seems unfairly target (sic) at those of Islamic faith rather than those at risk of involvement/ coercion into extremist behaviours in other areas. i.e white supremacy...' - while one respondent explained that:

"I think it's stupid that Muslim students (disproportionately) will be spied on... We were all outraged at a Muslim registry in America by trump (sic) but we forget we already have one..."

Furthermore, a potential for discrimination against and between students was something which several respondents perceived as a risk were the Prevent duty to be made a key part of curricula in an academic department; or was something which respondents already had perceived. As some respondents observed: 'People might feel they are being targeted if taught incorrectly. There may be incidents of discrimination and racism after lessons if taught incorrectly...', and 'Depending on the way it is taught, it might make an already marginalised group of Muslim students feel even more targeted...!'.

One respondent considered whether:

"Would it make classes more uncomfortable for those likely to be targeted by the duty, even if the result was a more critical shared understanding? How would it be perceived to see it on a module plan if you were not planning on going to the lesson?"

### *Censorship and self-censorship*

A second concerning theme that arose from our analysis of our survey responses was that of the perceived potential for both censorship and self-censorship that might arise from the implementation of the Prevent duty in a university setting. Prevent was described as potentially 'censoring seminars', as students may not wish to express their views through fear of being reported.' A respondent noted that a misapplication of the Prevent duty might be 'an over-reaction verging on hysteria', and concluded that: 'The danger of this could be that individual students become disaffected and alienated.' One further respondent who raised concerns about censorship or self-censorship observed that Prevent:

"... may create a climate where lecturers and students are less willing to raise or discuss certain ideas which are perceived as extreme. This has clear implications for freedom of speech, and may stifle criticism and debate. An important means of countering extreme views is to discuss them openly, subject ideas to counter arguments and critical thinking. By making students less willing to raise ideas due to fear of being reported, Prevent may be actually be counter-productive, and mean students are less likely to hear their views challenged."

Worryingly, another student respondent noted that:

"As a Muslim student, I have been very wary of researching some cases and certain legislations (sic) for my essays as I don't want this to be on my university search history and be flagged for radicalism..."

### *Necessity*

Some respondents, of course, explicitly observed that the Prevent duty in higher education was 'good', 'a good idea' or 'a good thing'. There was considerable further emphasis however on the *necessity* of the Prevent duty amongst the respondents who wrote positively about some aspects of the policy. Specifically, the Prevent duty was variously described as a 'good idea to ensure Universities accept some responsibility for the safety of the country and its students'; 'a comforting initiative'; 'a necessary thing'; and 'needed to help decrease terrorism'; while for one respondent an explicit inclusion of the Prevent duty on law and criminology curricula would raise 'awareness of the



seriousness of the issue' since the 'idea of being drawn into terrorism seems miles away to most people'.

#### *Student vulnerability*

A key sub-theme of the view from some respondents on issues of necessity was a particular necessity to implement something like the Prevent duty to protect students because of their vulnerability. Respondents observed that this need arose because of a 'diverse student population and potential influences which may occur as a result of being away from home'; while it is 'necessary to have measures in place to stop students from being radicalised', and that 'higher education staff have the duty to help student (sic) susceptible to being drawn into terrorism'. It was noted by one respondent that 'people are getting lured into terrorism due to feeling isolated from our society'.

#### *A need for support and clarity in approach*

There was some mention by our survey respondents of a need to remedy what was perceived as poor quality internal University-led training, and the variable extent of support offered to academics in applying the Prevent duty, as it were; as: '... better understanding [from] training on the issue would allow for wider and more informed discussion in the area.'. One respondent, who identified themselves as a legal academic, commented at length that:

'It is not clear to staff what the lines of reporting are, and, as a lawyer, I'm perturbed that the training offered no analysis of the duty to protect freedom of expression which is a key issue in higher education and can create the potential for conflict. The scenarios given were useful but the answer to each one appeared to be "it depends, some people would do x, some would do y, some would do nothing". For lecturers in the classroom this offers little insight and gives no structured way to reach a decision [to refer a matter on to senior colleagues under the Prevent duty policy concerned].'

#### *Raising awareness and the need for critical education on the detail of Prevent*

It is also clear from our survey responses that a thorough and critical approach to education in the curricula of our surveyed department on the Prevent duty would be beneficial, since it would 'raise awareness', 'counter misconceptions and foster a climate of open debate and free speech', and 'facilitate critical discussion'. One respondent felt that '... students might be reassured that lecturers have not bought into the duty uncritically.' This last theme of findings from our survey data we felt could be the basis of an argument, to be better developed in future research, for the 'choice to challenge' extremism in the classroom.

## 6. A discussion of the responses to our survey

The Home Secretary has made it clear that we all have a role to play in operating the Prevent duty in the educational institutions of England and Wales. However, our survey responses have shown that the Prevent duty in the University context is an issue riven with an inherent difference and a tendency toward opposite views: between fear of (self) censorship and discrimination on the one hand, versus a feeling of necessity to protect vulnerability on the other. We feel that the third, smallest strand of responses to our small-scale survey might provide the answer - a remodelling of the Prevent duty on an empowerment of students and academics to challenge extreme views in the classroom and on campus might satisfy some critics that the main object of Prevent in HE is not stigma nor safeguarding, but a pursuit of truth.

Some academics have proposed that universities should be excused from the Prevent Duty guidance within the public sector setting as to ensure academic freedom, as universities found that early proposals for extent of the Prevent duty within the Counter-Terrorism and Security Act to be 'unworkable, lacking understanding, vague and unnecessary'.<sup>62</sup> However, as Fahid Qurashi goes on to explain, as universities are legally bound by the statute, compliance was assumed and continuously monitored due to non-compliance being in contempt of court.<sup>63</sup> Measures were put in place by Prevent Duty guidance for bodies in Higher Education to implement a standard for external speakers, if they were perceived as 'controversial', and this has at least allowed universities to have an element of control over students being 'brainwashed' and subsequently drawn into terrorism.<sup>64</sup> However, Qurashi emphasises the fact that many disciplines and ideas in their infancy were controversial, and that many ideologies are expressed which initially do not conform to societal understanding, and are rejected; and then in time are more accepted<sup>65</sup>, giving the perception that the current standard for assessing the appropriateness of any external speaker on campus under the Prevent guidance for higher education in time might only ever need revisiting in any case. The policy framework set by the Home Office in their guidance also makes the assumption that 'human agency and rational decision-making' are not present in both students and lecturers within universities, Qurashi argues, giving another perception that in being vulnerable in situations exposed to external speakers, controversial materials and discussion about extremist ideological concepts, both students and lecturers are seemingly unable to make rational decisions on whether to accept a controversial

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<sup>62</sup> Fahid Qurashi 'Just get on with it: Implementing the Prevent duty in higher education and the role of academic expertise' (2017) 12(3) *Education, Citizenship and Social Justice* SAGE Journals 201

<sup>63</sup> *Ibid*

<sup>64</sup> *Ibid*

<sup>65</sup> *Ibid*

ideology.<sup>66</sup> We feel that the legal emphasis on the need for both students and lecturers to challenge any controversial ideas on campus needs to be stronger, and that the Prevent duty guidance for Universities in England and Wales needs to be re-structured and re-weighted to emphasise this issue.

## 7. The bigger picture

Earlier in this chapter, we outlined the legal framework that posits the Prevent duty in Universities as a human rights issues, and one that could well be adjudicated upon by the courts. Unfortunately, as far as judicial commentary provides, the situation remains unclear. The recent case of *Butt* is the only case to date to touch on this complex issue. As the claimant possessed perceived extremist views, the Extremism Analysis Unit (EAU) processed Butt's personal data on three separate occasions, following publicly expressing views at universities likening homosexuals to paedophiles and supporting female genital mutilation.<sup>67</sup> The challenge from the claimant was based on two grounds, firstly the lawfulness of government guidance documents for the prevent duty, more specifically, PDG (Prevent Duty Guidance for England and Wales) and HEPDG (Higher Education Prevent Duty Guidance). The second ground of challenge was the 'collection storage and dissemination' of data personal to him, as undertaken by the EAU. Both grounds were rejected in this case, firstly since Butt's standing as a 'victim' under section 7 of the Human Rights Act 1998 could not be established in a case of this type, since Butt himself was not a student or an academic, but a visiting speaker with no particular positive right to speak at universities. His freedom of expression, in the sense of his ability to espouse his radical Islamic views on a website he edited, was essentially unaffected by the fact that far fewer universities and student societies were inviting him to speak; and he had not been banned from campuses as such.<sup>68</sup>

In an application, in part, of the 2015 police intelligence database case of *Catt*, where it was found that the retention and storage of personal information was not an unlawful infringement of the article 8 rights of the claimant<sup>69</sup>, it was also held in *Butt* that the collection, storage and dissemination of the three analyses of Butt's potential extremism was not a breach of his Article 8 right to respect for private and family life<sup>70</sup>. Notably his expression of his views on a public website was not regarded as his private information, nor was his record of publicly speaking (at universities) on controversial views. The key factor determining that Article 8 ECHR was not engaged in the case

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<sup>66</sup> *Ibid* 205

<sup>67</sup> [2017] EWHC 1930 at para. 202.

<sup>68</sup> *Butt* at paras. 81-95.

<sup>69</sup> *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9

<sup>70</sup> *Butt* at paras. 254-255.

was that Butt did not have 'a reasonable expectation of privacy'<sup>71</sup>, a test notably implemented in the other key police intelligence case of *JR 38*.<sup>72</sup> The question is then: what would be a reasonable expectation of privacy regarding the Prevent Duty? Views expressed in a classroom by a student, by way of contrast with the issue of campus speeches delivered by Dr. Butt, may well be more likely to be accorded at least some greater human rights protection under the 'reasonable expectation of privacy test' - as the airing of formative views in a classroom exercise might be more expected to be protected by privacy rights.

## 8. Conclusions

Despite the varied problems or particular concerns raised by Rights Watch (UK)<sup>73</sup>, academic commentators and the Equality and Human Rights Commission, the Prevent duty is currently imposed upon the authorities specified under schedule 6 of the Counter-Terrorism and Security Act. Several academic writers highlight the flaws within the Prevent duty such as vague and ambiguous terms and contradicting legislative principles, and the problems public authorities face when carrying out their legal duty, with the possibility of infringing the human rights set out by the ECHR, under articles 8, 9, 10 and 14. However, until a challenge is brought to the courts by a student or lecturer, directly concerning the lawfulness of the content within the Prevent guidance, or the structures of the 2015 Act, and whether it is legally valid, it is unlikely that campaigning alone will effect greater political change around the Prevent strategy and duty.

That said, one of our survey respondents summarised our logical conclusion: 'An important means of countering extreme views is to discuss them openly, [to] subject ideas to counter arguments and critical thinking.' And if this is so, then we must consider a legally more binding duty to discuss extreme views in the classroom, and a legally- or policy-based mechanism to give individual educators in their classrooms or courses greater freedom to decide when to *challenge, rather than to report*, a student in their class.

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<sup>71</sup> *Butt* at paras. 227-237.

<sup>72</sup> *In re JR 38* [2015] UKSC 42; although see the criticism by Lord Kerr of a simplistic application of the reasonable expectation of privacy at para. 56.

<sup>73</sup> Rights Watch UK, 'Rights Watch (UK) Launches Landmark Report on the Prevent Strategy at the Houses of Parliament' (Rights Watch UK, 22 September 2016), from <http://www.rwuk.org/rights-watch-uk-launches-landmark-report/> (accessed 4 January 2018)