SUSPICION, DISCRIMINATION AND SURVEILLANCE:

The impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe

european network against racism

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Foreword

When ENAR decided to go forward and document the impact of counter-terrorism and counter radicalisation measures, Europe was reeling from deadly attacks in Paris (2015) that triggered a range of policy discussions that resulted in further securisation of Europe.

Several human rights organisations, including ENAR, were quick to warn policy-makers about the potential infringement of human rights and discrimination and stigmatisation of certain racialised groups. We developed a toolkit to support organisations to document the impact of discrimination and our own research project.

Through this research, we have seen the impact of these security measures goes very deep, and the stigmatisation of certain groups can have a psychological and traumatic impact on individuals and communities. In this report, we highlight how structural racism can manifest in Europe through policy-making developed under the cover of securitising Europe. In practice, policing and surveillance systems used in the name of safety can be harmful and used as a fishing expedition to capture data and create environments where people feel unsafe.

This report is the culmination of years of painstaking work, engagement with different groups, communities, policy-makers and practitioners. We've taken the time to listen to people's experience and document the result of structural racism and Islamophobia in policy-making. We offer solutions to these harms and reminders of our human rights framework and hope that this report serves as a significant tool for all stakeholders to re-evaluate their actions and priorities.

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Glossary

Islamophobia is a specific form of racism that refers to acts of violence and discrimination, as well as racist speech, fuelled by historical abuses and negative stereotyping and leading to exclusion and dehumanisation of Muslims, and all those perceived as such. It is a form of racism in the sense that it is the result of the social construction of a group as a race and to which specificities and stereotypes are attributed, in this case real or perceived religious belonging being used as a proxy for race. Consequently, even those who choose not to practice Islam - but who are perceived as Muslim because of their ethnicity, migration background or the wearing of other religious symbols - are subjected to discrimination. Furthermore, it is explicitly acknowledged that referring to Islamophobia is different from censorship and that critical discussions on religion and religious practices should still be possible.[1]

Structural racism is a product of a system in which public policies, institutional practices, cultural representations and other norms work in various, often reinforcing ways to perpetuate racial group inequity, and has been a feature of the social, economic and political systems in which we all exist.[2]

Institutional racism has been used to describe not only explicit manifestations of racism at direction and policy level, but also the unwitting discrimination at the organisation level. Indirect, institutional racism is more subtle, hidden but equally pervasive and damaging in nature.14It is seen in "processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people".[3]

Discrimination can be direct, indirect or through harassment. EU law provides that direct discrimination occurs 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on' protected grounds such as race. ethnicity or religion.[4] Indirect discrimination occurs 'where an apparently neutral provision, criterion or practice would put persons having' a particular protected characteristic is put 'at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[5] Harassment is deemed to be a form of discrimination in EU anti-discrimination and is defined as 'unwanted conduct' related to protected ground that has 'the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.[6]

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1   Dermana Seta, *Forgotten Women: the Impact of Islamophobia on Women*, (ENAR, 2016) <https://www.enar-eu.org/IMG/pdf/forgot-tenwomenpublication_lr_final_with_latest_corrections.pdf>
2   Ojeaku Nwabuzo, *Racist Crime and institutional Racism in Europe: ENAR Shadow Report 2014-18*, (ENAR, 2019) <https://www.enar-eu.org/IMG/pdf/shadowreport2018_final.pdf>
3   ibid.
4   Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art 2(2)(a).
5   ibid, art 2(2)(b).
6   ibid, art 2(3).

Introduction

The 2001 terrorist attacks on New York and Washington DC instigated a process of restructuring the global, regional and national counter-terrorism normative frameworks and institutional architecture. At the global level the UN Security Council, under its mandate to maintain international peace and security and through the adoption of resolutions binding all states, has been at the forefront of establishing the new global counter-terrorism framework, obliging all states to implement far-reaching counter-terrorism measures.[7] In Europe, the European Union and the Council of Europe have played a pivotal role in developing counter-terrorism law and policy. The Council of the European Union issued its first Framework Decision on Combatting Terrorism in 2002 (hereinafter, FDCT 2002).[8] In 2005 it adopted a counter-terrorism strategy[9] and a Strategy for Combatting Radicalisation and Recruitment to Terrorism.[10] In fact, since 2001 the EU has adopted well in excess of 200 counter-terrorism related measures.[11] In December 2020, the Commission issued its *Counter-terrorism Agenda for the EU* proposing further measures and activities.[12] The Council of Europe adopted a Convention on the Prevention of Terrorism in 2005,[13] adding an Additional Protocol to the Convention in 2015,[14] and a Counter-terrorism Strategy in 2018.[15]

There has always been concern about the impact of the proliferation of international counter-terrorism laws and policies on human rights, and there is mounting alarm at the marginalisation of human rights norms, institutions, and civil society actors in the emerging international, regional and national counter-terrorism policy frameworks and architecture. UN Human Rights Rapporteurs have documented the intentional use of counter-terrorism security measures in enabling the violation of human rights.[16] The UN Special Rapporteur on Protecting Human Rights and Fundamental Freedoms while Countering Terrorism has warned of the 'ongoing misuse of counter-terrorism law and administrative practices to quell legitimate dissent and limit freedom of expression'.[17] The Special Rapporteur observed that 'the instrumentalization of counter-terrorism, the prevention and countering of violent extremism, and protection of national security measures is brutal, with members of civil society arrested and detained on spurious grounds'.[18] The EU Fundamental

7   UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373; UNSC Res 1390 (28 January 2002) UN Doc S/RES/1390; UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624; UNSC Res 2170(15 August 2014) UN Doc S/RES/2170; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178; UNSC Res 2341 (13 February 2017) UN Doc S/RES/2341; UNSC Res 2354 (24 May 2017) UN Doc S/RES/2354; UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368; UNSC Res 2370(2 August 2017) UN Doc S/RES/2370; UNSC Res 2395 (21 December 2017) UN Doc S/RES/2395; UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396; UNSC Res 2462 (28 March 2019) UN Doc S/RES/2462;

8   Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164/3, amended by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21.

9   Council of the European Union (2005) *The European Union Counter-Terrorism Strategy*, 14469/4/05 REV 4, 30 November.

10   Council of the European Union (2005) *The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism*, 14781/1/05, 24 November.

11   Ben Hayes and Chris Jones, *Catalogue of EU Counter-Terrorism measures adopted since 11 September 2001* (Statewatch, 2013) 22. <https://www.statewatch.org/media/documents/news/2013/dec/secile-catalogue-of-EU-counter-terrorism-measures.pdf> accessed 01 February 2021.

12   European Commission, 'A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond' COM (2020) 795 final.

13   Council of Europe Convention on the Prevention of Terrorism, CETS No.196.

14   Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No.217.

15   Council of Europe, 'Counter-Terrorism Strategy (2018-2022)' CM (2018) 86-addfinal. The Additional Protocol has also been ratified by the EU, see Council Decision (EU) 2018/890 of 4 June 2018 on the conclusion, on behalf of the European Union, of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism [2018] OJ L159/15.

16   UNGA, Human Rights Council Thirty-eighth Session 18 June – 6 July 2018 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association' (26 July 2018) UN Doc A/HRC/38/34, para 21-27; UNGA, Seventy-third Session 'Interim report of the Special Rapporteur on freedom of religion or belief' (5 September 2018) UN Doc A/73/362, para 22-55.

17   UNGA, Seventy-third Session 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (3 September 2018) UN Doc A/73/361, para 7. See for example also: CCPR/C/SWZ/CO/1, para 36; CAT/C/RUS/CO/6, paras 34 and 35.

18   UNGA, Human Rights Council Fortieth Session 25 February – 22 March 2019 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (1 March 2019) UN Doc A/HRC/40/52, para 8.

Rights Agency warns that the EU's 'efforts to provide safety for its citizens', through 'stringent law enforcement – without thorough fundamental rights safeguards – could mean that the freedoms the EU currently enjoys are encroached upon to the long-term detriment of all'.[19] The risks faced by minorities are particularly acute. The UN Special Rapporteur on Contemporary Forms of Racism and Xenophobia has raised concerns that 'racist and xenophobic ideologies rooted in ethno-nationalism regularly combine with national security fears and economic anxieties to violate the human rights of non-citizens, indigenous peoples and minorities on the basis of race, ethnicity, national origin and religion.'[20] The European Commission against Racism and Intolerance (ECRI) has observed 'a dangerous "normalisation" of Islamophobic prejudice' as 'Islam and Muslims continue to be associated with radicalization, violence and terrorism'.[21]

> The 2017 Directive on Combatting Terrorism (hereinafter, DCT) requires the European Commission to submit a report by September 2021 on the DCT's impact 'on fundamental rights and freedoms, including on non-discrimination, and the rule of law'.[22]

In anticipation of this forthcoming review, this ENAR report documents experiences of counter-terrorism and counter-radicalisation measures by members of groups that are at heightened risk of facing discrimination and racism. The analysis and research recognises that the EU Decisions and Directive on combatting terrorism, while playing a role in structuring and influencing these national developments, fall into a policy landscape that this shaped by heterogeneous, competing national and international institutional actors. Furthermore, security policies, practices and discourse are moulded by local social, political, economic and cultural contexts that generate counter-terrorism policies and practices. This calls for careful attention to the ways in which specific national contexts construct and implement security policies and practices. The ENAR research therefore focuses on five EU states: France, Germany, Hungary, Poland and Spain. This research will contribute to understanding how EU and state-level policies are experienced, and their impact on minority groups' exercise of fundamental rights and freedoms in these states.

This report begins with an outline of the research methodology. Part I then outlines the legal and policy context. Chapter 1 locates current experiences of terrorist attacks in a longer historical context and outlines key elements of the DCT and EU counter-terrorism and counter-radicalisation strategies. Chapter 2 examines the connection between the legal frameworks and policy strategies and processes of racialisation, Islamophobia and discrimination. Chapter 3 examines the extent to which the development of EU counter-terrorism measures takes into consideration and provides protection for human rights and the rule of law. Chapter 4 sets out some of the main legal and policy developments in each case-study state. Part II of the report sets out findings from focus groups and stakeholder interviews. It is organised around three interconnected themes that emerge from the qualitative data: securitised suspicion of Muslim identities and religious practices (Chapter 5), experiences of securitised discrimination, harassment and abuse (Chapter 6), and the impact of living under intense state and social surveillance (Chapter 7). Part III outlines some of the key conclusions emerging from this research and proposes changes to EU policymakers for more effective and robust protection of human rights, equality and the rule of law.

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19   Fundamental Rights Agency, 'Embedding Fundamental Rights in the Security Agenda', 5 <https://fra.europa.eu/en/publication/2015/embedding-fundamental-rights-security-agenda> accessed 01 February 2021.

20   UNGA, Human Rights Council Thirty-eighth Session 18 June – 6 July 2018 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (25 April 2018) UN Doc A/HRC/38/52, para 63.

21   European Commission against Racism and Intolerance, 'Annual Report on ECRI's Activities Covering the Period from 1 January to 31 December 2018' (Strasbourg, Council of Europe, 2019), 10

22   Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6, Art 29(2).

Methodology

An effective examination of impacts on fundamental rights cannot just be a disembodied analysis of legal principles: it also needs to engage with and understand the lived experiences of affected individuals, groups, and communities.[23] Narratives from the experiences of racialised minorities have been particularly important in providing evidence of individual and systemic discrimination.[24] The study of the impact of counter-terrorism and counter-radicalisation measures in Europe, particularly on minorities that are the target or focus of such policies, remains limited and is largely based on research in the UK.[25] To contribute to the Commission's review of the impact of the DCT, ENAR has conducted research examining the experiences of counter-terrorism and counter-radicalisation measures by members of racialised groups that are at heightened risk of facing discrimination and racism. This report aims to understand how state counter-terrorism and counter-radicalisation policies are experienced and their impact on the exercise of fundamental rights and freedoms on racialised groups at risk of experiencing discrimination.

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23   Asim Qureshi, 'Experiencing the war "of" terror: a call to the critical terrorism studies community' (2020) 13 *Critical Studies on Terrorism* 485.

24   Carol Tator and Francis Henry, *Racial Profiling in Canada: Challenging the Myth of a Few Bad Apples* (University of Toronto Press, Toronto, 2006), Ch. 5.

25   Most such studies are qualitative and focus on the UK. See for example J Busher and L Jerome (eds.) *The Prevent Duty in Education: Impact, Enactment and Implications* (Palgrave MacMillan, London, 2020); MS Abbas, 'Producing 'Internal Suspect Bodies': Divisive Effects of UK Counter-terrorism Measures on Muslim Communities in Leeds and Bradford' (2019) 70 *British Journal of Sociology* 261; N Kapoor and K Narkowicz, 'Unmaking Citizens: Passport Removals, Pre-Emptive Policing and the Reimagining of Colonial Governmentalities' (2019) 42 *Ethnic and Racial Studies* 45; C Heath-Kelly and E Strausz, 'Counter-terrorism in the NHS: Evaluating the Prevent Duty Safeguarding the NHS' (University of Warwick, Coventry, 2018); L Jarvis and M Lister, '"As a woman…"; "As a Muslim…": Subjects, Positions and Counterterrorism Powers in the United Kingdom' (2017) 37 *Critical Social Policy* 245; L Blackwood, N Hopkins and S Reicher, 'From Theorizing Radicalization to Surveillance Practices: Muslims in the Cross Hairs of Scrutiny' (2016) 37 *Political Psychology* 597; L Jarvis and M Lister, 'Disconnected Citizenship? The Impacts of Anti-Terrorism Policy on Citizenship in the UK' (2013) 61 *Political Studies* 656; T Choudhury and H Fenwick *The Impact of Counter-Terrorism Measures on Muslim Communities in Britain* (, Equality and Human Rights Commission, London, 2011); L Zahra-Macdonald, 'Securing Identities, Resisting Terror: Muslim Youth Work in the UK and its Implications for Security' (2011) 39 *Religion, State and Society* 177; I Awan, '"I Am a Muslim Not an Extremist": How the Prevent Strategy Has Constructed a "Suspect" Community' (2012) 40 *Politics and Policy*; M McGovern and A Tobin, *Countering Terror or Counter-Productive: Comparing Irish and British Muslim Experiences of Counter-Insurgency Law and Policy*, (Edge Hill University, Ormskirk, 2010); S Vertigans, 'British Muslims and the UK Government's "War on Terror" Within: Evidence of a Clash of Civilizations or Emergent De-Civilizing Processes?' (2013) 61 *The British Journal of Sociology* 26; V Brittain, 'Besieged in Britain' (2009) 50 *Race and Class* 1; A Kundnani *Spooked! How Not to Prevent Violent Extremism*, (Institute of Race Relations, London, 2009); G Mythen and S Walklate, '"I'm a Muslim, but I'm not a Terrorist": Victimization, Risky Identities and the Performance of Safety", (2009) 49 British Journal of Criminology 736; B Spalek and A Imtoual 'Muslim Communities and Counter-Terror Responses: "Hard" Approaches to Community Engagement in the UK and Australia' (2007) 27 *Journal of Muslim Minority Affairs* 185; A Blick, T Choudhury and S Weir, *The Rules of the Game: Terrorism, Community and Human Rights* (Joseph Rowntree Reform Trust, York, 2006).

The data presented in this report is based on research carried out in five EU states: France, Germany, Hungary, Poland, and Spain. Of these, France, Germany and Spain have endured intense periods of political violence at different points over the past 60 years and have consequently developed differing domestic policy responses. By contrast, Hungary and Poland have had limited experience of terrorism and their legal and policy frameworks have developed largely to meet international and European legal obligations.

This research project started in October 2018. Researchers with experience, expertise and knowledge of each national context undertook initial desk research and field-data collection. Field research was conducted first in Germany and Poland (December 2018–May 2019) and later in France, Hungary and Spain, (June–December 2019). A common methodology was applied across all research sites and carried out in three phases. In phase 1, researchers collected information about and reviewed existing research and analysis of counter-terrorism and counter-radicalisation laws and policies. The review incorporated academic research, reports by public bodies, parliamentary debates, newspaper articles and NGO reports. The national researchers' preliminary report on each state identified the groups and communities that were a particular focus or target of counter-terrorism and counter-radicalisation measures and contributed to identifying key actors and organisations with knowledge, understanding and experience of policy development and implementation.

In phase 2, the national researchers collected original primary data using two methods: (1) expert interviews with key stakeholders and (2) focus group interviews with members of groups at risk of discrimination who are a target for counter-terrorism and counter-radicalisation measures. The expert interviews provide insights from individuals who, through their work or roles in community institutions and organisation, offer a broader perspective on the impact of security policies. By contrast, the focus group participants provide an account of how security measures are experienced and understood and their impact on the everyday lives of ordinary individuals who are not directly involved in implementing or developing security policy or leading community organisations.

The ambition was to complete at least 15 expert interviews in each research country. The targets for these were disaggregated into five broad categories: policymakers; practitioners; legal experts and human-rights NGOs; other civil society organisations; and researchers/academic experts, with at least one interviewee from each category.

In total 96 expert interviews were concluded: 16 each in Germany, Hungary and Poland, and 24 in both France and Spain. Of the 96 interviews, over a third were with key actors in civil society organisations including ethnic associations, mosques and religious associations, women's organisations, and community centres providing education, youth or other social services. Over a quarter of the interviews were with practitioners implementing counter-terrorism or counter-radicalisation policies including police officers, individuals working in the security services, teachers, youth workers, social workers, prison officers and probation staff. There were interviews with 13 academic experts, who were able to draw on their own research and experience of the field to provide information and analysis of the human rights implications and impacts of legislation and policy. The 12 legal and human rights experts included both lawyers representing clients directly affected by counter-terrorism measures and people working in NGOs analysing and documenting the impact of security legislation and policy on human rights. Policymakers were contacted in all five states, but it was only possible to secure interviews in Germany, Hungary and Poland.

TABLE 1. EXPERT INTERVIEW SAMPLE DISTRIBUTION BY CATEGORY OF INTERVIEWEE

Category of Interviewee	Number of interviews
Policymakers	3
Practitioners	28
Legal experts/human rights NGOs	12
Other civil society organisation	36
Researchers/academic experts	13
Other	4
Total	**96**

Potential interviewees were approached by the national researchers via email correspondence which included a letter from ENAR translated into the appropriate national language and explaining the context and purpose of the research. Interviewees signed interview consent forms and their interviews were conducted on the basis of anonymity. The expert interviews were semi-structured and in-depth and were conducted in the national language of the state. The majority were carried out in person, with a few over the phone or using online communication platforms. The interviews lasted between 30 and 90 minutes. There was no requirement to record the expert interviews, although in several cases a researcher recorded an interview for convenience. The national researchers made notes during the interviews, and summarised these into a memo in English.

The most direct testimony of the impact of counter-terrorism measures is provided by the focus group interviews. A total of 115 participants met as 18 focus groups: 3 each in France, Germany, Poland and Spain, and 5 in Hungary. The general demographics of the focus group participants are summarised in Table 2.

TABLE 2. FOCUS GROUP SAMPLE DEMOGRAPHICS

	No. of focus group participants	% of all focus group participants
Gender		
Male	47	41%
Female	68	59%
Age		
16–30	61	53%
31–45	38	33%
45+	7	6%
Data not recorded	9	8%
Country of Birth		
Born in the EU	76	66%
Born outside EU	33	29%
Data not recorded	6	5%
Country of citizenship		
EU citizen	80	70%
Non-EU citizen (only)	28	24%
Data not recorded	7	6%
Location of fieldwork		
Germany	24	21%
France	26	23%
Hungary	30	26%
Poland	22	19%
Spain	13	11%

Participants were recruited by the national researchers using a variety of strategies including personal networks, snowball sampling, and local civil society organisations. As the aim of the focus groups was to gain insights into

the everyday experiences of the impact of security measures, leaders of community organisations were excluded from participation, although such individuals may have been invited to be interviewed as key stakeholders. Information about the project was provided to participants in the language they were able to understand and they were required to provide consent to participate in the interviews. Participants were given 10 euros to cover their travel and time costs. Focus groups were carried out in the language that participants were most familiar and comfortable with. In Poland, where one focus group was conducted in Russian, the national researcher required the assistance of an interpreter. With the exception of one of the focus groups in France, all focus group discussions were audio-recorded, transcribed and then translated into English.

Phase 3 of the research was a feedback and discussion round-table with a range of stakeholders (i.e. policy-makers, practitioners, civil society actors and academic experts) in each case-study state. The round-table meetings included a presentation of emergent findings from the country, a discussion of these findings, and initial interpretation of the data. The purpose of these sessions was to invite comment and challenges from key experts and stakeholders and to consider policy implications of the findings in the national context. Anonymised field notes were taken at each of these sessions. Due to the COVID-19 pandemic it was not possible to complete a round-table session in France, and Poland's was a virtual round table. In Germany, two separate round-tables covered policy-makers and practitioners, and civil society organisations.

This report sets out the key findings from the five states, identifying key points and common patterns in the data. Alongside this report, ENAR is publishing a summary country report focusing on relevant key findings and national-level recommendations from each state. The recommendations in this report focus mainly on EU policy.

Part I:
Legal and Policy Context

1. THE EUROPEAN UNION, TERRORISM AND COUNTER-TERRORISM

This chapter examines the pivotal role of the EU in transforming Europe's counter-terrorism law and policy landscape since 2001. It shows how intensified European coordination and cooperation – developing pre-emptive offences, enabling intensified surveillance and moving from tackling terrorism to preventing radicalisation to violent extremism – has extended the reach of EU law and policy but has failed to pay sufficient attention to its impact on human rights and the rule of law. As this report will show, the impact of these laws and policies most directly affects groups already at risk of discrimination, and so risks reinforcing their exclusion and marginalisation.

1.1 Terrorism in the European Union

The modern conception of terrorism has its origins in the violence arising out of the French revolution.[26] It remains a contested concept, used to cover a wide and diverse range of actors and groups whose definition has eluded terrorism experts[27] and the international community 'because it involves difficult questions of when violence is justified or legitimate, by whom, and for what purposes'.[28]

In Europe, policy responses to terrorism developed since 2001 are themselves shaped by earlier painful memories and harrowing experiences of terrorist violence. In Western Europe there were close to 3,000 deaths from terrorism between the end of the Second World War and 2001.[29] Of the 15,484 terrorist attacks recorded in 10 EU states between 1970 and 2016, 4 out of 5 occurred before 2001.[30] The 1970s and 1980s were the deadliest decades, with at least 150 people killed in terrorist acts every year.[31]

For some European states, current counter-terrorism policies and practices also have their roots in colonial counter-insurgency operations.[32]

The terrorist attacks in Europe range across the full spectrum of political causes. Europol's reports on terrorism trends identify five broad categories of terrorism: ethno-nationalist and separatist, jihadist,[33] left-wing and anarchist, right-wing, and single-issue. Until 2001 domestic counter-terrorism laws and policies in Europe developed largely in response to ethno-nationalist and separatist conflicts, particularly in France, Spain, and the UK, and to violence from groups identified as far-left, far-right and anarchist. In France, the Corsican National Liberation Front carried out 637 or the 2,580 terrorist attacks that occurred between 1970 and 2014.[34] In Spain, the Basque separatist group *Euskadi Ta Askatasuna* (ETA) carried out over 2,000 terrorist attacks.[35] Even today, the vast majority of terrorist incidents in Europe relate to ethno-nationalist and separatist groups. They account for 70% of all terrorist attacks planned or carried out between 2006 and 2019.[36] During this period Europol reported 365 left-wing and anarchist attacks, 125 Islamist/Jihadist attacks and 31 right-wing attacks.[37]

These figures probably underestimate the extent of right-wing terrorism. The 2019 Right Wing Terrorism and Violence Trend report identifies 757 incidents which led to 326 deaths in Western Europe in 1990–2018. These killings are likely to be the tip of the iceberg in terms of right-wing attacks and violence, as racist and political murders 'rarely occur in complete isolation from less severe forms

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26 Gerard Chaliand and Arnaud Blin, *The History of Terrorism from Antiquity to Al Qaeda* (University of California Press, 2007).

27 Lisa Stampnitzky, *Disciplining Terror: How Experts Invented 'Terrorism'* (CUP, 2013).

28 Ben Saul, 'Minorities and Counter-Terrorism Law' (2018) 15 *European Yearbook of Minority Issues Online* 1, 5. See also Ben Saul, *Defining Terrorism in International Law* (OUP, 2006); Gilbert Ramsay, 'Why Terrorism Can, but Should Not be Defined' (2015) 8 *Critical Studies on Terrorism* 211.

29 Jan Oskar Engene, 'Five Decades of Terrorism in Europe: The TWEED Dataset' (2007) 44 *Journal of Peace Research* 109, 116.

30 Mirja Gutheil and others, 'EU Member States' policies and laws on persons suspected of terrorism-related crimes' (Study for the LIBE Committee, European Parliament, 2017), 27.

31 'People Killed by Terrorism per Year in Western Europe 1970-2015' <https://www.datagraver.com/case/people-killed-by-terrorism-per-year-in-western-europe-1970-2015> accessed 01 February 2021

32 See David Miller and Rizwan Sabir, "Counter-Terrorism as Counterinsurgency in the UK War on Terror" in S. Poynting (ed.) *Counterterrorism and State Political Violence: The 'War on Terror as Terror'* (Routledge, 2012).

33 When EUROPOL's EU Terrorism Situation and Tread (TESAT) reports were first published in 2006 they called this category 'Islamist', later changing it to 'religiously inspired' and now using the term 'jihadist'.

34 Erin Miller, 'Mass-Fatality, Coordinated Attacks Worldwide, and Terrorism in France' (National Consortium for the Study of Terrorism and Responses to Terrorism, Background Report, 2015), 5.

35 Gutheil, 'EU Member States' policies and laws on persons suspected of terrorism related crimes' (n24), 26.

36 Data from TESAT reports of 2007–2019 show that of 3,663 failed, foiled or successful terrorist attacks in the EU, 2613 were made by separatist and nationalists groups.

37 Data from TESAT reports of 2007-2019.

of violence'.[38] This inattention to right-wing terrorism is also seen in discussions of foreign-terrorist fighters, where there is less scrutiny of European foreign fighters travelling to Ukraine than to Syria.[39] Recognising growing links and coordination between European far-right movements and others outside the EU, in 2020 Europol reported on right-wing terrorist attacks outside the EU for the first time.[40] Following large-scale terrorist attacks in Norway, New Zealand, Canada[41] and the USA,[42] there are signs of growing concern of the threat from far-right terrorism in Europe. The European Commissioner for the Security Union noted the 'need to keep in mind the growing menace of right-wing extremism'.[43] In 2019, the EU Counter-terrorism Coordinator published his first discussion paper on right-wing extremism and terrorism in the EU.[44] Following killings in Hannau, the German Justice Minister stated that far-right terrorism was now the biggest threat to democracy in Germany.[45]

While separatist and nationalist attacks remain the most numerous and right-wing terrorism may be undercounted, in Europe the majority of fatalities from terrorism in the last decade have been from ISIS- or Al-Qaeda-related terrorism.[46] Since 2001 devastating and deadly Al-Qaeda- and ISIS-inspired terrorist attacks across Western Europe which have left over 600 dead have driven the intensified development of EU counter-terrorism law and policy.

EU policies have contributed to embedding and sustaining three fundamental innovations in response to terrorism across Member States since 2001. First, expanding of the scope of criminal law to include 'pre-emptive' offences; second, focusing interventions on preventing radicalisation to violent extremism; and third, increasing surveillance through increased data-sharing. While all three developments pose significant risks to human rights and the rule of law, the focus in this report is on the first two.

1.2 The Development of EU Counter-terrorism Policies

The EU's emphasis on criminal justice reflects and reinforces institutional dynamics focusing attention on areas where the Union has competence to develop or influence policy. The EU has competence to act on criminal justice and to establish an area of 'freedom, security and justice' by taking measures to prevent and combat crime.[47] It can seek to achieve greater security through enhanced cooperation, the coordination of relevant national authorities, and the 'approximation of criminal laws'.[48] In relation to terrorism, while the EU has legislative competence to 'establish minimum rules concerning the definition of criminal offences and sanctions',[49] its room for action is constrained by the need to respect Member States' own responsibilities on issues of internal security[50] and the recognition that national security remains the 'sole responsibility of each Member State'.[51] Regarding policing, the EU's competence is limited to enhanced cooperation amongst EU Member States and between the EU and third countries.

Radicalisation leading to violent extremism and terrorism is causing concern in many Member States and beyond. The Netherlands and the UK have been among the states at the forefront of developing counter-radicalisation policies. The scope for EU action on radicalisation remains constrained by the limits of its competence to act. Unable to mandate action, the EU concentrates on influencing and shaping national policies by developing strategies, establishing platforms, creating networks, exchanging best practice, and funding research. Its strategies on terrorism and radicalisation have become integrated into broader EU internal security and external relations policies, and featured in The Hague (2004) and Stockholm (2009) programmes. In the latter, the Council called on Member States to 'develop prevention mechanisms, in particular to allow the early detection of signs of radicalisation', to 'improve initiatives to counter radicalisation in all vulnerable populations', and to 'identify best practices

38 Jacob Aasland Ravndal and others, 'RTV Trend Report 2019 Right Wing Terrorism and Violence in Western Europe, 1990–2018' (Centre for Research on Extremism, University of Oslo, 2019), 4.

39 Egle Murauskaite, *Foreign Fighters in Ukraine: Assessing Potential Risk* (Vilnius, Institute for Policy Analysis, 2020).

40 Europol, *European Union - Terrorism Situation and Trend Report 2020* (European Police Office, 2020), 77–78.

41 Kevin Dougherty, 'Canadian PM says mosque shooting a 'terrorist attack on Muslims' *Reuters* 30 January 2017, < https://www.reuters.com/article/us-canada-mosque-shooting-idUSKBN15E04S> accessed 01 February 2021.

42 Jenny Gross, 'Far-Right Groups Are Behind Most U.S. Terrorist Attacks, Report Finds' *New York Times* (24 October 2020).

43 Mathew Tempest, 'Commissioner warns of 'growing menace' of right-wing terrorism in EU' *EURACTIV* (27 March 2017) <https://www.euractiv.com/section/politics/news/commissioner-warns-of-growing-menace-of-right-wing-terrorism-in-eu/> accessed 1 February 2021.

44 Council of the European Union, 'Right-wing Violent Extremism and Terrorism in the European Union: Discussion Paper' 11756/19 *Limite*, 30 August 2019.

45 Melissa Eddy, 'Far-Right Terrorism is No. 1 Threat, Germany is told after Attack' *New York Times* (21 February 2020).

46 Seth Jones, Catrina Doxsee and Nicholas Harrington, *The Right-wing Terrorism Threat in Europe* (Centre for Strategic International Studies, Washington DC, 2020). Between 2009 and 2020 69% of fatalities from terrorist attacks resulted from Al-Qaeda and ISIS-related attacks, and 22% were related to far-right individuals or networks.

47 Art 3(2) TEU.
48 Art 67(3) TFEU.
49 Art 83 TFEU.
50 Art 72 TFEU.
51 Art 4(2) TEU.

and specific operational tools to be shared with other Member States'.[52]

A central plank of the EU's work in this area has been the establishment in 2011 of the Radicalisation Awareness Network (RAN); by 2014 this had evolved into the RAN Centre for Excellence. The Centre brings together policy-makers, law-enforcement and security officials, prosecutors, local authorities, academics, field experts and civil society organisations to 'pool experiences, knowledge and good practices to enhance awareness of radicalisation'.[53] Building on the EU's 2014 Counter-radicalisation Strategy, which argues that effective prevention of radicalisation requires the involvement of frontline workers,[54] RAN offers training in understanding the process of radicalisation to enable Europe's social workers, healthcare professionals, educators, and police, prison and probation staff to identify individuals in the process of being radicalised.[55] Notwithstanding the EU Court of Auditors' warning that RAN's 'achievements of specific actions are often measured in terms of amount of activity rather than effectiveness', the Commission's counter-radicalisation work has continued to intensify and expand.[56] Following a report by a High-Level Expert Group on Radicalisation,[57] the Commission established a Steering Group on Radicalisation.

The EU's increased counter-terrorism action has been matched by massive financial investment. Estimated EU spending on counter-terrorism increased from 5.7 million euros in 2002 to 93.5 million in 2009. In 2016, EU spending on 'Security and Citizenship' stood at over 4,000 million euros.[58]

1.2.1. Terrorism, pre-crime and pre-emption

After 11 September 2001 the EU moved swiftly to mobilise it powers and resources in the fight against terrorism. Among the measures to have the most significant, far-reaching and direct impacts on groups at risk of discrimination in Europe was the adoption in 2002 of the FDCT. This instigated a 'viral propagation of anti-terrorism law in Europe' as the number of states with counter-terrorism legislation leapt from 6 before 2001 to 22 by the time an updated and revised Framework Decision was adopted in 2008.[59] This extensive expansion of criminalization, initiated in response to extraordinary events, does not fall under the tradition of temporary emergency counter-terrorism measures but instead inscribes permanent changes in the criminal law and procedure of Member States.[60] The 2017 Directive on Combatting Terrorism (DCT), introduced in the wake of the attacks on Paris in 2015, reaffirms the provisions of the 2002 and 2008 FDCTs while incorporating new measures on foreign terrorist fighters, cybercrime and radicalisation.[61]

The FDCTs established a common European definition of terrorism[62] and required states to ensure that their national laws criminalized nine 'terrorist acts',[63] as well as 'terrorism related offences'[64] and offences linked to terrorism.[65] At

> "The definition of terrorism and consequently its evaluation appears to be highly dependent on the a priori assumptions one has about political reality in general and about terrorism in particular and its causality."
>
> *Noreen Van Elk*

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52   The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens [2010] C 115/01. See also Cian Murphy and Diego Acosta Arcarazo, 'Rethinking Europe's Freedom, Security and Justice' in Diego Acosta Arcarazo and Cian Murphy (eds.), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing, 2014).

53   Commission, 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe' COM (2010) 673.

54   Commission, 'Preventing Radicalisation to Terrorism and Violent Extremism Strengthening the EU's Response' COM (2013) 941 Final, 4.

55   *Ibid*, 6.

56   European Court of Auditors, 'Tackling Radicalisation that Leads to Terrorism: The Commission Addressed the Needs of Member States, but with Some Shortfalls in Coordination and Evaluation' (2018).

57   High-Level Commission Expert Group on Radicalisation, *Final Report* (Publication Office of the European Union, Luxembourg, 2018)

58   Gianluca Sgueo, 'Counter-terrorism Funding in the EU Budget' (Briefing, European Parliamentary Research Service, 2016).

59   Kent Roach, 'Introduction: Comparative counter-terrorism law comes of age' in Kent Roach (ed.), *Comparative Counter-Terrorism* (CUP, 2013) 29.

60   Claire Hamilton, 'The European Union Sword or Shield: Comparing Counter-Terrorism Law in the EU and the USA after 9/11' (2017) 22 *Theoretical Criminology* 206.

61   DCT, Art 29(2).

62   Eugenia Dumitriu, 'The EU's definition of terrorism: The Council Framework Decision on Combatting Terrorism' (2004) 5 *German Law Journal* 585.

63   The offences are set out in Article 3(1)(a)-(i). Most relate to terrorist offences prohibited in numerous international treaties, but two, the protection of natural resource supplies and threatening to carry out the others acts mentioned in art 3 are not found in the existing international treaties.

64   See Cian Murphy, *EU Counter-Terrorism Law: Pre-emption and the Rule of Law*, (Hart Publishing, 2012), 67–68.

65   The new terrorism-related offences include provocation of terrorism and recruitment and training for terrorism. See Murphy, *EU Counter-Terrorism Law* (n57), 69-73.

the core of the 2017 DCT, replicating the FDCTs, lies the requirement that Member States prohibit in criminal law a range of 'terrorist acts' whose harms – causing death or injury to a person, kidnapping, damage to property, release of harmful substances – are already covered by ordinary criminal law.[66] Such criminal acts become 'terrorist acts' when carried out for one of three aims: to seriously intimidate a population; to unduly compel a government or international organisation to perform or abstain from performing any act; or to seriously destabilise or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.[67] Under the DCT these actions constitute 'terrorism'.

Through the DCT, the EU adopts a very broad definition of terrorism, which is not limited to causing death or injury to individuals but includes 'extensive destruction to […] public space or private property likely to […] result in major economic loss' where it is aimed at 'seriously intimidating a population', or 'unduly compelling' action by a government or international organisation.[68] There is no stipulation that an act is wilful, nor is it clear how probable an outcome must be to be 'likely' or how influenced an organisation or government must be to be 'unduly compelled'.[69] An action also becomes a terrorist act if it aims at 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country'.[70] As it makes no normative distinction between different types of states, the DCT risks criminalising activities aimed at overthrowing non-democratic, fascist or racist regimes.[71] The breadth of the definition of terrorism runs counter to the rule of law and the requirements of European Convention on Human Rights (ECHR) article 7.[72]

An expansive, broad definition of terrorism leaves significant discretion to states in determining which of the many acts that fall within the scope of the definition are then treated as terrorism. The dangers of a broad definition

were highlighted by the UK's Independent Reviewer of Terrorism Legislation when he expressed concern that 'an instinctive reluctance on the part of police and others to define terrorism as broadly as the law permits may encourage a tendency – itself potentially discriminatory – to reserve the word for the categories of perpetrators with which it is stereotypically associated.' This, he cautions, risks creating 'a tendency to categorise Islamist-inspired violence as terrorism more readily than what is still often referred to as "domestic extremism"'.[73]

The small number of right-wing attacks identified as terrorism reflects the blurred and contested boundaries between terrorism and hate crime.[74] Noreen Van Elk argues that 'the definition of terrorism and consequently its evaluation appears to be highly dependent on the *a priori* assumptions one has about political reality in general and about terrorism in particular and its causality'.[75] She notes that the 2015 refugee crisis saw a surge in right-wing activity, with 1,485 violent crimes and 10,373 hate crimes. Despite the structural similarities with other forms of terrorism, right-wing motivated crimes are not treated or perceived as terrorism in the context of the refugee crisis.[76] Jacob Ravndal, research fellow at the Univesity of Oslo Centre for Research on Extremism, suggests that the low incidence of right-wing terrorism recorded in Europol's European Terrorism Situation and Trend (TESAT) reports reflects the fact that 'many right-wing attacks remain below these governments' radars, either because they are registered as hate crimes rather than terrorism, or because they are never registered at all'.[77] In Germany

> "Many right-wing attacks remain below these governments' radars, either because they are registered as hate crimes rather than terrorism, or because they are never registered at all"
> *Jacob Ravndal*

66   DCT, Art 3(1).

67   DCT, Art 3(2)

68   DCT, Art 3.

69   Amnesty international, International Commission of Jurists and Open Society Justice Initiative, 'European Commission's proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism: Joint submission by Amnesty International, the International Commission of Jurists, and the Open Society Justice Initiative and the Open Society European Policy Institute' 2016, 9.

70   DCT, Art 3(2)(c).

71   Tarik Gherbaoui, 'Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?' in Christophe Paulussen and Martin Scheinin (eds.), *Human Dignity and Human Security in Times of Terrorism* (Asser Press, 2020).

72   EU Charter art 49, ECHR art 7, ICCPR art 15. See: Sionaidh Douglas-Scott, 'The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice' (2004) 29 EL Rev 219.

73   David Anderson, 'The Terrorism Act in 2013: The report of the Independent Reviewer on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006'. <https://terrorismlegislationreviewer.independent.gov.uk/category/reports/reports-former-reviewers/page/2> accessed 1 February 2021.

74   See also Eric Shimamoto, 'Rethinking Hate Crime in the Age of Terror' (2004) 72 *UMKC L Rev* 829; Helen Taylor 'Domestic Terrorism and Hate Crimes: Legal Definitions and Media Framing of Mass Shootings in the United States' (2019) 14 *Journal of Policing, Intelligence and Counter Terrorism* 227.

75   Noreen van Elk, 'What's in a Name? Asymmetries in the Evaluation of Religiously Motivated Terrorism and Right-wing Motivated Violence in the Context of the "Refugee Crisis"' (2016) 8 *Journal for Deradicalization* 153.

76   ibid, 153-177.

77   JA Ravndal, 'Right-Wing Terrorism and Violence in Western Europe: Introducing the RTV Dataset' (2016) 10 *Perspectives on Terrorism* 2, 3

> "In the face of these unknowns, government agencies have taken to imagining potential future attacks; replacing the statistical basis of actuarial justice with worst case scenario hypothesis."
>
> *Cian Murphy*

'the legal label "terrorism" seems rarely to be applied to extreme right-wing violence.'[78] For example a right-wing shooting of nine people in 2016 was initially identified by police as a 'rampage' and was only classified as right-wing terrorism after an independent review by the City of Munich.[79] Consequently the attack does not feature the 2016 TESAT report.[80] One analysis finds that between 2001 and 2017 over 17,000 violent crimes were committed in Germany by right-wing extremists, including over 500 arson attacks and 52 attacks involving explosives, yet there were fewer than 50 far-right terrorism investigations by the federal prosecutors and terrorism charges were only brought against 5 individuals during this period.[81] Another notes that between 2014 and 2017 half of the 21,000–24,000 members of right-wing extremist groups were linked to violence in Germany.[82]

While Roach stresses that 'much far-right violence satisfies conventional definitions of terrorism in the sense that it is committed for a political or ideological purpose and is designed to intimidate a population or to coerce a government to act',[83] Koehler finds that the legal system struggles 'to label serious acts of extreme right-wing violence clearly as terrorism'.[84] The failure to adequately report, record, and charge right-wing violence and activities as terrorism 'perpetuates misconceptions about the nature of the terrorism threat, encouraging Islamophobia while reducing vigilance against all types of terrorism'.[85] This bias may be further reinforced with the move towards the criminalisation of pre-emptive activities, as evidence for these are increasingly driven by the targeting decisions of intelligence and policing agencies.[86] These targeting decision will themselves be influenced by implicit understanding of what constitutes terrorism and where the greatest threat of terrorism comes from.

The shift away from traditional criminalisation towards pre-emption begins with the seemingly innocuous inclusion of not just particular acts of violence but also 'threatening' to commit any of the actions set out in the list of terrorist acts. Ordinary criminal law already allows charging a person for 'attempting' or conspiring to commit a terrorist act; the inclusion of 'threats' expands the reach of criminal law to bring future possible action within the scope of a prosecution for terrorism. It extends the criminal to words that have not manifested as actions that would constitute an attempt or plans that would amount to a conspiracy. However, a threat is not a plan; a threat is an utterance that may be fantasy, loose talk or bravado. Bringing threats of future possibilities into the scope of terrorism further erodes the link between 'terrorist acts' and the need for evidence of actual planning for a specific act of terrorist violence.

Furthermore, the designation of particular criminal acts as 'terrorist acts' provides the basis for the criminalisation of actions related to terrorist activities or threats of action related to terrorist activities. These include public provocation to commit a terrorist act,[87] recruitment for terrorism,[88] providing or receiving training for terrorism,[89] travelling[90] or supporting or otherwise facilitating travel for the purpose of terrorism,[91] and financing terrorism.[92] Aggravated theft and extortion with a view to committing a terrorist offence is designated in article 3 as an offence 'related to a terrorist activity'. Drawing up or using false administrative documents are also 'offences related

78   Daniel Koehler, 'Recent Trends in German Right-wing Violence and Terrorism: What are the Contextual Factors behind "Hive Terrorism?"' (2018) 12 *Perspectives on Terrorism* 72, 83.

79   Florian Hartleb, 'New Dimension of Terrorism: Tracking Right-wing-inspired Lone Wolves' (Open Democracy, 25 March 2020), <https://www.open-democracy.net/en/can-europe-make-it/new-dimensions-terrorism-tracking-right-wing-inspired-lone-wolves/?fbclid=IwAR24pnRuUlzEIHFunkNm6k-BUcrR1OSnZyx3zsnmzg5bme8AXagRtPZw9l5M> accessed 1 February 2021.

80   Similarly, Peter Mangs carried out three murders and twelve attempted murders in Sweden. He aimed to ignite a race war there. However, as the Swedish prosecuting authorities did not note his motives, his crimes are not recorded on any single-actor terrorism database. See Mattias Gardell, 'Urban Terror: The Case of Lone Wolf Peter Mangs' (2018) 30 *Terrorism and Political Violence* 793.

81   Koehler, 'Recent Trends in German Right-wing Violence' (n78) 80-82.

82   Michael Herzog zu Mecklenburg and Ian Anthony, *Preventing Violent Extremism in Germany: Coherence and Cooperation in a Decentralized System* (Stockholm International Peace Research Institute, 2020), 5.

83   Kent Roach, 'Counter-terrorism and the Challenge of Terrorism from the Far-right' (2020) *Common Law World Review* 1, 1.

84   Koehler, 'Recent Trends in German Right-wing Violence' (n78) 85.

85   Jesse Norris, 'When (and Where) can Right-wing Terrorists be Charged with Terrorism?' (2020) 13 *Critical Studies on Terrorism* 519, 520.

86   In the USA undercover operations that lead to terrorism convictions based on the actions of police informants that pressurise previously law-abiding defendants to engage in terrorism offences are overwhelmingly targeted at Muslims rather than right-wing suspects. See Jesse Norris and Hanna Grol-Prokopczyk, 'Racial and Other Sociodemographic Disparities in Terrorism Sting Operations' (2019) 5 *Sociology of Race and Ethnicity* 416.

87   DCT Art 5.

88   DCT Art 6.

89   DCT Art 7 and 8.

90   DCT Art 9.

91   DCT Art 10.

92   DCT Art 11.

to terrorist activities' if committed to further a terrorist offence, support a terrorist group or travel for terrorism.[93]

The DCT also requires states to prohibit the directing of a terrorist group or participating in the activities of a terrorist group.[94] The ways in which a person can participate in a terrorist group include, but are not limited to, 'supplying information or material resources, or by funding its activities in any way' with knowledge that their participation will further the group's criminal activities. Participation therefore only requires knowledge of the group's unlawful criminal activities, and not necessarily of its terrorist activities. Thus a person can be guilty of participating in a terrorist group without knowing that the group is a terrorist group. For example, an individual who participates in an animal rights or environmental organisation, knowing of its criminal activity (such as graffiti damage to property) but not its terrorist activity would still be liable for prosecution on grounds of participation in a terrorist group.[95]

Beneath the apparent continuity with the pre-2001 criminal justice approach to terrorism, the FDCTs and DCT, by introducing the criminalisation of 'offences related to terrorist activities', signal a shift in the focus of European counter-terrorism law from the punishment of activities that harm or attempt to harm others to state action against individuals to pre-empt any possibility of harm.[96]

This move towards pre-emption reflects a broader trend in the direction of regulating risk in modern societies and the emergence in criminal law of 'actuarial justice' as an approach that seeks to regulate groups and manage danger rather than punish or reform individuals.[97] However, the low number of incidents of and individuals involved in terrorism precludes the development of adequate models for risk assessment. As Murphy observes, 'in the face of these unknowns, government agencies have taken to imagining potential future attacks; replacing the statistical basis of actuarial justice with worst case scenario hypothesis', leading to a shift from what is probable to what is possible.[98] He identifies three changes that arise

from the move to pre-emption. First, a shift in the control of coercive power from the criminal justice process and its attendant procedural safeguards toward the use of administrative measures. Second, the expansion of criminal law measures beyond those that cause direct harm to others, bringing those who support or encourage others into the ambit of criminal law and criminalising actions that are themselves not harmful to others. Third, a resort to non-criminal powers, executive and civic regulations and broader surveillance.[99] While this report observes all three trends across the EU states covered in this research, the FDCTs and DCT have contributed most directly to the second and third trends noted by Murphy.

Ordinary criminal law already prohibits actions that directly harm people or property, as well as any attempt, conspiracy, or aiding and abetting of such action. The DCT, through requirements to criminalise public provocation, recruitment, travelling or training where these are 'related to' terrorist activities, extends the reach of criminal law beyond actions that directly harm others to activities that do not entail direct harm to others in and of themselves. The rhetorical connection to potential 'terrorist offences' suggests a link to harm that does not need to exist. There is no requirement for a terrorist offence causing harm to others to be planned, attempted or committed, nor is there a need, in most cases, to establish a link to a particular terrorist offence in the DCT. Pre-emption seeks to manage risk in a context where the 'risk of harm is seen as simultaneously unknowable and utterly unacceptable'.[100]

The expansion of criminal law in this way has been criticised as the criminalisation of the presumed 'dangerousness' of the individual rather than the harms arising from their actions, because 'the farther punishment is removed from a concrete terrorist act, the closer we get to a criminal law system aimed at punishing the dangerous individual.'[101] Such an approach encourages hyper-surveillance and justifies extensive data collection. It is difficult to place limits on data collection when it informs predictions of future possible action; the richer and more detailed the data, the more confident the prediction. The risky individual is at risk of being permanently watched. However, as the next section will show, a further and yet more far-reaching extension of state-led surveillance arises from the expansion of EU policies from criminalising terrorist acts to coordinating action to prevent

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93   DCT Art 12. Noted exclusion of Art 3(1)(j)

94   DCT Art. 4. Article 2 defines a terrorist group as 'a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences; 'structured group' means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.'

95   Murphy, *EU Counter-Terrorism Law* (n64), 63.

96   Marieke De Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14 *European Journal of International Relations* 161.

97   Murphy, *EU Counter-Terrorism Law*, (n64) 9-11.

98   ibid, 11.

99   ibid, 12-13.

100 ibid, 17.

101 Valsamis Mitsilegas, 'European Criminal Law and the Dangerous Citizen' (2018) 25 *Maastricht Journal of European and Comparative Law* 733, 743.

radicalisation to violent extremism; that is, acting to prevent individuals from holding views and ideas that could lead them to support terrorism.

1.2.2 Prevention of Radicalisation

While 2001 was the catalyst for greater EU action on terrorism, it was only after the Madrid and London bombings that the EU adopted its first overarching Counter-terrorism Strategy.[102] This signalled a broadening of the focus beyond criminal justice to an examination of the conditions that underpin support of and recruitment into terrorism.[103] Prevent, one of the four pillars of this strategy, with a strategic objective of stopping 'people from turning to terrorism by tackling the factors or root causes which can lead to radicalisation and recruitment', lies at the core of the new approach.[104] Emphasising its centrality in EU policy, the Council adopted a specific sub-strategy for combating radicalisation and recruitment to terrorism with an accompanying Action Plan.[105],[106] The strategy was further developed and revised in 2008 and 2014.[107],[108]

Within a short period a proliferation of national, European, and global policies appeared addressing radicalisation, a concept which was itself a recent arrival in the field of counter-terrorism analysis.[109] After 2001 the Dutch Intelligence Services was the first of Europe's security practitioners to apply radicalisation as the dominant framework from which to attempt to understand the pathway or route by which ordinary citizens can become terrorists. Peter Neumann, the Director of the International Centre for the Study of Radicalisation, argues that the concept of radicalisation allowed policymakers a way to

> "Individuals with radical ideas are 100 times more common than individuals involved in radical action; targeting ideas rather than actions multiplies the enemy by a factor of a hundred."
> *McCauley and Moskalenko*

discuss the conditions conducive to terrorism without the fear of being seen to excuse or condone it.[110] Rik Coolsaet, a Senior Associate Fellow at Egmont Royal Institute for International Relations in Brussels, views radicalisation as primarily a 'political construct' that was 'first raised within European police and intelligence circles' and integrated into the EU policy framework soon after.[111]

The role and utility of radicalisation as a concept remains deeply contested. A key criticism is the focus of radicalisation theories on the role of ideology and theology as a cause of violence. This approach is reflected in the European Commission description of radicalisation as 'the phenomenon of people *embracing opinions, views and ideas* which *could* lead to acts of terrorism' (emphasis added).[112] Thus radicalisation places individuals' views and opinions under scrutiny and sees ideology as incipient violence. However, as Borum and others note, the 'focus on radicalisation […] risks implying that radical beliefs are a proxy—or at least a necessary precursor—for terrorism. We know this not to be true. Most people who hold radical ideas do not engage in terrorism, and many terrorists—even those who lay claim to a "cause"—are not deeply ideological and may not "radicalize" in any traditional sense.'[113] McCauley and Moskalenko also caution against a focus on ideology, noting that 'individuals with radical ideas are 100 times more common than individuals involved in radical action; targeting ideas rather than actions multiplies the enemy by a factor of a hundred'.[114]

The emphasis on individual psychology in radicalisation theories is also criticised for shifting the focus from the

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102 Council of the European Union, 14469/4/05 REV 4, 30 Nov. 2005. See also Raphael Bossong, 'EU Cooperation on Terrorism Prevention and Violent Radicalization: Frustrated Ambitions or New Forms of EU Security Governance?' (2014) 27 *Cambridge Review of International Affairs* 66.

103 The EU Declaration on Combatting Terrorism of 25 March 2004 included a revised Plan of Action with seven strategic objectives, of which Objective 6 sought 'to address the factors which contribute to support for, and recruitment into, terrorism'.

104 See Rik Coolsaet, 'Radicalization: the Origins and Limits of a Contested Concept' in Nadia Fadil, Martijn de Koning and Francesco Ragazzi (eds), *Radicalisation in Belgium and the Netherlands: Critical Perspectives on Violence and Security* (IB Tauris, Bloomsbury, 2019).

105 Council of the European Union, 'The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism' 14781/1/05 REV 1, 24 November 2005.

106 European Council, 'EU Action Plan on Combating Terrorism' (15358/05); on 4/5 December 2006 the Council took note of a report on the implementation of the Radicalisation and Recruitment Action Plan, revised 12 February 2007.

107 Council of the European Union, 'Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism' 15178/08, 14 November 2008.

108 Council of the European Union, 'Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism' 9956/14, 19 May 2014.

109 On the development of prevention of radicalisation policies at the United Nations see Arun Kundnani and Ben Hayes, *The Globalisation of Countering Violent Extremism Policies: Undermining Human Rights and Instrumentalising Civil Society* (Transnational Institute, Amsterdam, 2018)

110 Peter Neumann, 'The Trouble with Radicalization' (2013) 18 *International Affairs* 873.

111 Coolsaet 'Radicalisation: the Origins and Limits of a Contested Concept' (n104), 30.

112 European Commission, 'Terrorist Recruitment: Addressing Factors Contributing to Violent Radicalisation' COM (2005) 313 final, 21 Sept. 2005, 1.

113 Randy Borum, 'Radicalization into Violent Extremism I: A Review of Social Science Theories' (2012) 4 *Journal of Strategic Security* 7, 8.

114 Clark McCauley and Sophia Moskalenko, *Friction: How Radicalization Happens to Them and Us* (Oxford, OUP, 2017) 274.

wider societal and political context and the role of state actions and policies that generate political violence. For example, in the EU counter-radicalisation strategies foreign policy is not mentioned as a relevant factor in radicalisation except in relation to its presence in an 'extremist worldview' that lead individuals to 'consider and justify violence' because it 'distorts perceptions of Western policies and increases suspicion of hidden agenda and double standards'.[115] This appears to delegitimise any political analysis suggesting a hidden agenda and double standards in Western policies as extremist. It also shifts any attention away from issues of policy onto a focus on greater coordination and enhanced efforts to change perceptions of Western foreign policies. Furthermore, EU counter-terrorism policy documents do not refer to state terrorism; terrorism is only ever envisaged as the consequence of the actions of non-state actors. The strategies are also silent on the impact or implications of counter-terrorism policies and policing responses; the dynamics of terrorism are disconnected from any state action. Thus rather than becoming a way to bring the root causes of terrorism back into policy debates, radicalisation soon settled as 'the single most important "root cause" of terrorism within Europe'.[116]

For many policymakers and practitioners, the practical value of radicalisation is not explaining why some people adopt violence in and of itself but the promise that the models of radicalisation hold out for enabling preventative interventions. The DCT calls on Member States to support professionals with 'training and awareness-raising measures aimed at enabling them to *identify and address signs of radicalisation*' (emphasis added).[117] The latter task presumes the existence of reliable 'signs of radicalisation'.

Disappointingly for practitioners and policymakers, most terrorism researchers stubbornly insist that the lack of a terrorist profile is not a failure of research but the outcome of research.[118] Radicalisation research has also not yielded a profile of an incipient soon-to-be terrorist, nor found any reliable 'pathway', 'conveyor belt' or 'staircase' along which it is possible to pick out individuals holding extreme views just before they move on to engage in unlawful violence. Models for explaining radicalisation 'narrate the process of becoming radical as both

contingent and determined'.[119] The lack of predictive power in the models of radicalisation is a persistent challenge for European governments, policymakers and security practitioners. As Arun Kundnani acutely observes, each model of radicalisation posits various relationships between ideological, social and psychological factors, as well as group and individual dynamics, but they remain unable to identify which individuals holding radical ideas will cross the line into terrorist violence.[120] After a decade of studying radicalisation, Marc Sageman, concludes that researchers are 'no closer to understanding the answer to our original question about what leads people to turn to political violence'.[121] Similarly, Rik Coolsaet, a key participant in the development of European policy, concludes that 'even 12 years after its inception, radicalisation remains ill-defined, complex and controversial. The same questions of a decade ago are still being asked today'.[122] Furthermore, 'the persistent lack of consensus on the drivers of radicalisation helps to explain why deradicalisation programmes tend to be a potpourri of objectives of all kinds, from cohesiveness to repression to counter narratives'.[123]

> "Even 12 years after its inception, radicalisation remains ill-defined, complex and controversial. The same questions of a decade ago are still being asked today."
> *Rik Coolsaet*

With no clear way to identify terrorists, counter-radicalisation policies have developed 'indicators' for what makes individuals 'vulnerable to' or puts them 'at risk' of radicalisation.[124] Such formulations enable the use of indicators while allowing for their lack of predictive power.[125] However, the lack of control groups in the research used

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115 Council of the European Union, 'The European Union Strategy for Combating Radicalisation' (n105), 4.

116 Rik Coolsaet and Tanguy de Swielande, 'Epilogue: Zeitgeist and (De-)Radicalisation' in Rik Coolsaet (ed.), *Jihadi Terrorism and the Radicalization Challenge in Europe* (Ashgate Publishing Company, Farnham, 2008) 159.

117 DCT, Recital 33.

118 See Marc Sageman, 'The Stagnation of Terrorism Research' (2014) 26 *Terrorism and Political Violence* 565; Borum, 'Radicalization into Violent Extremism' (n113).

119 Marieke de Goede and Stephanie Simon, 'Governing Future Radicals in Europe' (2013) 45 *Antipode* 315, 322.

120 Arun Kundnani, 'Radicalisation: The Journey of a Concept' in C Baker-Beall and others (eds.), *Counter-Radicalisation: Critical Perspectives* (Routledge, Abingdon, 2015).

121 Marc Sageman, 'The Stagnation of Terrorism Research' (2014) 26 *Terrorism and Political Violence* 565, 569.

122 Rik Coolsaet, 'All Radicalisation is Local': The Genesis and Drawbacks of an Elusive Concept, Egmont Paper 84 (Royal Institute for International Affairs, Brussels, 2016), 5.

123 ibid, 38.

124 On the development of risk indicators, see for example Rita Augestad Knudsen, 'Measuring Radicalisation: Risk Assessment Conceptualisations and Practice in England and Wales' (2020) 12 *Behavioral Sciences of Terrorism and Political Aggression* 37.

125 Kundnani, 'Radicalisation: The Journey of a Concept' (n120) 21.

to develop indicators erodes their value and validity.[126] The UK's Royal College of Psychiatry warns that the 'epidemiological database needed to construct a valid risk assessment instrument does not exist' and therefore 'current tools and methodologies should be treated with caution', particularly as 'methodologies that seek to predict rare events, such as acts of terror, yield consistently poor results'.[127] The indicators range from personal trauma, experiences of discrimination and the search for identity to political and religious beliefs. Ironically, outcomes shaped by institutionalised racism (social marginalisation, deprivation, discrimination) become themselves indicators of potential vulnerability to radicalisation. Indicators of risk provided by the UK government as guidance for schools in England, include a desire for adventure and excitement, a search for identity or a search for answers to questions of identity, faith and belonging.[128] Thus

'ostensibly innocuous thoughts, feelings and behaviours of children and young people are […] reconstructed as deviant and potentially dangerous'. Furthermore, 'without the initial framing of these features as indicative of a susceptibility to violent extremism, it is likely that any reasonable person would simply understand them as familiar characteristics of what it means to BE a child or young person.'[129] These broad and vague indicators widen the reach of counter-terrorism policies, justifying the use of greater levels of surveillance deeper into the lives of individuals and their families and communities.[130] However, as the next section shows, while the quotidian banality of many indicators could apply to anyone, at their inception European counter-radicalisation policies targeted Muslims, and in so doing enabled and embedded institutional racialised suspicion of Muslims.

126 Marc Sageman, *Misunderstanding Terrorism* (University of Pennsylvania Press, Philadelphia, 2016).

127 Royal College of Psychiatrists, *Counter-terrorism and Psychiatry*, Position Statement PS04/16 (Royal College of Psychiatrists, London, 2016), 5-6.

128 Department for Children, Schools and Families, 'Learning Together to be Safe: A Toolkit to Help Schools Contribute to the Prevention of Violent Extremism' (DCSF, Nottingham, 2008).

129 Vicki Coppock and Mark McGovern, 'Dangerous Minds'? Deconstructing Counter-Terrorism Discourse, Radicalisation and the "Psychological Vulnerability'" of Muslim Children and Young People in Britain' (2014) 28 *Children and Society* 242, 250.

130 Kundnani 'Radicalisation: The Journey of a Concept'(n120); see also Jonathan Githens-Mazer and Robert Lambert, 'Why Conventional Wisdom on Radicalization Fails: The Persistence of a Failed Discourse' 2010 86 *International Affairs* 889; Charlotte Heath-Kelly, 'Counter-Terrorism and the Counterfactual: Producing the 'Radicalisation' Discourse and the UK PREVENT Strategy 2013' (2013) 15 *British Journal of Politics and International Relations* 394

2. RACIALISATION, ISLAMOPHOBIA AND DISCRIMINATION

In setting out its 2005 Strategy on Combatting Radicalisation and Recruitment to Terrorism, the European Union emphasised that neither radicalisation nor recruitment to terrorism are 'confined to one belief system or political persuasion', emphasising the need to develop language that avoided 'linking Islam to terrorism'.[131] The strategy stresses that Al-Qaeda justifies its action through a 'distorted version of Islam'. The 2008 revised strategy defines 'radical Islamists' rather than Muslims or Islam as its target. This distinction between Islam and Islamism allows policymakers to argue that they are focusing on a political ideology and not a religion.

Yet key elements of the 2005 strategy constructed, sustained, and reinforced the perception of Muslims as a potential security threat.[132] It emphasised the need to engage in dialogue with Muslims and identified 'Muslim communities' as the target for enhanced efforts to change perceptions of European and Western foreign policies.[133] However, 'the suggestion that "Muslim communities" must be engaged if terrorism is to be prevented only serves to further strengthen the implicit construction of the "Muslim" other as a potential terrorist threat'.[134] Even attempts to highlight Muslim opposition to terrorism contain implicit acknowledgement of their perceived otherness and exclusion from European identity and belonging. Thus the Strategy welcomes the rejection of terrorism 'by the peoples of Europe [...] including Muslims;'[135] but the need to make clear that Muslims are included in the term 'peoples of Europe' was a tacit admission that their inclusion is not a given and needed to be made explicit.

The revised Strategies of 2008 and 2014 attempt to overcome the stigma of the initial focus on Muslims by expanding their remit to 'all forms of extremism'. Furthermore, the explicit mention of Muslims is replaced by reference to the need for dialogue with 'faith groups', and the need to provide training for imams has been replaced with the need for 'religious training'. While the text of the policy no longer mentions Muslims, in reality EU efforts at counter-radicalisation continued to focus overwhelmingly on Muslims and see Muslims and Muslim communities as the natural and proper subjects of counter-radicalisation prevention policies, and by extension, counter-terrorism policing.

In the process of calling for engagement with Muslims as a community, the EU Strategy confirm Muslim communities as the natural subject of counter-radicalisation policies and counter-terrorism policing. However, the Strategy's emphasis on engagement with Muslims and Muslim communities generates a complex frame of governance through communities that enables 'policed multiculturalism'; this entails a more stratified approach, in which 'trusted' Muslims exist alongside 'suspect' Muslims; the latter being further divided into victims, those 'at risk' of radicalisation, and those who are deemed dangerous and 'risky'.[136] The EU Strategy encourages states to work with trusted Muslims to 'ensure that voices of mainstream opinion prevail over those of extremism'. It calls for policies to 'empower moderate voices by engaging with Muslim organisations and faith groups that reject the distorted version of Islam put forward by Al-Qaeda and others' and 'seeks to encourage the emergence of European imams and enhance language and other training for foreign imams in Europe.'[137] The participation and involvement of Muslims in the co-production of counter-radicalisation and counter-terrorism action bolsters the legitimacy of state policies and state actors; at the same time state endorsement, resources and engagement seek to influence the development of Muslim communities' internal leadership.[138] The EU counter-radicalisation strategy reinforces a dichotomy approach to Muslims that views them as either moderate or extremist, echoing a central trope of the global war on terror:

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131 Council of the European Union, 'The European Union Strategy for Combating Radicalisation' (n105), 4.

132 Christopher Baker-Beall, The European Union's Fight Against Terrorism: Discourse, Policies and Identity (Manchester University Press, 2016), 142-171.

133 Council of the European Union 'The European Union Strategy for Combating Radicalisation' (n105), 4.

134 Baker-Beall, 'The European Union's Fight Against Terrorism' (n132), 148.

135 Council of the European Union, 'The European Union Strategy for Combating Radicalisation' (n105), 2.

136 Francesco Ragazzi, 'Suspect Community or Suspect Category? The Impact of Counter-terrorism as "Policed Multiculturalism"' (2016) 42 Journal of Ethnic and Migration Studies 724.

137 Council of the European Union, 'The European Union Strategy for Combating Radicalisation' (n105), 4.

138 Frederiq Volpi, 'Constructing the Ummah in European Security: Between Exit, Voice and Loyalty' (2007) 42 Government and Opposition 451.

Part I: Legal and Policy Context

> From the beginning of policy-making in the war on terror, the 'Muslim extremist' became a discrete category of identity, a legitimate subject of classification, control and containment by government, for the disclaimer that counter-terrorism does not target Islam but instead targets a 'distorted, perverted, twisted' version of Islam created a distinct category of politicised Islam as illegitimate, inauthentic belief moored in opposition to legitimate, 'mainstream', depoliticised 'majority' Islamic teachings. 'Extremists', categorised as a dissociative, deviant milieu, were characterised as the governmental subject, the healthy core of the Muslim body divided from the sick part of the body.[139]

The moderate/extremist and Islam/Islamism binaries reinforce the perception that the problem of terrorist violence lies with Islam, the need to work with Muslims and Muslim communities makes Islam both the 'cure and cause of radicalisation'.[140] Thus '[i]n the war on terror, every Muslim is infected with a dormant virus and must offer an immunisation record; a reassurance that the strain of Muslimness they contain is safe.'[141] Crucially both extremist and moderate Muslims are objects of policing and policy. They exist on a continuum; both are the objects of state intervention and control. By distinguishing moderate Muslims from extremists, policing and policy hope to be able to focus on extremists without being seen to openly profile individuals based on their race or religion.

However, scholars of race draw attention to the ways in which counter-terrorism policies and practices intensify and extend existing processes of the racialisation of Muslims.[142] The notion of the 'radical Islamist' resonates as it is inscribed onto existing Orientalist tropes and stereotypes of Muslim men and Islam as innately violent and aggressive.[143] Such tropes persist, reconfigured and re-presented in claims that the 'new terrorism' of Al-Qaeda, driven by 'religious fanaticism', decoupled from wider geopolitical conflicts, differs qualitatively

from other forms of terrorism and therefore justifies the expanded criminalisation of pre-emptive offences.[144] In placing religious belief or ideology as the distinctive driver of the 'new terrorism' alongside banal and vague indicators of radicalisation, policies for preventing terrorism feed paranoia about Muslim extremism.[145]

Garner and Selod use the concept of 'racialisation' to understand and capture the way Muslims experience these policies:

> The process of racialization entails ascribing sets of characteristics viewed as inherent to members of a group because of their physical or cultural traits. These are not limited to skin tone or pigmentation, but include a myriad of attributes including cultural traits such as language, clothing, and religious practices. The characteristics thus emerge as 'racial' as an outcome of the process.[146]

An important point here is that racialisation is a process that brings 'race' into being, and is not limited to colour or physical characteristics alone but can be constructed through cultural traits that include clothing and religious practices. Racism emerges from the construction of groups into a hierarchy based on characteristics that are used to signal innate difference and inferiority to Whites. The authors argue that Islamophobia in this context should be seen as a form of racism, as it involves a 'set of ideas and practices that amalgamate all Muslims into one group and the characteristics associated with Muslims (violence misogyny, political allegiance/disloyalty, incompatibility with Western values, etc.) are treated as if they are innate'.[147] Claims that Islamophobia cannot be racism because Muslims are not a race miss the point that race is a social construct and that religions can be 'raced'.[148]

In liberal democratic states that are committed to equality and anti-racism, processes of racialisation are subtle and indirect. Sentas' detailed and sustained analysis of racism in counter-terrorism policies in Australia identifies two key processes through which counter-terrorism policing

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139 Randa Abdel-Fattah, 'Countering violent extremism, governmentality and Australian Muslim youth as "becoming terrorist"' (2020) 56 *Journal of Sociology* 372, 378.

140 Katherine E Brown, 'Introduction: Radicalisation and Securitisation of Muslims in Europe' (2018) 7 *Journal of Muslims in Europe* 139.

141 Randa Abdel-Fattah, 'Managing Belief and Speech as Incipient Violence: 'I'm Giving you the Opportunity to Say that you Aren't' (2019) 14 *Journal of Policing, Intelligence and Counter Terrorism* 20, 21.

142 See Steve Garner and Saher Selod, 'The Racialisation of Muslims: Empirical Studies in Islamophobia' (2015) 41 *Critical Sociology* 9; Cameron Smith, 'Race and the Logic of Radicalisation under Neoliberalism' (2018) 54 *Journal of Sociology* 92; Louis Canikar and Saher Selod, 'Review of Race Scholarship and the "War On Terror"' (2018) 4 *Sociology of Race and Ethnicity* 165; Amal Abu-Bakare, 'Counterterrorism and Race' (2020) 8 *International Politics Review* 79.

143 Edward Said, *Orientalism*: Western Concepts of the Orient (Routledge, 1978); see also Sophia Rose Arjana, *Muslims in Western Imagination* (OUP, 2014).

144 Walter Laqueur, The New Terrorism: Fanaticism and the Arms of Mass Destruction (OUP, 1999).

145 Tim Aistrope, 'The Muslim Paranoia Narrative in Counter-radicalisation Policy' (2016) 9 *Critical Studies on Terrorism* 182.

146 Garner and Selod 'The Racialisation of Muslims' (n142), 12.

147 ibid, 13. See also Ramon Grosfoguel and Eric Mielants, 'The Long-Durée Entanglement between Islamophobia and Racism in the Modern/Colonial Capitalist/Patriarchal World-system: An Introduction' (2006) 5 *Human Architecture* 1, and Nasar Meer, 'Racialization and Religion: Race, Culture and Difference in the Study of Antisemitism and Islamophobia' (2013) 36 *Ethnic and Racial Studies* 385.

148 See Garner and Selod 'The Racialization of Muslims' (n142).

and policies are implicated in processes of racialisation; firstly through the differentiation and categorisation of those subject to counter-terrorism, and secondly through 'normalisation' of this by the repeated and continuous exercise of state power against those deemed the natural subjects of policing.[149] Thus, policies that operate through inclusion, participation and engagement with Muslim communities may 'better select suspect populations', but are not race-neutral.[150] For Sentas, 'counter-terrorism law and policing, in their different modes bring into existence *policed subjects* who are the objects of counter-terrorism: the extremist and the moderate Muslims'.[151] It 'makes and remakes a common sense that Muslims [...] must be subject to policing'.[152] While identification of a person as 'moderate' is clearly not criminalisation, it nevertheless involves a 'racialized process of being made a *policed subject*' (emphasis added).[153]

Anticipating criticism of profiling, policymakers and politicians have argued that a strategy targeting Al-Qaeda- or ISIS-inspired terrorism will inevitably have a disproportionate impact on Muslims and that the policy requires engagement with Muslims and Muslim communities.[154] However, it is neither inevitable nor clear that policies targeting terrorists could or should target all Muslims or Muslims as a community. The EU Strategy itself recognises that only a small minority of the population hold extremist views, and an even smaller number move from holding extremist ideas to enacting violence.[155] This is consistent with TESAT data. The number of suspects arrested in relation to ISIS- or Al-Qaeda-related terrorism between 2006 and 2019 amount to 0.02% of Muslims out of a population of 25 million in Europe. Since most individuals who are arrested are released without charge after questioning, the number charged may be a more appropriate focus. Here the proportion falls further to 0.009% of European Muslims. Calling on Muslims to work to prevent extremism 'makes these heterogeneous communities accountable for governing a tiny minority of extremists.'[156]

> **"'In the war on terror, every Muslim is infected with a dormant virus and must offer an immunisation record; a reassurance that the strain of Muslimness they contain is safe."**
> *Randa Abdel-Fattah*

Given the collective call to Muslims to engage with counter-terrorism combined with constant suspicion of Muslims as radicalisation risks it is not surprising that they face stigmatisation and experience collective blame for terrorism. The surge in violent Islamophobic assaults and incidents in the aftermath of terrorist attacks manifests a logic that holds Muslims accountable for the actions of terrorists.[157] Beyond these spikes, the research for this report details how the perception of Muslims as a security threat permeates and contours their daily experiences of discrimination.

Thus, EU security policies that maintain fear of Muslims as a security threat layer onto pre-existing as well as growing anti-Muslim sentiment. EU survey data shows that one in ten Europeans are uncomfortable working with a Muslim,[158] while one in five do not want Muslims as neighbours.[159] Across all countries, Europeans were more comfortable with their child being in a relationship with someone who was Jewish or Buddhist than one with a Muslim.[160] Consistent overestimation of the size of a coun-

149 Victoria Sentas, *Traces of Terror: Counter-Terrorism Law, Policing and Race* (OUP, 2014), ch 2.

150 ibid, 5.

151 ibid, 22.

152 ibid, 23.

153 ibid, 177.

154 Richard Ford and Stewart Tendler, 'Minister Tells Muslims: Expect Police to Target You' *The Times* (2 March 2005), <https://www.thetimes.co.uk/article/minister-tells-muslims-expect-police-to-target-you-xr73wldf73p> accessed 1 February 2021.

155 Council of the European Union, 'The European Union Strategy for Combating Radicalisation' (n105), 2.

156 Mark Gilks, 'The Security-prejudice Nexus: "Islamist" Terrorism and the Structural Logics of Islamophobia in the UK' (2020) 13 *Critical Studies on Terrorism* 24, 35.

157 See, for example: Chris Allen and Jan Nielsen, *Summary Report on Islamophobia in the EU after 11 September 2001* (European Monitoring Centre for Racism and Xenophobia, Vienna, 2002); C Bozzoli and C Muller, 'Perceptions and Attitudes Following a Terrorist Shock: Evidence from the UK (2011) 27 *European Journal of Political Economy* 89; A Echebaria-Echabe and E Fernandez-Guede, 'Effects of Terrorism on Attitudes and Ideological Orientation' (2006) 36 *European Journal of Social Psychology* 259; Centre for the Analysis of Social Media, 'Anti-Islamic Content on Twitter' 24 April 2017 <https://demos.co.uk/project/anti-islamic-content-on-twitter/> accessed 1 February 2021 ; Ria Ivandic, Tom Kirchmaier and Stephen Machin, 'Jihadi Attacks, Media and Local Hate Crime' Discussion Paper 12352 (IZA Institute for Labor Economics, Bonn, 2019), <http://ftp.iza.org/dp12352.pdf> accessed 1 February 2021. For a discussion of methodological challenges in measuring impact of terrorism on hate crime see, Klas Borell, 'When Is the Time to Hate? A Research Review on the Impact of Dramatic Events on Islamophobia and Islamophobic Hate Crimes in Europe, (2015) 26 Islam and Christian–Muslim Relations 409.

158 Kantar, *Report on Discrimination in the European Union*, Special Eurobarometer 493, (European Commission, 2019), 87.

159 European Union Agency for Fundamental Rights, *Second European Union Minorities and Fundamental Rights Survey: Muslims Selected Findings*, (Publications Office of the European Union, Luxembourg, 2017), 22.

160 Kantar '*Report on Discrimination in the European Union*' (n158), 95–97; a similar pattern is also found in 'Eastern and Western Europeans Differ on Importance of Religion, Views of Minorities, and Key Social Issues' (Pew Research Centre, Washington DC, 2019)

try's Muslim population may intensify fears that Muslims pose a demographic and cultural threat.[161]

The impact of growing anti-Muslim racism is evidenced in reports of levels of discrimination in European survey data.[162] In the 2008 EU Minorities and Discrimination Survey, 10% of Muslims reported experiencing religious discrimination; by 2015 this had increased to 17%.[163] Overall, 39% of Muslims reported discrimination because of their ethnic or immigrant background over the past 5 years, and a quarter had experienced this in the past 12 months.[164] Less than 10% of Muslims who experience harassment report it, and even of those who experience physical assault only a minority report it to the police. Furthermore, among those who did report it to the police, 81% were dissatisfied with the way their complaint was handled.[165]

Such endemic and persistent levels of discrimination matter. They constitute a violation of the EU's commitment to principles of equality, and harm social inclusion and integration.[166] Furthermore, they undermine the goals of engagement in the EU's counter-terrorism strategies. Muslims who have experienced discrimination, harassment or violence have lower levels of trust in the legal system and the police.[167] More worryingly, almost a third of Muslims who have been stopped by the police believed that this was because of their immigrant or ethnic minority background. While 60% of those stopped said they were treated respectfully, a significant minority (16%) found their treatment during the stop disrespectful.[168]

Experiences of state security actors shapes an individual's willingness to cooperate and engage with policing and security measures. There is now fairly robust and consistent research evidence showing that support for and cooperation with government policies, including on counter-terrorism, increase when state policies and practices are seen as legitimate.[169]

Crucially for the EU and European governments, the value of procedural fairness applies not only to the implementation of policies (through public officials in Member States) but also applies to how legal norms and policies are developed and formulated. Drawing a distinction between 'police' and 'law' legitimacy – where the former is the perceived legitimacy of the police or other state officials' enforcement of the law and the latter is the 'perceived legitimacy of the laws that are enforced' – research evidence shows that the most important predictor of cooperation in counter-terrorism is the perception of 'law legitimacy'. Thus procedural fairness in the implementation of counter-terrorism 'can potentially have little effect if the laws underpinning police action are judged as illegitimate'.[170]

The perceived legitimacy of policies and policing increases where state officials are seen to be treating people fairly. This means that experiences and perceptions of discrimination that undermine evaluations of fairness, and therefore legitimacy, also damage efforts at cooperation.

Social or group identity has an important role in shaping the relationship between fair treatment and cooperative behaviour. Individuals react not only to how they are treated but also to how individuals belonging to a group with which they identify are treated. Where they witness unfair treatment by the authorities in the decision-making concerning members of a social group they identify with this influences their willingness to cooperate with those authorities.[171] Fair treatment by public bodies and agents communicate to marginalised groups the extent to which they are valued and respected, 'the way representatives of the dominant group treat people from new or sub-ordinate groups may be a particularly important

161 Gideon Skinner and James Stannard, 'Perils of Perception 2018' IPSOS MORI, <https://www.ipsos.com/ipsos-mori/en-uk/perils-perception-2018> accessed 1 February 2021

162 Marc Helbling 'Opposing Muslims and the Muslim Headscarf in Western Europe' (2014) 30 *European Sociological Review* 242; Jolanda van der Noll, and Vasillis Saroglou 'Anti-Islam or Anti-religion? Understanding Objection against Islamic Education' (2015) 41 *Journal of Ethnic and Migration Studies* 219.

163 European Union Agency for Fundamental Rights, *Second European Union*, (n159) 25.

164 ibid, 28.

165 ibid, 48.

166 See Lars Leszczensky, Rahsaan Maxwell and Erik Bleich, 'What Factors Best Explain National Identification among Muslim Adolescents? Evidence from Four European Countries' (2020) 46 *Journal of Ethnic and Migration Studies* 260; Fenella Fleischmann and Karen Phalet, 'Identity Conflict or Compatibility: A Comparison of Muslim Minorities in Five European Cities' (2016) 37 *Political Psychology* 447.

167 European Union Agency for Fundamental Rights, *Second European Union*, (n159) 57.

168 *Ibid* 55.

169 See for example Aziz Huq, Tom Tyler, and Stephen Schulhofer, 'Mechanisms for Eliciting Cooperation in Counter Terrorism Policing: Evidence from the United Kingdom' (2011) 8 *Journal of Empirical Legal Studies* 728; Tom Tyler, Stephen Schulhofer and Aziz Huq, 'Legitimacy and Deterrence Effects in Counterterrorism Policing: A study of Muslim Americans. (2010) 44 *Law and Society Review* 365; Adrian Cherney and Kristina Murphy, 'Policing Terrorism with Procedural Justice: The Role of Police Legitimacy and Law Legitimacy' (2013) 46 *Australian and New Zealand Journal of Criminology* 403; Natasha Madon, Kristina Murphy and Adrian Cherney, 'Promoting Community Collaboration in Counterterrorism: Do Social Identities and Perceptions of Legitimacy Mediate Reactions to Procedural Justice Policing?' (2017) 57 *British Journal of Criminology* 1144; Kristina Murphy, Natasha Madon and Adrian Cherney, 'Promoting Muslims' Cooperation with Police in Counter-terrorism: The Interaction between Procedural Justice, Police Legitimacy and Law Legitimacy' (2017) 40 *Policing: An International Journal* 544.

170 Cherney and Murphy 'Policing Terrorism with Procedural Justice' (n169), 417.

171 ibid, 416.

element of processes of inclusion and exclusion'.[172] For example, research in Australia suggests that the Muslims who felt most stigmatised were also those who were most sensitive to signs of procedural justice. Those who felt most stigmatised by the public, the media and the police were less willing to report information to the police, however: 'perceptions of procedural fairness moderate the effect of feeling stigmatised on their intention to report terror threats to the police'.[173] Human rights and the rule of law provide a valuable and crucial framework for ensuring procedural fairness, yet as the next section shows, EU security and counter-terrorism policies have paid insufficient attention to protecting human rights and upholding the rule of law.

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172 Ben Bradford, 'Policing and Social Identity: Procedural Justice, Inclusion and Cooperation Between Police and Public' (2014) 24 *Policing and Society* 22, 39.

173 Kristina Murphy, Natasha Madon and Adrian Cherney, 'Reporting Threats of Terrorism: Stigmatisation, Procedural Justice and Policing Muslims in Australia' (2020) 30 *Policing and Society* 361, 371.

3. HUMAN RIGHTS AND THE RULE OF LAW

Experiences of systemic and persistent human rights violations by state actors are a significant tipping point for individuals joining organisations that support violence. Research by the UN finds that the actions of state security actors are 'a prominent accelerator of recruitment' into terrorism.[174] The Organisation for Security and Co-operation in Europe (OSCE) warns that 'measures to combat terrorism that violate international human rights standards are counterproductive. They undermine the rule of law and the credibility of public authorities, as well as their ability to counter the threat posed by terrorism'.[175] In developing counter-terrorism policies, states must remember that provoking heavy-handed security responses that erode commitment to human rights and the rule of law can contribute to the strategic calculations of organisations that support violence.[176] Terrorists leverage their asymmetric weakness by provoking repressive state responses that enable them to exploit the ensuing societal polarisation. In Northern Ireland, for example, the IRA 'worked to provoke harsh measures […] knowing full well the benefits it would reap in terms of support and recruits'.[177] ISIS has also been clear that its attacks in Europe seek to ferment polarisation, fuelling hostility and suspicion of Muslims, which they hope will eventually lead Muslims to leave Europe.[178]

It has long been recognised that states' response to political violence can undermine the very values that they espouse.[179] In *Klass v Germany*, the European Court of Human Rights acknowledged that repressive counter-terrorism measures could undermine or destroy democracy 'on the ground of defending it' and cautioned that 'States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.'[180] Lord Hoffman, in the UK House of Lords, holding that the British government acted unlawfully in derogating from the ECHR to enable the indefinite detention of foreign terrorist suspects, echoed these sentiments:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[181]

Given these acknowledged dangers, the protection of human rights and the rule of law should be hard-wired into European policy frameworks. Instead they remain marginalised in the EU's normative frameworks, institutions and structures.

The EU declares respect for the rule of law and human rights, including the rights of persons belonging to minorities, as fundamental and founding values.[182] The ECHR binds both Member States of the Union and the EU itself.[183] Furthermore, EU action in all areas, including counter-terrorism, must not infringe the rights set out the EU treaty and Charter of Fundamental Rights. For the Commission the principles rule of law include 'legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law'.[184]

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174 United Nations Development Programme, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment* (New York, 2017), 5.

175 See OSCE, Countering Terrorism <http://www.osce.org/odihr/countering-terrorism> accessed 1 February 2021.

176 See Myriam Francois-Cerrah, 'Islamic State Wants to Divide the World into Jihadists and Crusaders' Daily Telegraph (London, 18 November 2015). See also AK Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns* (Princeton University Press, 2009).

177 Andrew Silke, 'Fire of Iolaus: The Role of State Countermeasures in Causing Terrorism and What Needs to be Done' in Tore Bjorgo (ed.), *Root Causes of Terrorism: Myths, Reality and Ways Forward* (Routledge, Abingdon, 2005), 244.

178 Murtaza Hussain, 'Islamic States Goal: "Eliminating the Grayzone" of Coexistence between Muslims and the West' *The Intercept* (17 November 2015) <https://theintercept.com/2015/11/17/islamic-states-goal-eliminating-the-grayzone-of-coexistence-between-muslims-and-the-west/> 1 February 2021

179 Paul Wilkinson, *Terrorism verses Democracy: The Liberal State Response*, (Routledge, Abindon, 2010); Gil Merom, *How Democracies Lose Small Wars: State, Society, and Failures of France in Algeria, Israel in Lebanon, and the United States in Vietnam* (CUP, 2004); Peter Chalk, 'The Liberal Democratic Response to Terrorism' (1995) 7 *Terrorism and Political Violence* 10.

180 *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1979) para 49.

181 *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, 97.

182 Art 2 TEU.

183 Art 6 TEU.

184 European Commission, 'A New EU Framework to Strengthen the Rule of Law' (Communication) COM (2014) 158 final.

Despite these legal commitments and vocal political declarations, many early EU counter-terrorism policy documents, including the 2004 Declaration on Combatting Terrorism and The Hague Programme, were silent on their implications for human rights. Only in the European Commission's 2005 Communication Concerning Terrorist Recruitment and the EU Counter-terrorism Strategy did a strategic commitment to human rights as part of its counter-terrorism strategy emerge.[185] The implications of this commitment and concrete action required remain underdeveloped, particularly in contrast to the UN Global Counter-terrorism Strategy, one of the organising pillars of which is 'measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism'.[186]

The key legal instruments also lack robust protection of human rights. The 2002 FDCT relegates the need to respect Convention and Charter rights to anodyne invocations, reminding states that the Decision does not override their obligations in international human rights law.[187] The FDCT neither details specific interferences on specific rights that may arise, nor suggests how to minimise interferences or points to human rights norms that would assist states in implementation.[188] The 2008 Framework Decision contains a more detailed set of safeguards, but with most of these located in the non-binding Preamble, enforcement remains at the discretion of national authorities and agents of their criminal justice systems.[189] Attempts by the European Parliament to introduce human rights safeguards into the operative text of the revised Framework Decision were unsuccessful.[190] This pattern is repeated in the DCT, with safeguards for human rights and the rule of law elaborated in non-binding recitals,[191] while the binding text is limited to restating the standard phrase that the DCT 'shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles, as enshrined in Article 6 TEU'.[192] In fact, the DCT appears to weaken some elements of human rights protection; the explicit references to freedom of expression found in Article 2 of the 2008 FDCT are relegated to a provision in the DCT's recital.[193]

A European Commission report on recruitment to terrorism also cites human rights and the rule of law as fundamental to the foundation to the Union, arguing that the Union 'will never tolerate xenophobia or racism'.[194] However, in an acknowledgment of the potential interference of rights that counter-terrorism may entail, drawing the powerful metaphor of balancing liberty and security the strategy notes the importance of maintaining 'the crucial balance between different fundamental rights in this area, particularly the right to life on the one hand, and the right to freedom of expression and privacy on the other'.[195] However, as Waldron cautions, invocation of the balance metaphor needs to 'pay some attention to the fact that the real diminution in liberty may affect some people more than others,' and that security measures may involve a 'proposal to trade off the liberties of a few against the security of the majority.'[196] Furthermore, such measures may increase protection from terrorism while reducing protection from the infringement of individual rights by the state.[197]

The EU's inattention to potential human rights harms arising from its counter-terrorism measures is not surprising, given the marginalisation of human rights and the rule of law impact analysis in the development of EU counter-terrorism measures.[198] Since 2001 fewer than three percent of counter-terrorism legislative measures have been subject to public consultations, and three quarters of counter-terrorism measures have been adopted without an impact assessment.[199] While the EU Counter-terrorism Coordinator noted the need to understand the impact of counter-terrorism measures on minority groups in 2010, and the Commission committed to carrying out

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185 Baker-Beall 'The European Union's Fight against Terrorism' (n132), 182.

186 UNGA A/RES/60/288 (20 September 2006).

187 Art 1(2) FDCT 2002.

188 This point is also made by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in relation to invocation of human rights law obligations in the UN Security Council Resolutions on counter-terrorism. See UNGA 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (2019) UN Doc A/74/335, para 21. See also Anastasia Tsoukala, 'Democracy against Security: The Debates about Counter-terrorism in the European Parliament, September 2001-June 2003' (2004) 29 Alternatives 417.

189 Murphy, EU Counter-Terrorism Law (n64), 74.

190 European Parliament, Report on the Proposal for a Council Framework Decision Amending Framework Decision 2002/475/JHA on Combating Terrorism (COM(2007)0650 – C6-0466/2007 – 2007/0236(CNS)), A6-0323/2008.

191 DCT, Recital 22, 35, 36 and 39.

192 DCT, Art 23.

193 DCT, Recital 40, 'The expression of radical, polemic or controversial views in the public debate on sensitive political questions, falls outside the scope of this Directive and, in particular, of the definition of public provocation to commit terrorist offences'.

194 Commission, 'Communication from the Commission to the European Parliament and the Council concerning Terrorist Recruitment: Addressing the Factors Contributing to Violent Radicalisation' COM (2005) 313 final, 21 September 2005, 2.

195 ibid.

196 Jeremey Waldron, 'Liberty and Security: The Image of Balance' (2003) 11 The Journal of Political Philosophy 191, 194. See also Stuart Macdonald, 'The unbalanced imagery of anti-terrorism policy' (2009) 18 Cornell Journal of Law and Public Policy 519; C Michaelsen, 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29 University of New South Wales Law Journal 1

197 ibid, 195.

198 Valsamis Mitsilegas, 'Counterterrorism and the rule of law in an evolving European Union: Plus Ca Change?' (2020) New Journal of European Criminal Law DOI: 10.1177/2032284420971783

199 Wim Wenisk and others, 'The European Union's Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness' (European Union, Brussels, 2017), 17.

an impact assessment in 2015 ahead of updating the 2008 FDCT,[200] the EU adopted the DCT without any *ex ante* impact assessment.[201] This marginalisation of human rights impact assessments was compounded by the speed with which the EU adopted the DCT, leaving limited time for the engagement of civil society and human rights experts and thus curtailing public participation and accountability.[202]

Inattention to human rights impacts before adoption has been matched by a lack of scrutiny on human rights and rule of law impacts in ex-post evaluations. The Commission's implementation evaluation of the 2002 FDCT glanced only cursorily at the safeguarding of individual rights.[203] The lack of attention to potential human rights harms is evidenced by recent European Court of Justice cases in which EU measures attempting to enable broad and enhanced data collection and data sharing were ruled to violate individual rights.[204] While these decisions are welcome, reliance on protecting fundamental rights through judicial oversight in individual cases is constrained by judicial deference to governments on issues of national security.[205] In this context the review of the human rights impact explicitly mandated in DCT is a development in the right direction. However, fundamental features embedded in legal and policy frameworks that erode human rights and the rule of law need to be addressed through broader democratic political and policy processes.

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200 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Agenda on Security' COM (2015) 185 final, 28 April 2015, 14.

201 Council of the European Union, 'EU Counter-Terrorism Strategy – Discussion Paper' Note 15894/1/10 Rev 1, 29 November 2010, 10-11.

202 See for example, 'Rush to "fight terrorism" threatens our fundamental rights and security' *European Digital Rights* (4 July 2016), <https://edri.org/our-work/rush-fight-terrorism-threatens-our-fundamental-rights-security/> accessed 1 February 2021.

203 Murphy, *EU Counter-Terrorism Law* (n64) 79.

204 *Digital Rights Ireland and Seitlinger and Others* (C-293/12 and C-594/12) [2014] E.C.R. I-238 and ECJ, Opinion 1/15 (Grand Chamber) – Draft agreement between Canada and the European Union, 26 July 2017. See also Arianna Vedaschi, 'The European Court of Justice on the EU-Canada Passenger Name Record Agreement: ECJ, 26 July 2017, Opinion 1/15' (2018) 14 *European Constitutional Law Review* 410.

205 Didier Bigo and others *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges.* (Centre for European Policy Studies, Brussels 2015). See also Federico Fabbrini, 'Courts and the politics of secrecy: national security, human rights and the importance of supranational oversight' (2018) 41 *West European Politics* 869.

4. LEGISLATION AND POLICY IN THE CASE STUDY STATES

This chapter focuses on two central aspects of counter-terrorism laws and policy that are influenced and shaped by EU law, policies and practices in the five states covered by this report. First, the shift towards pre-emption in the development of criminal law offences relating to terrorism; and second, the rapid development of counter-radicalisation policies and plans accompanied by increased state-instigated surveillance of groups deemed to be at risk of radicalisation for signs of incipient terrorism. Both developments play a critical role in shaping the experiences of groups at risk of discrimination examined in this report. A third trend is the expansion of the use of executive powers against those suspected of involvement in terrorism, limiting judicial checks and so eroding the rule of law and accountability. While not directly related to any EU measures or policies this reinforces the broader trend toward pre-emption and prevention.

This section sets out key laws and policies in each of the states covered by this report. Among these France, Germany, and Spain, having experienced significant levels of terrorism in the last century, had a developed and tested existing framework of anti-terrorism laws while Hungary and Poland, with little experience of non-state actor terrorism, introduced counter-terrorism laws to ensure their alignment with EU law prior to their accession to the Union in 2003. Supported by the FDCT and DCT, all five states have expanded the scope of their criminal law to encompass pre-crime and pre-emptive offences, criminalising conduct that does not directly entail harm to others.[206] These offences rely on the assumption that present unlawful actions are indicators of future terrorist violence. As noted earlier in this report, this opens the door to racialised stereotyping, placing greater weight on the assumed dangerousness of the individual than on the direct danger of their actions.

While counter-radicalisation only emerged in security policy from 2003, it is now deeply embedded in European counter-terrorism policy frameworks. The focus on action to counter radicalisation has intensified in recent years. Notwithstanding initial concerns about the implications for human rights and the rule of law, many EU states have developed counter-radicalisation policies and action plans and adopted an approach that enrols frontline workers in sectors such as education, healthcare and social work into the state security apparatus.[207] This involves training both public officials (including educators, youth workers and security actors) and members of civil society organisations working on social issues in 'vulnerable communities' to understand pathways to radicalisation and identify purported signs of radicalisation.

4.1 France

In France, a pre-crime approach to terrorism has been in place for several decades. Here the primary tool in prosecutions for preparatory actions has been the offence of 'criminal association in connection with a terrorist enterprise'.[208] This allows prosecution without requiring a specific terrorist action plan and can be used against those who provide logistical or financial support. According to Human Rights Watch (HRW), 'the broad definition and expansive interpretation of *association de malfaiteurs* translate into a low standard of proof for decision to arrest suspects or to place them under investigation by a judge. Indeed, casting a wide net to ensnare large numbers of people who might have some connection with an alleged terrorist network has been one of the characteristics of investigations into *association de malfaiteurs*.'[209] HRW argues that this has led to convictions based on weak and circumstantial evidence connecting individuals to those involved in a terrorist enterprise through their association, regular contact and shared political and religious beliefs. An analysis of the evidence underpinning these prosecutions, which centred on ideological commitment and religious

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206 European Commission, Report from the Commission to the European Parliament and the Council based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, COM(2020) 619 final, 30 September 2020.

207 The European Commission has compiled information about Member States' counter-radicalisation strategies and related counter-terrorism (CT) strategies. See European Commission, 'Prevent Strategies of Member States' <https://ec.europa.eu/home-affairs/what-we-do/networks/radicalisation_awareness_network/ran-and-member-states/repository_en> accessed 1 February 2021.

208 Law 96-647 of July 22, 1996 introduced the charge of '*association de malfaiteurs en relation avec une entreprise terroriste.*' [criminal association in connection with a terrorist enterprise]
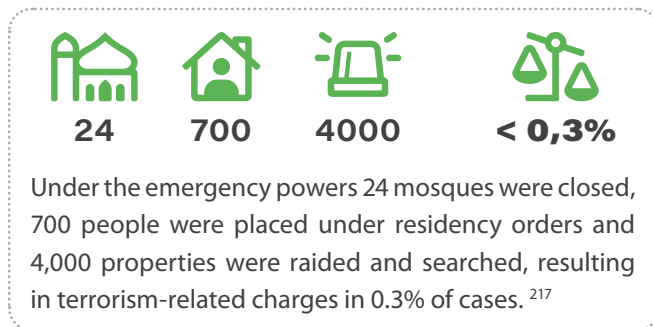
209 Human Rights Watch, *Pre-empting Justice: Counter-terrorism law and procedure in France* (Human Rights Watch, New York, 2008) 2.

beliefs in the absence of a direct threat to public order, suggested 'a shift away from the legitimate criminalisation of preparatory acts threatening public order and safety, towards the establishment of mechanisms of guilt by association rooted in a form of 'enemy criminal law'.'[210]

Prosecutions for the offence of 'apology for terrorism' are also increasing in use. While the offence dates back to the nineteenth century, legal changes in 2014 have seen a dramatic increase in investigations and prosecutions and a leap from three convictions in 2014 to 306 in 2016.[211] The latter convictions were the result of 1,850 police investigations, one in five of which were of children and young people under the age of 18.[212] By 2018, apology for terrorism was the most frequently used counter-terrorism criminal measure in France.[213] Yet 'cases do not typically involve direct incitement to violence but usually revolve around drunken interactions with the police or provocative – and sometimes obnoxious – statements in school courtyards or on social media'.[214]

In the aftermath of November 2015 attacks in Paris, the French government declared a State of Emergency, empowering the executive to take extraordinary measures to prevent possible future attacks.[215] Prior to the State of Emergency, French anti-terrorism laws had allowed the police to search homes and detain suspects only after securing a judicial warrant. The powers introduced by the State of Emergency removed this important safeguard and allowed the executive to act without such a warrant. Emergency laws empowered state officials to close mosques, raid homes, search premises, and place individuals under residency orders without the obligation to first present evidence to an independent judge. Furthermore, the threshold for using the emergency powers was much wider than under the criminal law. Rather than evidence of criminal or unlawful activity, the emergency powers allowed a search of premises used by a person whose 'behaviour constitutes a threat to public order and security'. Human rights bodies report numerous examples of racist insults and unnecessary damage to property during raids.[216]

24   700   4000   < 0,3%

Under the emergency powers 24 mosques were closed, 700 people were placed under residency orders and 4,000 properties were raided and searched, resulting in terrorism-related charges in 0.3% of cases.[217]

The State of Emergency lasted until November 2017, when parliament passed the Strengthening Homeland Security and Counter-terrorism Act (SILT). The SILT law retains and normalises pre-emptive administrative measures. It grants broad powers to the executive and transfers powers to authorise security perimeters, close places of worship for up to six months, place individuals under house arrest and carry out surveillance, search and seizure from the judiciary to the executive. This amounts to a profound rebalancing of the national counter-terrorism framework towards greater executive power with weakened *a posteriori* rather than *a priori* judicial oversight.[218]

Compared to other Western European states, France for a long time resisted developing policies for preventing and countering radicalisation, preferring to rely on the twin approach of criminal prosecutions and the expulsion of foreign nationals deemed a terrorist threat.[219] However, the 2012 attack in Toulouse, the increasing number of French citizens travelling to Syria and Iraq to join ISIS and a review of policy by the Prefect Yann Jounot led France to develop its first counter-radicalisation policies. Since

210 Henri Decoeur, 'The Criminalisation of armed jihad under French law: Guilt by association in the age of enemy criminal law' (2017) 25 *European Journal of Crime, Criminal Law and Criminal justice* 299, 301.

211 Commissioner for Human Rights, 'Misuse of anti-terror legislation threatens freedom of expression' Council of Europe, 4 December 2018. <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threat-ens-freedom-of-expression> accessed 1 February 2021.

212 Nadim Houry, 'France's Creeping Terrorism Laws: Restricting Free Speech' *Just Security* 30 May 2018, <https://www.justsecurity.org/57118/frances-creep-ing-terrorism-laws-restricting-free-speech/> accessed 1 February 2021

213 UN OHCHR, 'Preliminary findings of the visit: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to France' 23 May 2018. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23128&LangID=E> accessed 1 February 2021

214 Houry, 'France's Creeping Terrorism Laws' (n212).

215 For concerns relating to the use of powers under State of Emergency see Berenice Boutin and Christoph Paulussen, 'From the Bataclan to Nice: A Critique of France's State of Emergency Regime' ASSER Policy Brief No. 2016-01 (Asser Institute, The Hague, 2016).

216 Commission Nationale Consultative Des Droits De L'Homme, ''Statement of Opinion on State of Emergency' 18 February 2016, para 7-10. <https://www.cncdh.fr/sites/default/files/english_avis_statement_of_opinion_on_the_state_of_emergency.pdf> accessed 1 February 2021.

217 Ministry of Interior, 'Bilan de l'état d'urgence' [Assesssment of the State of Emergency] 3 November 2017 <www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence> and Iris Ouedraogo, '32 attentats déjoués, 4457 perquisitions, 752 assignations à résidence : l'état d'urgence en chiffres' [32 thwarted attacks, 4,457 searches, 752 house arrest: the state of emergency in figures] *Le Journal du Dimanche* 1 November 2017,< https://www.lejdd.fr/Societe/32-attentats-dejoues-4457-perquisitions-752-assignations-a-residence-letat-durgence-en-chiffres-3480650> accessed 1 February 2021.

218 Adrián Serrano-Sanz, 'Normalizing the Exception in the Counterterrorism Response: The Case of France' (2021) 173 *Revista Española de Investigaciones Sociológicas* 141.

219 On the use of national security removals see Human Rights Watch, France – *In the Name of Prevention: Insufficient Safeguards in National Security Removals* (New York, 2007) <http://hrw.org/reports/2007/france0607/> accessed 1 February 2021

2014, French officials have made up for this lost time, inundating practitioners and civil society with numerous new policies and action plans. Following the attacks in Paris in January 2015 it adopted a Counter-terrorism Plan. After the attacks of November 2015, the government adopted a new Security Pact (PDS), increasing the resources and personnel dedicated to countering terrorism. In 2016 there was a revised Action Plan Against Radicalisation and Terrorism (APART). [220] In February 2018 there was a further National Plan for the Prevention of Radicalisation (PNPR),[221] followed by a Plan of Action against Terrorism (PACT) in July 2018.[222]

4.2 Germany

Memories of the subversion of democratic institutions during the Weimar Republic led the Federal Republic of Germany to adopt constitutional provisions enabling the state to pre-emptively curtail some fundamental rights of individuals deemed to threaten the free democratic basic order.[223] Building on laws and policies developed in the 1970s against the home grown terrorism of the Red Army Faction,[224] in the immediate aftermath of the 2001 terrorist attack on the USA two packages of security measures were introduced that expanded surveillance and data-collection powers and enabled police and intelligence agencies to target 'international terrorism'.[225] This included abolition of the 'religious privilege' that until then had protected religious associations from powers enabling federal or state governments to ban associations threatening the constitutional legal order.[226]

However, it was the Council of Europe[227] and the EU that provided the most significant impetus for introducing 'pre-crime' offences into German law.[228] The German penal code was amended to cover the 'preparation' of violent offences endangering the state,[229] and a new offence of establishing contacts with the intention of receiving instruction for the purpose of committing a serious violent offence endangering the state was created.[230] These offences, which extended criminalisation beyond the realm of attempts and conspiracy traditionally covered by criminal law, have sparked criticism for their 'criminalisation of otherwise innocent or 'neutral' conduct: conduct that is not wrongful apart from the required harmful intention, and from which such harmful intention is not easily inferred'.[231] Pre-crime offences also cover travelling abroad with the intention of facilitating terrorism and 'encouraging the commission of a serious violent offence endangering the state'.[232]

Countering extremism and threats to the domestic political order have traditionally fallen on federal and state-level Offices for the Protection of the Constitution (*Verfassungsschutz* or VS) and the police. The VS is a key institution for gathering intelligence and information on potential emerging domestic threats. The federal VS dominates public debate on extremism in Germany. It provides an annual public report that list 'extremist' movements and organisations across a range of categories including 'Islamist extremism'.[233] These are widely disseminated and used by public and private bodies. Organisations and individuals identified by the VS as 'extremist' face significant stigmatisation and social and economic repercussions. As the VS does not have a policing or investigative role and its function is political analysis, its information is kept separate from police data.[234] However, where there is a vital

220 Government of France, 'Plan d'Action Contre la radicalisation et le terrorisme: Dossier de Presse' [Plan of action against radicalisation and terrorism: Press document] 9 May 2016 <https://www.gouvernement.fr/sites/default/files/document/document/2016/05/09.05.2016_dossier_de_presse_-_plan_daction_contre_la_radicalisation_et_le_terrorisme.pdf> accessed 1 February 2021.

221 Government of France, 'Radicalisation: les cinq grands axes du plan "Prévenir pour protéger"' [radicalisation: the five main pilliars of the 'Prevent to Protect Plan'] <https://www.gouvernement.fr/radicalisation-les-cinq-grands-axes-du-plan-prevenir-pour-proteger> accessed 1 February 2021.

222 Government of France, 'Plan d'Action Contra le Terrorime' [Plan of Action Against Terrorism] <https://www.gouvernement.fr/risques/plan-d-action-contre-le-terrorisme> accessed 1 February 2021.

223 German Basic Law, Art 18. The rights that can be forfeited include freedom of expression, assembly, association, privacy of correspondence and communications, property, and asylum. The key features of a 'free democratic basic order' are set out in the Federal Act on the Protection of the Constitution and on the Federal Office for the Protection of the Constitution, Art 4. See Federal Ministry of Justice and for Consumer Protection, 'Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz' [Act on cooperation between the Federal Government and the Länder in matters of constitutional protection and on the Federal Office for the Protection of the Constitution] <https://www.gesetze-im-internet.de/bverfschg/> accessed 1 February 2021.

224 See Kevin G. Horbatiuk, 'Anti-Terrorism: The West German Approach' (1979) 3 *Fordham International Law Journal* 167; Shawn Boyne, 'Law, Terrorism, and Social Movements: The Tension between Politics and Security in Germany's Anti-Terrorism Legislation' (2004) 12 *Cardozo J Int'l & Comp L* 41

225 See Oliver Lepsius, 'Liberty, Security, and Terrorism: The Legal Position in Germany' (2004) 5 *German Law Journal* 435.

226 German Basic Law, Art 9(2).

227 Council of Europe Convention on the Prevention of Terrorism 1 June 2007, CETS No. 196

228 Anneke Petzsche, 'The European Influence on German Anti-Terrorism Law' (2012) 13 German Law Journal 1056.

229 StGB §89a.

230 StGB 89b.

231 Andrew Cornford and Anne Petzsche, 'Terrorism Offences' in K Ambos, A Duff, J Roberts, T Weigend, and A Heinze (eds.) *Core Concepts in Criminal Law and Criminal Justice* (CUP, 2020), 179.

232 StGB § 91

233 The 2019 report gives details in relation to the following categories: right-wing extremism/terrorism; "Reichsbürger" and "Selbstverwalter" ("citizens of the Reich" and "sovereign citizens"); left-wing extremism; Islamist extremism and terrorism; extremist efforts by foreigners posing a threat to security (excluding Islamist extremism); intelligence activities; espionage and cyberattacks carried out on behalf of a foreign power; and the Scientology Organisation. Federal Office for the Protection of the Constitution 'Annual Reports' <https://www.verfassungsschutz.de/en/public-relations/publications/annual-reports> accessed 1 February 2021.

234 BVerfG, Judgment of the First Senate of 24 April 2013 - 1 BvR 1215/07 -, paras. 1-233, <http://www.bverfg.de/e/rs20130424_1bvr121507en,html>

public interest its information is shared, and so may play a role in the identification of and action against so-called *Gefährder*.

In fact, the identification of and action against '*Gefährder*' is a central plank of pre-emption in Germany. *Gefährder*, a concept emerging from a federal police working group,[235] has been defined as a person concerning whom there are facts to justify the assumption that they are planning to undertake a significant politically-motivated crime such as those listed in the Code of Criminal Procedure, StPO s100a.[236] Although there may be insufficient evidence for prosecution, designation as a *Gefährder* by a court enables the police to restrict an individual's movements, require them to wear an electronic ankle monitor and impose bans on social contacts and communications.[237] Such powers, initially applied to non-German nationals,[238] were extended to German nationals after the 2016 attacks on the Berlin Christmas Markets.[239] In 2017 550 Muslims were identified as *Gefährder*.[240] The concept of *Gefährder* illustrates the shift towards pre-crime, undermining the presumption of innocence and blurring the distinction between unlawful and lawful behaviour by constructing lawful actions, activities and associations as 'pre-criminal'. The German jurist and judge Professor Kai Ambos has suggested that in targeting dangerous persons rather than acts it comes dangerously close to creating a 'criminal law of the enemy'.[241]

Large-scale counter-radicalisation programmes initiated after the Joint Counter-terrorism Centre's 2009 De-radicalisation working group and the Federal Ministry of Interior's 2011 Prevention summit[242] paved the way for the implementation of so-called selective

preventive measures[243]. By 2015, the '*Demokratie Leben*' (Live Democracy) programme had been established by the Federal government to provide 100 million euro a year to fund federal, regional and local initiatives against right-wing extremism and Islamism.[244] The Strategy of the Federal Government on Extremism Prevention and Promotion of Democracy was published in 2016[245] and the National Programme to Prevent Islamist Extremism was published in 2017. [246] The federal government allocated 400 million euros, directed mainly at civil society organisations, for the implementation of the latter in the period 2017–20.[247]

In Germany the emphasis has been on locally-based initiatives focusing on family and social support. Despite prominent calls for more preventive measures, the establishment and growth of this prevention infrastructure has sparked some criticism. It is argued that project-based prevention measures are a cheaper alternative that allow the welfare state to retreat from its tasks of organising and securing sociality.[248] Furthermore, the focus on Salafism and Islamism as the sole roots of radicalisation is criticised for enabling policymakers and practitioners to take other socio-economic and sociocultural factors such as inequality and dynamics in foreign policy less seriously[249]. According to the study by the National Centre for Crime Prevention, no scientific evaluations are yet available that verify the effectiveness of prevention interventions

235   Landtag Brandenburg, Drucksache 6/6272.

236   ibid and Deutscher Bundestag, Drucksache 19/3701.

237   BKAG §55 (Act on the Federal Criminal Police Office and the Cooperation of the Federation and the States in Criminal Police Matters) <https://www.gesetze-im-internet.de/bkag_2018/BJNR135410017.html> accessed 1 February 2021.

238   Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Residence Act), §56. Online at: www.gesetze-im-internet.de/aufenthg_2004.

239   German Institute for Human Rights, 'Written submission to the 123rd session of the Human Rights Committee for adoption of the "List of Issues Prior to Reporting" for the Federal Republic of Germany' April 2018, 7.

240   'Blame traded over Berlin Truck Attack' *Deutsche Welle* (13 February 2017) <https://www.dw.com/en/blame-traded-over-berlin-truck-attack/a-37538489> accessed 1 February 2021

241   Kai Ambos (2020) 'The Terrorist as a potentially Dangerous Person – The German Counterterrorism Regime' *Just Security*, 28 May 2020, https://www.justsecurity.org/70264/the-terrorist-as-a-potentially-dangerous-person-the-german-counterterrorism-regime/ accessed 1 February 2021.

242   'German Interior Minister Urges Muslims to combat militancy' *Deutsche Welle* (25 June 2011). <https://www.dw.com/en/german-interior-minister-urges-muslims-to-combat-militancy/a-15188733> accessed 1 February 2021.

243   Wiebke Steffen,'Internationaler Terrorismus: Wie können Prävention und Repression Schritt halten?' [International Terrorism: How Can Prevention and Repression Keep Up] BKA-Herbsttagung vom 18. - 19. November 2015, 23. ,https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/Herbsttagungen/2015/herbsttagung2015SteffenLangfassung.pdf?__blob=publicationFile&v=1> accessed 1 February 2021

244   'About "Live Democracy!"' Federal Programme, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. <https://www.demokratie-leben.de/en/federal-programme/about-live-democracy.html> accessed 1 February 2021.

245   Federal Government of the Federal Republic of Germany, 'Strategie der Bundesregierung zur Extremismusprävention und Demokratieförderung [Federal Government Strategy for the Prevention of Extremism and Promotion of Democracy]', 2016. This defines the prevention of extremism to 'include measures which prevent and counteract rejection of the order of values of the Basic Law and the Democratic Constitutional State, and also serve the security of the citizens in this context […] Measures directed towards people and groups, their environment and their network as well as possible offenders to prevent the consolidation of problematic attitude patterns and to interrupt attitudinal transition towards (violent) action.'

246   'Nationales Präventionsprogramm gegen islamisitschen Extremismus', ['National Prevention Programme against Islamist Extremism] https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/sicherheit/praeventionsprogramm-islamismus.html> accessed 1 February 2021.

247   Mecklenburg and Anthony, *Preventing Violent Extremism in Germany* (n82) 12.

248   *Michail Logvinov, Salafismus, Radikalisierung und terroristische Gewalt: Erklärungsansätze, Befunde, Kritik* [Salafism, radicalization and terrorist violence: explanations, findings, criticism] (Springer, Wiesbaden, 2017), 123.

249   ibid.

against Islamist extremism,[250] although there are some project-based (self-)evaluations.[251]

4.3 Hungary

The Hungarian penal code was amended in 2003 to harmonize national legislation with EU law. A new criminal code (Act C of 2012) included a very broad definition of terrorism, with 'terrorist acts' covering not only violence against individuals but also extending to action such as vandalism.[252] It also criminalised threatening to commit a terrorist act[253] and failure to report a terrorist act.[254] In the wake of the 2015 'refugee crisis' the Hungarian government emphasised the perceived threat of terrorism from refugees and migrants coming into Europe from North African and the Middle East.

Of the five states covered in this report, Hungary and Poland did not have significant counter-radicalisation policies in place or were in the process of developing their policies during the period when research for this report was undertaken. In Hungary the training of teachers and school staff in identifying signs of radicalisation started in 2019 through the Crime Prevention Department of the National Police. The department incorporated sessions on counter-terrorism and deradicalisation within its existing crime prevention training on drugs, domestic violence and bullying in schools. While initial training has been delivered, at the time of writing there had been no referrals of young people identified as at risk of radicalisation.

The Hungarian government introduced the Sixth Amendment to the Fundamental Law to strengthen executive powers in response to increased migration to Europe in 2014. Relying on the vague concept of a 'terror threat situation', the Sixth Amendment furnishes the government with far-reaching powers where a 'terror threat situation' is declared to exist. Within 15 days of such a declaration parliament is required to confirm the existence of a 'terror threat situation' by a two-thirds majority vote. While this is an important check on executive power, the declaration of a 'terror threat situation' nevertheless provides the basis for the exercise of exceptional executive

powers for a period of 15 days. During this 15-day period the executive is able to enact exceptional measures including suspending laws, fast-tracking the adoption of new ones, and applying special measures (yet to be defined) to prevent terrorism. The Sixth Amendment provides a wide scope for sweeping restrictions to the rights to freedom of association and peaceful assembly, privacy and freedom of movement. In a political landscape where refugees and others are regularly portrayed as a threat to security, concerns have been raised that the government could apply the measures arbitrarily for political rather than security reasons. [255] Thus, 'the "terror threat situation" violates the principle of legality, which requires that the law be formulated in clear and unambiguous terms'.[256]

4.4 Poland

In Poland, the EU has been a key driver in the development of counter-terrorism legislation, with laws initially introduced as part of the process of harmonising legislation prior to Poland joining the EU.[257] By 2015 Poland had launched its first four-year National Anti-Terrorism Plan, and in 2018 Poland's Internal Security Agency established a Terrorism Prevention Centre of Excellence to focus on terrorism prevention. Poland has not developed counter-radicalisation policies or programmes.

The lack of a clear definition of terrorism has fuelled concern about a push towards developing pre-emptive terrorism offences. An important feature of Poland's counter-terrorism law is the concept of 'an offence of a terrorist nature', first introduced in the Act of 16 April 2004.[258] The United Nations Human Rights Committee found the concept 'overly broad and not adequate in defining the crime's nature and consequences', and urged Poland to ensure that the Polish Penal Code defines such crimes narrowly and in terms of their purpose.[259] Such concerns have not inhibited the Polish government from building upon this concept to establish a range of pre-emptive terrorism offences including public provocation of terrorism,[260]

250 Andreas Armborst and Marcus Kober, 'Effekte von Ansätzen zur Prävention Islamistischer Radikalisierung: Systematische Übersichtsarbeit zu den Methoden und Ergebnissen von Studien zur Evaluation von Präventionsansätzen im Bereich Islamismus' ['Effects of approaches to the prevention of Islamist radicalization: Systematic review of the methods and results of studies evaluating prevention approaches in the field of Islamism] (Nationales Zentrum Kriminalprävention, Bonn, 2017).

251 ibid.

252 Criminal Code Section 314

253 Criminal Code Section 316

254 Criminal Code Section 317

255 Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe* (Amnesty International, London, 2017) 17. Available at <https://www.amnesty.org/download/Documents/EUR0153422017ENGLISH.PDF> accessed 1 February 2021.

256 ibid.

257 Piotr Daranowski, 'Poland' in Kent Roach (ed.) *Comparative Counter-Terrorism Law* (CUP, 2015).

258 Penal Code article 115 § 20.

259 Amnesty International, 'Submission to the United Nations Human Rights Committee, 118th Session, 17 Oct – 04 Nov 2016 (Amnesty International, London, 2016). <https://amnesty.org.pl/wp-content/uploads/2016/10/HRC-submission-Amnesty-International.pdf> accessed 1 February 2021.

260 Art. 255a. Whosoever disseminates or publicly presents content that could facilitate the commitment of an offence of a terrorist nature is punishable by three months to five years' imprisonment.

terrorist training,[261] and crossing the Polish border for the purpose of conducting a terrorist offence.

Poland's 2016 Anti-Terrorism Act significantly increased executive powers aimed at preventing 'events of a terrorist nature'. Poland's Commissioner for Human Rights argued that the legislation infringes constitutional and European human rights[262] with insufficient procedural control and oversight.[263]

> 1 - it enables the Internal Security Agency (ISA) to maintain and retain lists of individuals suspected of engaging in terrorist activities. A person listed on the ISA registry cannot challenge the placement or initiate the process to have their name removed from it.[264]
>
> 2 - the head of the ISA can order covert surveillance of non-Polish nationals (and Polish citizens with whom they communicate, work, or share accommodation) for up to three months.[265]

Crucially, in term of accountability and oversight the covert surveillance is carried out by executive action and does not need prior judicial authorisation unless it is deemed necessary to extend the surveillance period beyond three months. However, this safeguard can be circumvented by the executive if they close the surveillance procedure and after a few days, open a new procedure involving the same person for a further three months. This legal lacuna creates the risk of permanent surveillance on a rolling three-month basis with no judicial oversight.[266]

Moreover, the Law 'does not provide procedural safeguards to ensure that a person, should she or he be made aware of surveillance, can challenge it and have access to an effective remedy against unlawful surveillance.'[267]

Under the 2016 Anti-Terrorist Act, the Internal Security Agency (ISA), police and border guards can collect fingerprints, photographs and biometric material from non-Polish nationals where there are doubts as to their identity or the declared purpose of their stay in Poland, or there is suspicion of their engagement in a 'terrorist event' (art. 10). The 2016 Act also amends the 2013 Foreigner Act. One important change is the addition of art.329a by which the Minister of the Interior can issue a foreign national with 'an obligation to return' order if there is fear or suspicion that they might be involved in terrorist activity. An obligation to return order does not require priori judicial authorization and has immediate effect. As noted by Amnesty International, taken together the various measures in the 2016 Act '[consolidate] sweeping powers, including enhanced surveillance capacity, in the hands of the Internal Security accountability. Combined with other legislative amendments, such as those to the Police Act[268] and the Criminal Procedure Code,[269] it creates conditions for violations of the rights to life, liberty, privacy, fair trial, expression, peaceful assembly, and non-discrimination.'[270]

4.5 Spain

Despite Spain's counter-terrorism measures developed in response to terrorism from Basque separatist groups, it has significantly expanded its counter-terrorism policies in the past decade, adopting its first Comprehensive Strategy Against International Terrorism and Radicalisation in 2014, updated in 2019 by a National Counter-terrorism Strategy.[271] A raft of measures adopted after the attacks on the Charlie Hebdo offices in Paris signalled a shift towards the development of pre-emptive offences. Unlike earlier anti-terrorism laws targeting the actions and activities

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261 Anti-Terrorism Act of 10 June 2016 Art. 32.5, modified art. 255a of the Penal Code. According to art.255a §2 a person who, aiming to commit an offence of terrorist character, participates in training that might facilitate the commission of such offence has committed an offence punishable with imprisonment up to five years. See <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000904/T/D20160904L.pdf> accessed 1 February 2021.

262 In particular, the Commissioner for Human Rights raised concerns over the vague and overbroad definition of 'an event of a terrorist nature' (art. 2.7 of the 10 June 2016 Act); the vague procedures regarding the register of individuals suspected of terrorism (art 6 of the 10 June 2016 Act); and differential treatment and uncontrolled surveillance of non-citizens (art. 9. 1 of the 10 June 2016 Act). See 'The Commissioner for Human Rights challenges the Anti-Terrorism Act before the Constitutional Tribunal' 11 July 2016 https://www.rpo.gov.pl/pl/content/RPO-skarzy-ustawe-antyterrorystyczna-do-TK accessed 1 February 2021.

263 Parliament of Poland, 'Extraordinary subcommittee to consider the government's bill on anti-terrorist activities and amending certain other acts (print no. 516)' http://www.sejm.gov.pl/Sejm8.nsf/transmisje_arch.xsp?unid=09D-B4AC2D8FF0E98C1257FBC0034DDDA accessed 1 February 2021.

264 Amnesty International, 'Poland: Submission to the United Nations Human Right Committee' (Amnesty International, London, 2016), 11. https://amnesty.org.pl/wp-content/uploads/2016/10/HRC-submission-Amnesty-International.pdf 1 February 2021.

265 Anti-Terrorism Act 2016, Article 9.

266 Helsinki Foundation for Human Rights, 'Uwagi Hesinskiej Fundacji Praw Czlowieka do projektu ustawy o dzialaniach antyterrorystycznych (druk sejmowy nr 516) [Comments of the Helsinki Foundation for Human Rights on the draft law on anti-terrorist activities (Sejm print no.516)], p. 7 <http://www.hfhr.pl/wp-content/uploads/2016/05/HFPC_ustawa_antyterrorystyczna.pdf> accessed 1 February 2021.

267 The Panoptykon Foundation, 'Stanowisko Fundacji Panoptykon w sprawie projektu ustawy o działaniach antyterrorystycznych' [The position of the Panoptykon Foundation on the bill on anti-terrorist activities] http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/04/Panoptykon_uat_opinia_10.05.2016.pdf accessed 1 February 2021.

268 Act of 15 January 2016 amending the Police Act and certain other acts (*Ustawa z dnia 15 stycznia 2016 r. o zmianie ustawy o Policji oraz niektórych innych ustaw*) Journal of Laws 2016 item 147.

269 Act of 11 March 2016 amending the Criminal Procedure Code and certain other Acts (*Ustawa z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw*) Journal of Laws 2016 item 437.

270 Amnesty International, 'Poland: Submission to the United Nations Human Rights Committee' (n264) 10.

271 Government of Spain, 'National Counter-terrorism Strategy' (2019) Available: https://www.dsn.gob.es/es/documento/estrategia-nacional-contra-terrorismo-2019 1 February 2021.

of terrorist organisations and their members, the new proposals aimed to address increasing concern about attacks by individuals inspired, rather than directed, by a terrorist organisation; so called 'lone wolves'.

The Spanish criminal law code was expanded to cover a wider range of pre-emptive terrorism offences[272] focusing on prohibiting 'training and indoctrination in hate'. The measures prohibiting terrorist training extend beyond training in practical skills to encompass 'ideological training' through indoctrination. Controversially, this covers not only the indoctrination of others but also self-indoctrination, and makes it unlawful to repeatedly access online material that incites terrorism. It also prohibits the acquisition or possession of documents of this nature for the purpose of self-indoctrination in order to commit any terrorist offence.

The pre-crime offences are so wide-ranging that an individual may be found guilty of an offence if they are simply in possession of a book with the aim of indoctrinating themselves to commit a terrorist offence, even if they have not read it.[273] Depending on the circumstances, the mere expression of ideas can justify an investigation, police control, and even the temporary restriction of some individual rights such as the right to privacy of communications, to the extent that such a form of expression is seen as a reasonable indication of the existence of danger. While conviction for self-indoctrination entails more than the adoption of ideological views and necessitates evidence of decisions to take actions based on these ideological views, the level or nature of the action needed to support prosecution for ideological training remains unclear and uncertain.[274]

Human rights experts and organisations have raised concerns about the prosecutions for glorification of terrorism introduced in the anti-terrorism law. UN human rights experts have warned that the lack of clear definitions in the legislation enabled disproportionate and discretionary enforcement.[275] According to Amnesty International 'social media users, journalists, lawyers and musicians

have been prosecuted under Article 578 of the Spanish Criminal Code, which prohibits "Glorifying terrorism" and "humiliating the victims of terrorism"'.[276] The increase in the use of this offence since the introduction of amendments in 2015 has included the prosecution of musicians and children's puppeteers.[277] The result is 'increasing self-censorship and a broader chilling effect on freedom of expression in Spain'.[278]

Spain launched its National Plan to Fight Violent Radicalisation (PEN-LCRV) in 2015.[279] It identifies the need for the 'early detection' of violent radicalism, and aim to focus on 'those communities, groups or individuals at risk or vulnerable.'[280] The plan, prepared by the Intelligence Centre for Counter-Terrorism and Organised Crime (CITCO), places particular emphasis on training officials and civil society actors to identify signs of radicalisation. The focus is on local officials (social workers, school staff, local police, courts and social entities) meeting and exchanging information to assess and manage 'early warnings' of radicalisation. In addition to the national policy there are different regional and local plans and protocols. Some, such as the local plans in the Basque region,[281] Catalonia,[282] Madrid,[283] and Malaga[284] have attracted public discussion and controversy.

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272 Organic Law 2/2015 modified measures on terrorism offences in Organic Law 10/1995.

273 Alberto Alonso Rimo, 'Is prevention better than cure? The ever-increasing criminalisation of acts preparatory to an offence in Spain' (2020) 9 *International Journal for Crime, Justice and Social Democracy*. Advance online publication, https://doi.org/10.5204/ijcjsd.v10i1.1502 accessed 1 February 2021.

274 Spain, Supreme Court judgment 39/2018 of 16 January 2018, Roj: STS 39/2018 – ECLI: ES: TS: 2018:39

275 UNCHR, '"Two legal reform projects undermine the rights of assembly and expression in Spain" – UN Experts' 23 February 2015. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597> accessed 1 February 2021.

276 Amnesty International, 'Tweet… if you dare: how counter-terrorism laws restrict freedom of expression in Spain' (Amnesty International, London, 2018), 2.

277 Guy Hedgecoe, ''The Spanish Rappers getting 'terror' sentences for songs' *BBC News* 17 March 2018, <https://www.bbc.co.uk/news/world-europe-43407694> accessed 1 February 2021.

278 Amnesty international, 'Tweet…if you are' (n276), 2.

279 Plan Estrategico Nacional de Lucha contra la Radicalizacion Violenta (PEN-LCRV) [National Strategic Plan to Fight Against Violent Radicalisation] 2015. Available at http://bit.ly/2gt90fO accessed 1 February 2021.

280 ibid, 5.

281 Gropo de Trabajo Interdepartmental, 'Plan de Actuacion del Gobierno Vasco frente al terrorismo internacional de pretexto religioso' [Basque Government Action Plan Against International Terrorism on Religious Pretexts], 20 November 2017. https://www.irekia.euskadi.eus/uploads/attachments/10561/PLAN_frente_al_Terrorismo_Internacional_2017.pdf?1511173607 accessed 1 February 2021.

282 *Protocolo de prevención, detección e intervención de procesos de radicalización islamista* [Procedure for Prevention, Detection and Intervention in Islamist Radicalization Processes] (PRODERAI)

283 At the end of 2018 the Community of Madrid, through the Department of Justice's Agency for the Re-education and Reintegration of Young Offenders (ARRMI), launched a protocol 'to detect and act before radicalization processes in minors that comply with judicial measures and thus stop possible jihadist recruitment'.

284 Transversal Plan for Coexistence and Prevention of Violent Radicalization in the City of Malaga 2017-2020, http://www.interior.gob.es/documents/642012/5179146/I+Plan+Transversal+por+la+Convivencia.pdf/b62bc722-c8f6-4677-9c3f-5841aa51ea40 accessed 1 February 2021.

Part II:
Research
Findings

5. SUSPICION OF MUSLIM IDENTITY AND RELIGIOUS PRACTICES

Part 1 of this report noted how at its inception, the EU's counter-radicalisation policies focused exclusively and explicitly on Muslims and Islam. In placing suspicion and scrutiny on Muslim identities and religious practices it risks enabling discrimination. As states adopted, developed, and implemented their counter-radicalisation policies and action plans, supported by EU coordination and sharing of best practice, they replicated and reinforced a focus on Muslim religious identities and practices. At the same time, the DCT's criminalisation of pre-emptive action that occurs before there is any plan to commit an attack underpins and legitimises prosecutions that rely heavily on evidence of dangerous association and risky identities. Drawing on the testimonies of focus group participants and interviews with key actors in civil society, this chapter suggests that these developments have contributed to a securitised suspicion of Muslim religious practices and expressions of religious identity, making them a source of fear and anxiety and triggering further investigation by police or other state officials. This suspicion extends to mosques, Islamic classes, the act of prayer, and even to Arabic language classes.

5.1 Focus on Muslims and Islam

Commitments to non-discrimination ensure that legislative measures rarely target specific ethnic or religious groups explicitly. Nevertheless, research for this report uncovered instances of early drafts of legislation and policy papers focusing explicitly on Islam and Muslims. For example, the draft regulations accompanying **Poland's** Anti-Terrorism Act 2016 list activities or actions deemed 'terrorist related' in a 'catalogue of terrorist incidents'. These included information about any plans for establishing Islamic universities, visits to prisons by Islamic clerics or representatives of Islamic institutions; and participating in chats and forums on radical Muslim websites.[285] In the final version of the regulations these openly discriminatory provisions has been replaced with more neutral references to 'religious groups' and

'international extremism'.[286] Similarly, interviews in **Spain** found that concern about the stigmatisation of Muslims led references to 'Islamism' to be changed to 'violent extremism' in the Catalan Counter-radicalisation Protocol. While these linguistic changes may reflect an attempt to dilute any stigmatisation of Muslims, they nevertheless reveal how some laws formulated in neutral language in their final version, explicitly targeted Muslims and Islam when they were first developed or proposed.

Formally neutral policies require enactment through interpretation and implementation. These processes generate understandings of the primary targets of policies that may not be expressly articulated in the policy itself. In Spain, teachers who attended training in relation to counter-radicalisations protocols reported that it reproduced narratives of Muslims as a danger to Europe and emphasised the need for vigilance against Muslim students. Thus while the documentation did not explicitly name any 'target population' the interviewees reported that it was taken for granted in presentations that the discussion was about Muslims.[287]

Assumptions that violence and extremism are inherent in Islam and Muslim cultures can also seep into policy discourse. Such assumptions are implicit, for example, in the description of some of the training provided by Poland's Terrorism Prevention Centre of Excellence. The brochure about the training states that government administration bodies can learn about the 'specificity of the Muslim culture in the emergence of extremist attitudes'.[288] A securitized racialisation of Muslims is also evident in Poland's 2019 draft Migration Policy, which was leaked to the public

285 Office of the Prime Minister 'o działaniach antyterrorystycznych oraz o zmianie niektórych innych ustaw' [On anti-terrorist activities and on amending other acts] 16 March 2016 <http://orka.sejm.gov.pl/Druki8ka.nsf/0/9C-CA65458151278AC1257FB50049D701/%24File/516.pdf<B> accessed 01 February 2021.

286 'Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 22 lipca 2016 r. w sprawie katalogu incydentów o charakterze terrorystycznym' [Regulation of the Minister of the Interior and Administration of July 22, 2016 on the catalog of incidents of a terrorist nature] <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160001092> accessed 01 February 2021.

287 Interview, counter-terrorism practitioner, Spain.

288 *Terrorism Prevention Centre of Excellence* 2018-19, at 11. Available at <https://tpcoe.gov.pl/cpt/aktualnosci/1553,Broszura-Centrum-Prewencji-Terrorystycznej-ABW.html> accessed 01 February 2021.

by the Association for Legal Intervention.[289] This early draft presents Muslims and Islam as a security threat and a group 'particularly unable to integrate', because of 'their sense of distinctiveness and superiority over the host society', which consequently drives them to 'build parallel societies.'[290] Muslims are viewed as either already dangerous or at constant risk of becoming dangerous. The draft policy cites the increasing number of conversions to Islam as a 'problem' faced by Western European states, which, it worries, Poland too will soon face.[291]

While some politicians and policymakers single out Islam and Muslims in statements introducing new security measures, others struggle for less discriminatory terminology. The Spanish government referred to the counter-terrorism measures adopted after 2015 as an 'anti-jihadist pact'. The preamble to legislation, introducing new pre-crime offences, refers to the need to combat 'jihadist International terrorism' which, it explains, is 'characterized by having incorporated new forms of aggression, consisting of new instruments of uptake, training or indoctrination in hate, to use them cruelly against all those who, in their extremist and violent ideology, are qualified as enemies'.[292] This reinforces the connection of jihad with terrorism, further crowding out the varied, complex and multiple meanings of the term in Muslim communities.

5.2 Securitising Muslim religious practices

Many counter-radicalisation strategies attempt to draw a distinction between signs of extremism on the one hand and the expression of conservative religious views on the other. They argue that security policy does not target conservative religious dogma or practice but only 'extremist' or 'radical' beliefs. The problem here is the inherent elasticity and ambiguity of the terminology. While some states emphasise that counter-radicalisation measures are not seeking to police conservative religious views, interviews for this report have highlighted the difficulties that arise when trying to draw such clear distinctions. Interviews with practitioners and policymakers yielded numerous examples of Muslim religious practices, beliefs and views that had attracted the attention of security actors and prompted further investigation and questioning. In Spain, interviewees with first-hand experience of counter-radicalisation training noted that indicators of risk included changes in religious practice, changes in appearance such as growing a beard, participation in 'radical' demonstrations, listening to 'radical' music, holding 'extremist' views, and participation in combat sports or survival training. While the authorities refused to publish the risk factors presented in the training, a covert recording of a four-hour training session for teachers obtained by the news website *La Directa* revealed teachers being instructed to monitor Muslims for a range of banal everyday cultural and religious practices, including eating halal food, not wearing makeup, not celebrating Christmas and St George's day, wearing henna tattoos, removing piercings or growing a long beard.[293]

Heightened suspicion of Muslim religious beliefs and practices is also reinforced by comments from politicians. **France's** Interior Minister, Christophe Castaner, suggested that 'rigorous religious practice', particularly during Ramadan (the month during which Muslims fast), should trigger investigation by security services. He also named growing a beard, not kissing a person on the cheek in greeting, refusal to 'team up with a woman', 'regular and ostentatious practice of ritual prayer', and the 'wearing of the full-face veil for a female civil servant in public spaces' as signs of potential radicalisation

289 Association for Legal Intervention, 'Polska polityka migracyjna wg PiS, czyli jeden naród i jedna religia' [Polish migration policy according to PiS, or one nation and one religion] 26 June 2019 <https://interwencjaprawna.pl/polska-polityka-migracyjna-projekt-mswia/> accessed 01 February 2021. Written by the Department of Migration Analysis and Policy of the Ministry of Interior and Administration (MIA), the document has never been officially published but was leaked by the Association for Legal Intervention. According to a Ministry Interior tweet, the document was only a draft for internal communication and once finalized would be submitted for inter-ministerial and public consultation. https://twitter.com/MSWiA_GOV_PL/status/1143098375417581569 accessed 01 February 2021

290 Department of Analysis and Migration Policy of the Ministry of Interior and Administration, 'Polityka Migracyjna Polski' [Polish Migration Policy] 10 June 2019, < Polityka migracyjna polski (interwencjaprawna.pl)> accessed 1 February 2021

291 Konrad Pędziwiatr notes that this point is made in the policy document with reference to an article from *Polonia Christiana*, a far-right Catholic website that 'has been at the forefront of the racialization and stigmatization of Muslims in Poland'. See Konrad Pędziwiatr, 'The New Polish Migration Policy: False Start' *Open Democracy* (London, 19 August 2019, <https://www.opendemocracy.net/en/can-europe-make-it/the-new-polish-migration-policy-false-start/?fbclid=IwAR3-g6pEcteS_992At0TIbAfa6MNwaEa7sLks8COH4wpasHUq4KePfhTYY8> accessed 1 February 2021

292 Official State Newsletter, 'Ley Orgánica 2/2015, de 30 de marzo, por la que se modifica la Ley Orgánica

10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de Terrorismo' [Organic Law 2/2015, of March 30, which modifies the Organic Law 10/1995, of November 23, of the Penal Code, in the matter of crimes of terrorism] 31 March 2015 <https://www.legislationline.org/download/id/5975/file/Spain%20Law%202-2015%20amendment%20penal%20code%20terrorism_2015_es-.pdf> accessed 1 February 2021

293 Vincent Almela and Ainhoa Nadia DouHaibi 'No Beure Coca-Cola, No Celebrar Sant Jordi o Esborrar-se els Tatuatges són Indicadors de "Radicalització Islamista", Segons els Mossos'[Not Drinking Coca-Cola, Not Celebrating St George's Day or Erasing Tattoos are Indicators of "Islamist Radicalisation," According to the Mossos] La Directa 18 December 2018 < No beure Coca-Cola, no celebrar Sant Jordi o esborrar-se els tatuatges són indicadors de "radicalització islamista", segons els Mossos - directa.cat> accessed 1 February 2021

requiring police investigation.[294] The vectors of suspicion that such statements identify appeared to seep into the everyday experience of many of the Muslims interviewed for this report. Muslim youth workers who worked with marginalised young people recalled having to regularly explain basic religious practices to their non-Muslim colleagues because so many viewed any Islamic religious practice as a potential indicator of radicalisation. Human rights defenders also reported that French officials often cited ordinary Muslim religious practices when submitting evidence that an individual was a national security threat sufficient to justify the use of State of Emergency measures.[295]

During a focus group in **Germany** a Muslim teenager recalled the example of teachers labelling a classmate unwilling to look male teachers in the eye as a potential 'radical'.

> We had a girl at school who was very 'radical' according to the teachers. The only reason they gave for their assumption was that she didn't want to look one teacher in the eye because he is a man. That was the only thing. I couldn't judge whether she was really radical or whether she just wanted to live out a pious behaviour she had heard of. [...] I was then asked by the teachers to somehow explain to her in an Islamic way that her behaviour is complete nonsense. [...] Of course you have to be careful, but I think such topics are treated very extremely in schools. This girl then also [felt] radical, she was like 'Yes, I'm a bad person if you say so". I don't think the teachers knew what they were doing. Of course if you say to the girl, 'You think wrong and it's dangerous what you do here' this is somehow discriminating against her.
>
> (Focus Group, Germany)

The comments here illustrate the heightened risk of attracting state-led surveillance from displaying religiously conservative behaviour that is interpreted as a potential sign of extremism. The teacher in this case appears to go so far as to call on the interviewee to engage the student in a discussion about the validity of her understanding of religious obligations. Yet the student's beliefs, while religiously conservative, are lawful.

The teacher, enacting and implementing counter-radicalisation policies, entangles the state in regulating ways of being Muslim.

The research found that in some cases counter-radicalisation measures and procedures are activated against Muslims not because of their actions or ideas but because of suspicions about those with whom they associate. A teacher in **Spain** recalled a case where the counter-radicalisation procedure was initiated after a student was truant from school. Normally this would have been treated as a case of truancy alone with a letter sent to the student's parents about her absence from school. The procedure was triggered because the student's friends included an individual whom the teacher thought might hold 'radical' ideas. This led to police notification and an investigation of the girl, her family and her friends for possible indications of radicalisation:

> As a school we must activate [the counter-radicalisation procedure] because if we do not do it and something happens, inspectors come and ask for explanations. We have the responsibility. The Mossos (Catalan Police) come to collect the information and that's it. I sent an email to Mossos, and the next day they were here.[296]

In this case the procedure was triggered not by the student's actions but by her association and connection to an individual believed by the teacher to hold 'radical' views. Inferring the risk of radicalisation from an individual's association with others infringes on their right to freedom of association, it limits the networks and relationships that individuals can freely develop.

In explaining the decision to activate the procedure, the interviewee alluded to the pressure on school staff to make referrals to security officials. The teachers feared that if they did not inform the police and something happened they would come under scrutiny for their failure to report their concerns. The findings here point to how anxiety about the fear of missing genuine cases and the repercussions from this for the individual and their institution loom large in decision-making and pressure practitioners and institutions to make referrals to security officials. This was echoed in interviews in **Germany**, where a counter-radicalisation practitioner noted that the emphasis on pre-emption and precaution led experienced teachers to

294 'Christophe Castaner liste les signes de radicalisation ? "Vous avez une barbe vous-même", lui répond un député' [Christophe Castaner lists the signs of radicalization? "You have a beard yourself", answers a deputy] *Europe 1*, (Paris, 9 October 2019), <https://www.europe1.fr/politique/christophe-castaner-liste-les-signes-de-radicalisation-religieuse-vous-avez-une-barbe-vous-meme-lui-repond-un-depute-3924324> accessed 1 February 2021.

295 See also Amnesty International, *Punished Without Trial: The Use of Administrative Control Measures In the Context of Counter-Terrorism in France* (2018).

296 Interview, counter-terrorism practitioner, Spain.

escalate situations and report them to the VS as soon as religious behaviour such as praying is involved in order to be 'on the safe side before anything serious might happen'.[297] The findings from the interviews in Spain and Germany are consistent with research among educational professionals in the UK, suggesting that the lack of veracity in the broad and vague indicators of potential radicalisation generate anxiety and fear of missing genuine cases, thus contributing to increased referrals to the police for further investigation.[298]

A number of interviews revealed the ways in which the racial and religious identities of Muslims appear to inform concerns that take shape in the imagination of state actors and the possible explanations that they expound in interpreting and understanding the views, comments or actions of Muslims. In one example teachers construed the ambition of a Muslim student studying nursing to pursue a career helping wounded people in conflict zones as a potential desire to travel to Syria. As a result, they activated the counter-radicalisation procedure, placing the student and her family under covert surveillance for six months. The student's Muslim identity and ambition to pursue humanitarian work led her to be viewed with suspicion, triggering the protocol and justifying intrusive and extensive surveillance. The psychological and social impact of the invasion of her private and family life extended well beyond the six months during which she was under surveillance.

Community workers interviewed for this research believed that the fear that religious practice and the expression of religious identities could be misread as signs of radicalisation is eroding the trust between families and their social workers. In their view this erosion of trust means that individuals and their families are less likely to engage effectively with the systems of support they need to address the difficulties and challenges they face.[299] This has the potential for a wider knock-on impact on social integration and life chances. Reluctance to speak openly with welfare professionals is one indicator of this. Survey data from France suggests that a quarter of Muslims (26.1%) are

careful about what they say to youth workers and social workers for fear of being discriminated against.[300]

5.3 Suspicion of mosques and prayer rooms

The association of Islam with terrorism is reinforced by state measures to regulate Islamic education, the training of imams and the governance of mosques.[301] In Spain after the 2004 terrorist attacks the Interior Minister, José Antonio Alonso, called for greater state control of mosques as a counter-terrorism measure.[302] In Germany public discussion of proposals to require religious clerics to prove their knowledge of German focused only on imams. In March 2019 Jens Spahn, a leading member of Angela Merkel's cabinet, demanded that sermons in mosques should be in German.[303] Reinforcing the need for hyper-surveillance and feeding suspicion of Muslims and Islam, he argued for greater state control and regulation of mosques because 'the authorities had to know what was happening in mosques'.[304] German policies for Preventing Islamist Extremism called on Muslim communities and mosques to engage 'more' with the prevention programmes, implying a failure to do enough. In Poland the initial draft 'indicators of terrorist incidents' included opening a mosque. In France the association of mosques with terrorism was reinforced when executive powers were used to close some

> Communal rooms used by Muslim students for prayers were closed by the university administration, citing the fear that such spaces could be used for radicalisation

297 Interview, counter-radicalisation practitioner, Germany.

298 Joel Busher and others, *What the Prevent Duty Means for Schools and Colleges in England: An Analysis of Educationalists' Experiences* (The Aziz Foundation, London, 2017).

299 On research of the experiences of Prevention of Radicalisation programmes in social work see Tony Stanley, Surinder Guru and Vicki Coppock, 'A Risky Time for Muslim Families: Professionalised Counter-radicalisation Networks' (2017) 31 *Journal of Social Work Practice* 477; Tony Stanley, Surinder Guru and Anna Gupta, 'Working with PREVENT: Social Work Options for Cases of 'Radicalisation Risk' (2018) 30 *Practice* 131; Håvard Haugstvedt, 'Trusting the Mistrusted: Norwegian Social Workers' Strategies in Preventing Radicalization and Violent Extremism' (2019) 19 *Journal for Deradicalization* 149.

300 Francesco Ragazzi and others, The Effects of Counter-Terrorism and Counter-Radicalisation Policies on Muslim Populations in France: A Quantitative Study, (Centre for the study of Conflict, Liberty and Security, Paris, 2019), 42. See also Hannan Dover and others, 'Factors associated with Counter Terrorism-Related Behaviour Change among Australian Muslims' (2020) 3 *International Journal of Islamic Psychology* 34.

301 Yvonne Haddad and Michael Balz, 'Taming the Imams: European Governments and Islamic Preachers since 9/11' (2008) 19 *Islam and Christian–Muslim Relations* 215.

302 J.A. Rodríguez and J.M. Romero, 'Es necesaria una ley para poder controlar a los imames de las pequeñas mezquitas' (Is it necessary to have a law to control imams in small mosques?) *El País*, (Madrid, 2 May 2004), <https://elpais.com/diario/2004/05/02/espana/1083448801_850215.html> accessed 01 February 2021

303 'Spahn will Imame zur Deutschprüfung zwingen' (Spahn wants to force imams to take German tests) *Die Welt* (Berlin, 30 March 2017) <https://www.welt.de/politik/deutschland/article163268590/Spahn-will-Imame-zur-Deutschpruefung-zwingen.html> accessed 01 February 2021

304 Sigal Samuel, 'The Push to Ban Arabic Sermons in Europe's Mosques' *The Atlantic* (Washington, DC, 12 April 2017) <https://www.theatlantic.com/international/archive/2017/04/push-to-ban-arabic-sermons-in-european-mosques/522000/ accessed 01 February 2021

mosques during the State of Emergency. France's counter-terrorism strategy also includes a focus on increased state control of the training of imams and supervision of mosques.[305]

Research for this report suggests that policies and comments framing the mosque as objects of suspicion feed a wider societal suspicion of mosques, prayer rooms and even the very act of Islamic prayer. Participants in a focus group in **Germany** gave details of a German university where communal rooms (often designated as quiet rooms or contemplation rooms) used by Muslim students for prayers were closed by the university administration, citing the fear that such spaces could be used for radicalisation. When students started to pray in other spaces such as quiet niches in the library or deserted corridors, the university instructed their security personnel to patrol such locations. Students found praying faced interrogation and questioning by the guards and had their details taken to be passed to the university administration. Again, in explaining their actions the guards alluded to concern about security. Referring to such incidents one participant described the experience as leaving them 'feeling that we have to crawl away from something… We are really persecuted at university. It's like a cat and mouse game'.[306] For these interviewees the prohibition on praying on university premises had a direct impact on their ability to carry out a basic religious practice; this was particularly difficult in winter months, when the shorter days mean that three of the five daily prayer times occur during normal working hours.

During focus group discussion in **Spain**, parents reported that their children's attendance at mosque for religious education attracts questioning from school teachers, echoing the suspicion of mosques and the association of Islamic schools and education with the nurturing of violence and extremism:

> They are obsessed in knowing what is going on inside the mosques […] they are not calm […] They are obsessed with that "security", whether Muslims "plot things" in their mosques or if they are organizing crimes in their mosques.
> (Focus group, Spain)

As leaders of community institutions that are seen as sites of suspicion, imams and others managing mosques find themselves the subject of intense scrutiny through informal questioning and visits from police and security officials. Victoria Sentas' analysis of race and counter-terrorism policing in Australia reveals how informal questioning is a vital tool enabling racialised counter-terrorism policing. Informal questioning 'secures evidence of collective identity' and produced 'the individual and the targeted community and, in doing so, developed institutionalised common sense about those who are policed'.[307] The fact of being questioned, even informally, confirms the institutions and the community as policed subjects of incipient violence. Informal questioning of those involved in running mosques or community organisations, confirms and constitutes their positioning as a suspect community, and confirms that Muslims must 'offer transparency to police as a pre-condition to belonging'.[308] Whether a person answers or not informs the state's judgment of them, and their willingness to be transparent and known to the state also informs whether they are seen as 'extremist' or 'moderate'. Interviewees in Germany and Spain who were active in mosque communities reported that informal questioning by security officials, while voluntary in theory, retained a sharp coercive edge:

> [W]hen you are more active in mosque communities you subconsciously know that everything could be monitored. And then when something is done against this mosque or even said about the mosque you know that your name also definitely pops up on the lists. But you take this risk, so to speak, if you want to remain active in the communities.
> (Focus group, Germany)

Leaders of Muslim civil community organisations reported that many of mosques they knew received constant visits from state security actors; the 'informal' visits and conversations during such visits were a normalised part of life in a mosque. They believed that the police or security officials used these exchanges to gather information and intelligence about the mosques and their congregations. These collective experiences of Muslim communities led them to believe that failure to collaborate would generate suspicion and further scrutiny:

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305 Sylvie Corbet and Jean-Francois Badias, 'France to end imam, teacher deals to counter extremism' *AP News* (New York, 18 February 2020), <https://apnews.com/article/bee22150326aab9b95bd5c99f2794d7e> accessed 01 February 2021.

306 Focus group, Germany.

307 Sentas, *Traces of Terror* (n149), 210.

308 ibid, 211.

> Some communities receive continuous visits from the Urban Guard, the National Police, Mossos de Escuadra, the Civil Guard, or the CNI [National Intelligence Centre], to find out who is who in the community. Many have been asked for documentation about the people who are on the mosque board. They bother them to know whether they are willing to collaborate or not, to gain control over them. Their visits are without prior appointment or notice. The collaboration of all the centres is sought; there is talk of prevention; but in reality it is institutionalized and entrenched Islamophobia.
>
> (Leader of Muslim community organisation, Spain)

The experiences reported here are consistent with Sentas' evaluation of informal questioning as part of a policing strategy of duress where informal questioning is carried out under the implied threat of formal questioning and worse for those who fail to cooperate. The interviews reveal the informal pressures placed on mosques to prove their innocence. The compulsion to cooperate 'voluntarily' is reinforced by fear of state action. At one end of the spectrum interviewees in Spain reported that failure to cooperate and collaborate lay behind their failure to secure permits for activities such as an *iftar* in public spaces; at the other end are reports that imams who failed to cooperate were threatened with prosecution for apology for terrorism or, if they were not Spanish citizens, deportation.

State security activities disrupt the associational life of the community that organises around a mosque. Interviewees reported that if a member of the mosque is arrested, even if they are released without further action, the mosque still finds itself stigmatised, and many Muslims in the local community, fearful of being entangled in a web of state surveillance, start to disassociate and distance themselves from the mosque. This disrupts social life, curtailing the ability to maintain associational activities. In **France** the closure of mosques and prayer rooms during the State of Emergency was criticized in the focus groups as unnecessary collective punishment that removed vital community facilities with little understanding of the impact on elderly Muslims and young people.

Some of the mosque leaders interviewed, aware that their institutions do not benefit from the usual presumption of innocence, said that mosques preemptively collect the evidence needed to prove their good citizenship and loyalty; for example, many mosques in Catalonia routinely and regularly record sermons and make these available to the police if needed. In the words of one mosque leader, this is a 'survival strategy' to avoid 'entering into

a confrontation with the State'.[309] In **Germany** a focus group participant who was active at their local mosque offered an account of the steps the mosque took to keep records of visiting speakers and the topics of their talks to demonstrate to others that they did not offer a platform for anyone that could be regarded as an extremist or radical. Muslim individuals and organisations undertaking such actions are seeking to show that they are law-abiding and safe, but in so doing they reinforce the moderate/extremist dichotomy.

5.4 Moderate/extremist Muslim identities

In the Member States covered by this research, security officials and counter-terrorism policies often drew a distinction between Islam on the one hand and Islamism, Salafism and Jihadism on the other. This moderate/extremist dichotomy implicates all Muslims in a potential for violence while allowing security policies to focus on just some Muslims. It retains a focus on identity over action, as Islamist and Salafi identities are seen to reflect a commitment to ideas that prefigure a propensity to violence.

Germany's Federal Ministry of the Interior characterizes Islamism as the most virulent and dangerous threat to the country.[310] The VS defines it as 'a form of political extremism' which aims at 'partly or fully abolishing the liberal-democratic constitution' of the German state, and views Islamism as determining or at least regulating societal life and political order. [311] In **France**, after the attacks on the Charlie Hebdo magazine Prime Minster Manuel Valls declared that 'France is not at war with Islam and Muslim [but] we are at war against jihadism and terrorism'.[312] The **UK's** Independent Review of Anti-terrorism law suggested that the analytical value of the term 'Islamist' or 'Islamic' terrorism is outweighed by the negative consequence of linking religion to violence, and

309 Interview with leader of Muslim community organisation, Spain.

310 'Für die Bürgerinnen und Bürger der Bundesrepublik Deutschland und der westlichen Staatengemeinschaft wird auf absehbare Zeit der islamistisch motivierte internationale Terrorismus die virulenteste Bedrohung bleiben',[For the citizens of the Federal Republic of Germany and Western states, Islamist-motivated international terrorism will remain the most virulent threat for the foreseeable future] <https://www.bmi.bund.de/DE/themen/sicherheit/extremismus-und-terrorismusbekaempfung/terrorismus/terrorismus-node,html> accessed 1 February 2021.

311 *Verfassungsschutzbericht* 2017 (Bundesministerium des Innern, für Bau und Heimat, Berlin, 2018), 164. <https://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/publikationen/verfassungsschutzberichte/vsbericht-2017> accessed 1 February 2021.

312 'France attacks:"War with terrorism not Islam, PM Valls says' *BBC News* (13 January 2015) https://www.bbc.co.uk/news/world-europe-30794973 accessed 1 February 2021.

proposed the use of 'Daesh inspired' terrorism.[313] Since 2019, the Canadian government has stopped using the term Islamist, arguing that 'the Government's communication of threats must be clear, concise, and cannot be perceived as maligning any groups.'[314] The British police have also considered avoiding such terminology.[315]

In Germany, France and Spain there is a particular focus on Salafism as a form of Islamism. In **Germany** the VS refers to Salafism as a 'particularly radical form of Islamism' and directly links the growth in the number of individuals seen as Salafi to the increased threat of terrorism.[316] In **Spain**, the Catalan government, when introducing the procedure for detecting Islamist radicalisation, stressed that Salafism should not be stigmatised as terrorism, yet admitted that Salafist groups were 'under special control', suggesting that they faced enhanced surveillance and scrutiny.[317] The **UK** is one of the few states where the police, drawing a distinction between different strands of Salafism, have in the past supported and partnered with Salafi communities and Salafi-led organisations in their counter-radicalisation work.[318] Among academic experts, there is significant disagreement on the salience of Salafism as an indicator and driver of radicalisation.[319]

The vague and broadly defined concept of Islamism enables the label to be used to cover a broad range of political activism.[320] Civil society actors who organise around their Muslim identity feel vulnerable to being denounced as Islamists. The social and political stigma and risk of interference with their political and social rights due to being labelled Islamist or extremist by the state demands that any process by which individuals are identified or named should be based on careful definition using objective criteria that is open to challenge and scrutiny.

In **Germany**, the VS plays a dominant role in identifying groups and organisations as Islamist. VS officials acknowledged in interviews that they are regarded as 'experts in the field of Islamism'.[321] This, they recognise, makes it 'hard to debate anything around Islam without the involvement of the VS'.[322] For Muslims, the impact of being identified by the VS as an Islamist can be devastating, even when such a claim is later successfully challenged. Individuals and organisations reported profound social and economic impacts of being labelled Islamist. At the same time, individuals found that the criteria, processes and evidence by which the VS reached its conclusions remained unclear and opaque, limiting their right to due process and eroding their right to a presumption of innocence.

The influence and asymmetry of knowledge between the VS and other German state actors even affects the development and delivery of counter-radicalisation policies. According to an interviewee working in the Federal Office for Migration and Refugees, the VS remains dominant in setting the agenda of an interdepartmental working group on prevention of Salafism. Relying on data and information from the VS, which it keeps confidential, other officials in the working group are unable to challenge claims made by the VS. In one example the Federal Office for Migration and Refugees suspended a project for workshops training imams to challenge Salafists coming to their mosques because one of the project's partners had members that the VS considered were linked to the Muslim Brotherhood, an Islamist organisation.[323]

For many people of faith, their religious beliefs and values are not only an important source of identity but provide motivation for social and community activism.[324] However, the suspicions and fears of activism or mobilisation attached to Muslims' religious identity curtails their ability to participate in public life in ways that are meaningful to them. The Muslim founder of a charitable non-profit NGO concerned with environmental protection and

313   Martin Bentham, 'Do not refer to "Islamist terrorism" says watchdog' *Evening Standard* (1 February 2018) <https://www.standard.co.uk/news/uk/don-t-refer-to-islamist-terrorism-says-watchdog-a3755701.html> accessed 1 February 2021.

314   Public Safety Canada, '2018 Public Report on the Terrorism Threat to Canada – 29 April 2019 Update' < https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/index-en.aspx> 1 February 2021.

315   Dominic Kennedy, 'Police may drop "Islamist" term when describing terror attacks' *The Times* (20 July 2020).

316   2013 Annual Report on the Protection of the Constitution, Federal Ministry of the Interior, June 2014,22, <https://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2014/vsb-kurzfassung-2013-en.html accessed 1 February 2021.

317   'Un protocol del Govern detectarà si hi ha radicalització islamista a les aules' *Catalunyapress* 17 November 2015. Catalunya Press, 'Un protocol del Govern detectarà si hi ha radicalització islamista a les aules' [A government protocol will detect if there is Islamist radicalization in the classrooms] 17 November 2015 <https://www.catalunyapress.cat/texto-diario/mostrar/376700/protocol-govern-detectar-hi-radicalitzacio-islamista-aules> accessed 1 February 2021.

318   Robert Lambert, *Countering Al-Qaeda in London: Police and Muslims in Partnership*, (Hurst and Co, London, 2011)

319   Some of these contentions are reflected, for example, in the public disagreement between Professors Oliver Roy and Gille Kepel. See Oliver Roy, 'The Islamisation of Radicalism' *MadaMasr* 11 January 2016, <https://www.madamasr.com/en/2016/01/11/opinion/u/the-islamization-of-radicalism . See also Nadia Henni-Moulaï, 'Olivier Roy: France's government fails to understand the nature of radicalisation' *Middle Eastern Eye* (23 November 2020), <https://www.middleeasteye.net/news/france-islam-olivier-roy-authorities-failure-radicalisation accessed 1 February 2021; Gilles Kepel with Antoine Jardin, *Terreur dans l'Hexagone: Genèse du djihad français* [Terror in the Hexagon: The Genesis of French Jihadism] (Gallimard, Paris, 2016).

320   See Arun Kundnani, *The Muslims are Coming: Islamophobia, Extremism and the Domestic War on Terror* (Verso, London, 2014)

321   Interview, policing and security practitioner, Germany.

322   Interview, policing and security practitioner, Germany.

323   Interview, policymaker, Germany .

324   Tim Peace, *European Social Movements and Muslim Activism: Another World but with Whom?* (Palgrave, London, 2015).

sustainability had felt since 2001 that his activism was always under suspicion and needed to be explained:

> The majority of society is somehow conditioned in regard to certain topics surrounding Islam since 9/11. I feel that I have to justify and vindicate my activism and my presence as a Muslim man as such at all times.[325]

Even an organisation that is not a religious association can find itself racialised and viewed as a Muslim organization because of the issues it works on or the identity of those involved in the organisation. In one example, a local secular civil-society organization in **France** working with young people excluded from school faced questioning from local officials after it offered Arabic language classes on its premises. The organisation's director believed the hostility towards it arises from the fact that many of their clients are women wearing the hijab, and the association of the hijab and Arabic with extremism and terrorism:

> [W]e are impacted mainly because there are women who wear the hijab who attend the association; they bring their children, for example, for the Arabic language course. [...] it's not terrorists but 'the Muslim' who they're afraid of, and that's why we've been suspected and accused of proselytizing.
> Director, civil society organisation, France

The director wryly contrasted this with their English language classes, which do not attract suspicion or adverse attention. He patiently pointed out that he had signed the Charter of Secularism, that the classes at the centre welcomed both men and women and the participants included both women who wore the veil and women who did not. Despite these facts, the organisation was suspected of proselytising by state officials. Marwan Muhammad, the former director of the French civil rights organisation the Collective Contre Islamophobie (CCIF), argues that the accusation is rooted in a fear in French society that 'militant Islamism, under the guise of associative action, is aimed at weakening social cohesion'.[326] According to Muhammad, such accusations would have little traction 'if minds were not as effectively prepared to consider the presumed Islamicity of [the association] and other negative social markers such as the ethno-racial, social and residential origin carried by its president as the suspicious and hidden source of an anti-republican political enterprise'.[327]

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325 Interview, civil society organisation, Germany.

326 Marwan Mohammed, 'Stigmatiser pour "mieux" gouverner la ville. Accusation de "communautarisme" et répression politique à l'échelle locale' (Stigmatizing to 'better' govern the city. Accusation of 'communitarianism' and political repression at the local level', in Marwan Mohammed and Julien Talpin (eds.) *Communautarisme?* (PUF, Paris, 2018) 69-83.

327 ibid.

6. DISCRIMINATION, HARASSMENT, AND ABUSE

The previous chapter has outlined how the enactment and implementation of counter-terrorism policies has securitised Muslim identities and religious practices as indicators of potential radicalisation and sources of suspicion and fear. This chapter focuses on experiences of discrimination, harassment and abuse that also draw on fear and suspicion of Muslims as potentially threatening public safety and security. Drawing on data from the focus group discussions and interviews with civil society organisations, the findings offer qualitative insights into lived experiences of discrimination, harassment, and abuse, and the impact of these on the enjoyment of human rights and fundamental freedoms. While the focus in this chapter is on interpersonal experiences, it begins with statements from public figures that generate the backdrop against which individual acts of discrimination and abuse take place.

6.1 Discrimination and public discourse

What politicians say matters. Where they articulate and amplify hate against a group, they can increase the risk of hate crime[328] and domestic terrorism.[329] As Professor Solanke observes, 'individual perpetrators take the cue for their behaviour from public norms and narratives – these act as a resource for discriminatory ideas and create a backdrop for face-to-face discriminatory behaviour'.[330] In Europe, the perception of Muslims as a threat to society is the strongest determinant of public anti-Muslim sentiments.[331] Anti-Muslim conspiracy theories and tropes, once relegated to fringe groups, are increasingly accepted as part of mainstream political discourse in some European states.[332] Thus the experiences of everyday interpersonal discrimination and

abuse recalled in the focus group discussions emerge from a canvas of social norms thick with racialised stereotypes about Islam and Muslims, recalling and reconfiguring Orientalist tropes of Muslims and Islam as innately violent and a threat to European values and identity.

In states with small Muslim populations such as Poland and Hungary the significant level of anti-Muslim prejudice manifests as 'Islamophobia without Muslims'.[333] Research participants in both countries identified leading politicians as the key actors fanning the flames of anti-Muslim discrimination and harassment. The arrival of large numbers of refugees in Europe during 2015 was a critical point at which the expression of anti-Muslim sentiment escalated and moved from the margins of society to take centre stage in political debate.

The Hungarian government's 'national consultation' on immigration and terrorism involved posting to every household in Hungary questionnaires that were condemned by the European Parliament as 'highly misleading, biased and unbalanced' as they sought to establish 'a biased and direct link between migratory phenomena and security threats'.[334] Reinforcing this link and concurrent with the consultation, a 'public information campaign' included erecting billboards across Hungary with the statement, 'Did you know the attack in Paris was carried out by immigrants?'

In 2016, during a referendum campaign on whether the EU should establish quotas for the settlement of refugees, the Hungarian government repeatedly stated that European values needed to be protected from the threat posed by Islam.[335] Prime Minister Orban described the arrival of asylum seekers in Europe as 'a poison' and said that 'every single migrant poses a public security and

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328 N Parveen, 'Boris Johnson's burqa comment "led to a surge in anti-Muslim attacks"' *The Guardian* (2 September 2019). <https://www.theguardian.com/politics/2019/sep/02/boris-johnsons-burqa-comments-led-to-surge-in-anti-muslim-attacks> accessed 1 February 2021.

329 James A. Piazza, 'Politician Hate Speech and Domestic Terrorism' (2020) 46 *International Interactions* 431.

330 Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart Publishing, Oxford, 2017), 13.

331 Sabri Ciftci, 'Islamophobia and Threat Perceptions: Explaining Anti-Muslim Sentiment in the West' (2012) 32 *Journal of Muslim Minority Affairs* 293.

332 John Mulhall, *Going Mainstream: The Mainstreaming of Anti-Muslim Prejudice in Europe and North America*, (Hope not Hate, London, 2017); Ivan Kalmar, 'The east is just like the west, only more so: Islamophobia and populism in Eastern Germany and the East of the European Union' (2020) 28 *Journal of Contemporary European Studies* 15.

333 See Katarzyna Górak-Sosnowska, 'Islamophobia without Muslims? The Case of Poland' (2016) 5 *Journal of Muslims in Europe* 190; Gert Pickel and Cemal Öztürk, 'Islamophobia without Muslims? The "Contact Hypothesis" as an Explanation for Anti- Muslim Attitudes – Eastern European Societies in a Comparative Perspective' (2018) 12 *Journal of Nationalism, Memory & Language Politics* 162.

334 European Parliament, 'Resolution on the Situation in Hungary' 10 June 2015 (2015/2700(RSP))

335 United States Department of State, '2016 Report on International Religious Freedom – Hungary', 9. <https://www.state.gov/reports/2016-report-on-international-religious-freedom/hungary/

terror risk.'[336] Further government consultations in 2017, intensified the popular fear of Islam, terrorism and mass migration with claims that civil society support for refugees was aimed at the Islamisation of Europe.[337] State-controlled media reinforced and amplified the political rhetoric demonizing migrants and Muslims. Staff at the state-funded MTVA network said that they were required to focus on stories linking refugees to violence and crime, even when these were known to be false.[338]

The intensified Islamophobic political rhetoric was noted in the focus groups in **Poland and Hungary**. Immigrants who had lived in Hungary and Poland for many years as well as European-born Muslim converts contrasted life before and after 2015, a critical turning point after which their life was palpably different and worse:

> So, before 2015, it didn't happen […] how to put it, such aggressive remarks and I guess I didn't even notice if they were, because I just wandered around like any normal person. But after 2015, because they specifically referred too often to the fact that the scarf on my head was a negative thing, or that I myself existed was negative […] I feel that everyone gained a lot of confidence [to abuse Muslims and migrants]. So since it's widely accepted and we can read on billboards how dangerous we are, everyone feels that they are empowered and they have the right to do that.   (Hungary, Focus Group)

For this woman state propaganda changed the public's perception of her from a 'normal person' to her mere existence being a 'negative' thing. In addition, the interviewees felt that the government propaganda enables and allows racism and that people felt empowered to act on their prejudices. Some said that they now feared the weeks leading up to any elections as they anticipated that politicians would revive their rhetoric against Muslims and migrants.

In **Poland**, candidates in the October 2015 presidential and parliament elections played on fears and anxieties about the 'Muslim terrorists' 'flooding into Europe'. The head of the Law and Justice Party (PiS), Jaroslaw Kaczyński, drawing on xenophobic tropes of foreign contagion, argued that Muslim refugees carry parasites that can be dangerous to Europeans.[339] By 2016 'Islamophobic views were brought further mainstream not only in politics, but also in media, education and other spheres of life.'[340]

Despite the growing hostility of the political discourse, most respondents in Poland considered it a safe country to live in; they felt welcomed in their neighbourhoods. There were many stories of solidarity, kindness and support in everyday interactions with Polish friends and neighbours. However, alongside this positive experience there was a sense of unease and tension, a fear that these good relations were fragile and could change at any moment. This tension was captured by one respondent who spoke of 'feeling safe but living in fear':

> When you are living, you feel safe, we live safe, but we live in fear. Everybody is living in fear. […] For example, if you look to the news, if you look to the political speech, if you look - "we don't want hostels", "we don't want foreigners in our country" – this is the political speech. Sometimes, […] people […] they will take this speech and put it in action. […] if the people […] listen to the government, then this speech will become action. As I told you, the government, they have this speech and they start to put it in practice in terms of policies and procedures in the immigration office or for residence cards or whatever.   (Focus group, Poland)

The hostility directed at migrants, Muslims and refugees by politicians maintains a fear that negative public attitudes could rapidly and dramatically deteriorate and descend into violence. The pervasive fear of collective punishment from a public backlash in the wake a terrorist attack was experienced after the news broke of the murder of Mayor of Gdańsk in January 2019. Media reports

336 ibid.

337 Zsolt Sereghy, 'Islamophobia in Hungary National Report 2017' Enes Bayraklı and Farid Hafez (eds.), *European Islamophobia Report* 2017 (SETA, Foundation for Political, Economic and Social Research, 2018), 313. http://www.islamophobiaeurope.com/wp-content/uploads/2018/07/EIR_2017.pdf

338 Daniel Nolan and Shaun Walker, 'Hungarian journalists admit role in forging anti-migrant 'atmosphere of fear'' *The Guardian* (London, 13 April 2018) <https://www.theguardian.com/world/2018/apr/13/hungary-journalists-state-tv-network-migrants-viktor-orban-government

339 'Kaczyński: Parasites and protozoa in the organisms of refugees that are dangerous for Poles' *Newsweek* 13 October 2015, <https://www.newsweek.pl/polska/jaroslaw-kaczynski-o-uchodzcach/89mwbx3> accessed 1 February 2021.

340 Konrad Pędziwiatr, 'Islamophobia in Poland: National Report 2016' in Enes Bayraklı & Farid Hafez (eds.), *European Islamophobia Report 2016*, (SETA, Foundation for Political, Economic and Social Research, 2017), <http://www.islamophobiaeurope.com/wp-content/uploads/2017/05/EIR_2016.pdf> accessed 1 February 2021.

that this was a 'terrorist attack'[341] left Muslims in fear and bracing themselves for a possible backlash if the attacker was a Muslim. A woman recalled the moment the news reached her:

> I was at work when they showed this on TV, a Syrian man who works with me was also very afraid. We waited to know who did it, and calmed down only when we found out that the attacker was not a foreigner, not a Muslim. I don't know about others, but I was afraid. (Focus group, Poland)

Another participant expressed the views of many others when she said that the situation in the country would have 'completely changed' if the killer had been Muslim, as it would have confirmed the message from politicians that Muslim are a threat to Polish society. The participants live in fear of the potential backlash from any violent incident in which the perpetrator has a Muslim name or background, they believe they will be held collectively responsible for the actions of an individual with whom they share no connection other than a shared religious identity.

6.2 Discrimination in the use of counter-terrorism powers

The previous chapter identified instances where legislation and policies explicitly and directly target Muslim identities and religious practices as indicators of risk and radicalisation. As such, these point to discriminatory treatment by the state in its laws and policies. The focus in this section is on three issues. First, experiences of discrimination arising from the use of broad powers that allow police or other security officials to stop, question and search individuals. Second, the potential for arbitrariness and discrimination in decisions to charge people with terrorism offences. Third, lack of accountability for the use of immigration powers in pursuing security objectives.

The power to stop and search is usually exercised on the basis of legislation that grants significant discretion to security officials in determining who to stop, and so it is

difficult to challenge. In fact, legal challenges have tended to succeed where they focus on the breadth of the discretion conferred by the legislation and the ensuing risk of discrimination rather than on proving actual discrimination in the exercise of the power in a particular case.[342] Proving discrimination to the standard required for a legal challenge is complex.[343]

In many EU states historical experiences of being over policed and under protected inform the fraught relationship between minority groups and the police. Surveys show that Muslims and racialised minorities believe police stops to be based on unfair and unjustified profiling.[344]

Across all five case-study sites there was a widespread perception among participants that Muslims are profiled and selected for questioning by police and security officials on grounds of their perceived race, ethnicity and religion. Some interviewees' experiences of increased and intensified stops and controls in the aftermath of a terrorist incident, especially when the attack had occurred in another European state, had reinforced the sense of being unfairly profiled. Many participants believed that expressions of religious identity risked further investigation from police due to racialised profiling. For some participants the increased police focus on Muslims has become normalised as part of their life:

> The worst thing is that we assume that this is normal. As we are Muslims this is our turn to live like this. I think it takes a radical change for things to be different. What is the role of the institutions? Protect society in general. In this case, one part of society is being protected from the alleged damage that another part could do. These institutions are causing damage to this last part. I feel discriminated against 24 hours a day, every day of the year. Just by the fact of being and declaring that I am a Muslim I become a suspect. (Focus group, Spain)

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341 'Piotr Niemczyk: To był atak terrorystyczny. Trzeba natychmiast uruchomić programy walki z mową nienawiści' [Piotr Niemczyk: It was a terrorist attack. Hate speech programs must be launched immediately] 15 January 2019 http://www.tokfm.pl/Tokfm/7,130517,24366605,piotr-niemczyk-to-byl-atak-terrorystyczny-trzeba-natychmiast,html> > 1 February 2021.

342 *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45

343 See: Eda Seyhan, *A Human Rights Guide for Researching Racial and Religious Discrimination in Counterterrorism in Europe,* (Amnesty International/Open Society Foundations: London, 2021).

344 In a survey in France 43.4% of Muslim respondents thought police stops were mostly or totally unjustified, compared to 31.9% who thought they were fairly or totally justified. Muslim respondents were twice as likely to find this targeting mostly or totally unjustified compared to the control group (34.4% compared to 15.1%). Ragazzi and others, 'The effects of counter-terrorism' (n300) 45. See also Fabien Jobard and Rene Lévy,'Racial Profiling: The Parisian Police Experience' (2011) 53 *Canadian Journal of Criminology and Criminal Justice* 87. On Germany see Jeremie Gauthier, 'Cultural profiling? Police prevention and minorities in Berlin' in Thierry Delpeuch and Jacqueline Ross (eds.), *Comparing the democratic governance of police intelligence: New models of participation and expertise in the United States and Europe* (Elgar, Cheltenham, 2016).

Airports are a space where Muslims find their religious identity becomes a proxy for terrorism risk and so encounter discriminatory surveillance.[345] A teenage German Muslim recalled the following incident at an airport security check and reflected on the justifiability of such practices:

> As a Turkish Muslim with a beard I have been checked thoroughly. I thought to myself, 'What is going on here?' I am a completely normal person like everyone else. All my other friends went through security normally. When I wanted to go through I was taken aside. There was a classmate behind me wearing a headscarf. She was taken into a room. She later told me that she was frisked everywhere [...]. Well, ok, bad things have happened before. But you don't have to control every person so hard.
>
> (Focus Group, Germany)

This interviewee feels that he is targeted based on his religion and ethnicity as a 'Turkish Muslim with a beard'. While it is difficult to know the reason for being stopped on a particular occasion, his experience, combined with that of this classmate, a female who wears a headscarf, reinforces his sense of facing religious profiling, as it is their common Muslim identity that unites them and distinguishes them from their friends. The interviewee believes such stops should target people who are potential security threats, not those who are 'completely normal'. The incident reminded the teenagers that their Muslim identity precludes them from experiencing public spaces, like airports, as 'completely normal' people; their Muslimness ensures that their experience is different and distinct from that of their non-Muslim friends.

Yet attributing discrimination to the exercise of counter-terrorism policing powers is complex. Research suggests that prior experiences of discrimination inform and shape how individuals respond to counter-terrorism laws and policies, and that 'the more a person has experienced discrimination, the more likely it is that he or she will perceive counter-terrorism policies as discriminatory'.[346] Thus

the 'potential discrimination linked to counter-terrorism is difficult to distinguish from all the other forms of discrimination that Muslims face, particularly in their relations with the police'.[347]

There were also concerns that broad and vaguely-drafted terrorist offences leave significant space for arbitrary or discriminatory decisions when it came to charging people for terrorism. The **Hungarian** case of Ahmed Hamed illustrates the expansive scope of the definition of terrorism and the potential this creates for the misuse of counter-terrorism laws against refugees and migrants. In September 2015 Ahmed was one of a group of refugees at the Serbian-Hungarian border who were seeking to enter Hungary. After guards used tear gas and water cannons against the crowds at the border, which included elderly people, women, and children, Ahmed participated in throwing stones at the guards over the border fence. For this he was convicted of committing 'acts of terror' and initially sentenced to ten years' imprisonment (a re-trial reduced this to 5 years). The decision to charge Ahmed with a terrorism offence rather than a public order offence was widely criticized by human rights groups and international governments. The US government reflected many of their concerns in its statement that the conviction involved a 'broad interpretation of what constitutes "terrorism"'.[348]

In **Spain** many of the focus group participants were worried about the wide scope and unjustified use of pre-emptive terrorism offences, fearing that they could be used to prosecute individuals who were not engaged in anything close to planning a terrorist attack and had no intention to do so. Among Muslim parents there was particular concern that laws criminalising viewing ideological materials placed young people at risk of criminalisation for online browsing, fearing that 'any day they may take our children, without having to show many things'.[349]

345 See for example Leda Blackwood, Nick Hopkins and Steve Reicher, 'I know who I am, but who do they think I am? Muslim perspectives on encounters with airport authorities, (2013) 36 *Ethnic and Racial Studies* 1090; Leda Blackwood, Nick Hopkins and Steve Reicher, 'Flying While Muslim': Citizenship and Misrecognition in the Airport' (2015) 3 *Journal of Social and Political Psychology* 148; Baljit Nagra and Paula Muarutto, 'Crossing Borders and Managing Racialized Identities: Experiences of Security and Surveillance Among Young Canadian Muslims' (2016) 41 *Canadian Journal of Sociology* 165; Saher Selod, *Forever Suspect: Racialized Surveillance of Muslim Americans in the War on Terror* (Rutgers University Press, New Brunswick NJ, 2018) 49-74.

346 Ragazzi, *The Effects of Counter-Terrorism and Counter-Radicalisation Policies* (n300) 77.

347 ibid.

348 Mark Toner, 'Sentencing by Hungarian Court of Ahmed Hamed' 6 December 2016 < https://2009-2017.state.gov/r/pa/prs/ps/2016/12/264924.htm> accessed 01 February 2021.

349 Focus group, Spain.

In **Hungary and Poland**, where many of the focus groups' interviewees were refugees or recent migrants, the lack of transparency and procedural rights in immigration processes were a key concern. Many felt that decisions on visas, citizenship and immigration applications were tainted by discriminatory stereotypes and assumptions that link them to threats to national security:

> There are some changes, but they are not official/announced legislation changes, we feel that there are some hidden unofficial directions, changes behind the scenes that are affecting us. An example would be naturalization applications and processes. In many cases applications are rejected without any logical justification or reasons. Somehow, unexplained situations. I know a case of a Yemeni lady who has an ill daughter and she applied three times and it didn't work. Her husband and all her children are Hungarian citizens, and she was still rejected without a good reason. So there is no clear law about that, but they are being racists with those types of decision. (Focus Group, Hungary)

In the absence of information about the basis on which decisions have been made the, interviewees drew on rule-of-law standards of procedural fairness in reaching a conclusion of discrimination. A focus group participant in **Poland** articulated the fear that the lack of procedural safeguards will allow national security to be misused to achieve immigration objectives, as 'anything can be thrown in the name of counter-terrorism'.

The arrest and deportation from Poland of Ameer Al-Khawlany illustrates challenges to the rule of law and due process in this area. Ameer is an Iraqi national and a PhD student at Jagiellonian University in Krakow. Between October 2016 and April 2017 he was arrested and detained by order of the Internal Security Agency (ISA) on the basis that he posed a threat to national security. Media reports suggest that Ameer was arrested after refusing to cooperate with the ISA by providing information on immigrant and Muslim communities in Poland. Despite an open letter from his university's staff calling for transparency and fair treatment, neither Ameer nor his lawyer were informed of the basis of his arrest, detention and deportation. Most worryingly, he was deported without notification to his lawyers.

6.3 Securitised discrimination, harassment and abuse in daily life

Recurrent daily encounters of discrimination are associated with negative outcomes for mental and physical health.[350] The negative impact of everyday discrimination becomes compounded when combined with discrimination from law enforcement agencies.[351] While there is an emerging body of literature documenting micro-aggression experienced by Muslims, the focus here is on open, explicit and aggressive forms of discrimination and abuse.[352] Muslim participants in this research drew a clear link between the political discourse and security policies that generate fear and suspicion of Muslim identities and religious practices and the discrimination and abuse that they faced. In their view the former enables and encourages the latter.

Many focus group participants felt that the state's suspicion of Muslims permitted ordinary citizens to be wary of them and emboldened discrimination, harassment and abuse. The association of Islam with violence and suspicion of Muslims as incipient extremists and potential terrorists left many research participants feeling forever vulnerable to encountering discrimination and abuse. They pointed to personal examples of discrimination and abuse rooted in fear of Muslims. They recalled instances where carrying everyday items such as shopping bags led to verbal abuse in public spaces:

> Two Polish men entering the bus, on the seats facing me. Then they look at my face and the two plastic bags. One of them started talking. At the beginning, their way of looking at me was not positive. And one of them asked me 'Are you sure there is no bomb in your plastic bag?' (Focus group, Poland)

350 Tene Lewis, Courtney Cogburn, & David Williams, 'Self-reported experiences of discrimination and health: Scientific advances, ongoing controversies, and emerging issues' (2015) 11 *Annual Review of Clinical Psychology* 407.

351 A survey of American Muslims reported that 'Muslims who reported being called offensive names and being singled out by law enforcement officials had a higher probability of having clinically significant levels of depressive symptoms'. See David Hodge, Tarek Zidan, & Altaf Husain, 'Depression among Muslims in the United States: Examining the Role of Discrimination and Spirituality as Risk and Protective Factors' (2016) 61 *Social Work* 45, 49.

352 For discussion on micro-aggressions experienced by Muslims see Izram Chaudry, '"I felt like I was being watched": The hypervisibility of Muslim students in higher education', (2021) 53 *Educational Philosophy and Theory* 257.

The threat of abuse causes some to hide their Muslim identity by avoiding actions or activities that reveal their Muslim identity:

> I was someone who did *salat* (prayer) anywhere – not any more. And when it comes to going to the beach or the pool. I used to think "I go as I want." Not any more – now if I have to wear a bikini, I wear it. I want to go unnoticed. I had a group of Spanish friends, we were traveling. I prayed in front of them because I wanted to show them what Islam is. Now, I can't even think of it. I don't even want to be asked if I'm Muslim... I want to go totally unnoticed. I don't want to get attention.   (Focus Group, Spain)

In Warsaw a student from East Africa explained how while riding on a bus with fellow Muslims, they felt that the atmosphere created by their presence on the bus, was 'so tense' that they waited until they got off the bus to greet one another with '*salamu alaykum*'. Another person mentioned needing to mute his smartphone application for the adhan (a call to prayer), as the opening words, '*Allahu akbar*', an ordinary Islamic phrase used in daily prayer, have become synonymous with terrorism. Fear of discrimination, harassment and abuse is leading Muslims to increasingly censor their use of Islamic and religious expressions.

6.4 Discrimination and abuse targeting Muslim women

Consistent with other research on Islamophobia in Europe, research for this report found that Muslim women, whose religious identity becomes hyper-visible when they wear the hijab, face constant and continuous discrimination including verbal and in some instances physical abuse in everyday encounters in the street.[353]

> As a woman wearing a headscarf, when I am out on the street I have in mind that I can become a victim of abuse or attacks, even assaults. I couldn't then say that I feel very safe, especially when I'm out at night at the train station, especially at times when football fans or drunk people are out and about. I have heard comments from drunk people behind my back and I didn't feel very safe then. In my city there is also a known quarter where very right-wing people live and hang out. [...] I don't have any problems in everyday life but I know that I am wearing a risky piece of clothing.
> (Focus group, Germany)

The testimony above reflects the pervasive sense of insecurity that some Muslim women reported living with. The possibility of abuse and attack is something that they must 'have in mind' when out on the streets. This insecurity increases around particular locations or at specific times. It reveals how many Muslims do not enjoy the freedom to move without restriction or interference in the towns and cities where they live but must carefully navigate to avoid hotspots where there is a heightened risk of abuse. However, other testimonies show that even spaces believed to be safe can be the site for violent attacks:

> After the Charlie Hebdo events I was at the library with a friend of mine, both wearing the veil. At some point this old guy, a man, walked by us. He totally tried to rip her veil off... I was choked... He totally wanted to. Yes, I had never felt such an excluding feeling about my hijab before. And when I saw this, I was so choked. And my friend was so traumatized. And now it has been a while, anyway, but I was so choked. He really wanted to take it off her, he was determined... But you know, she started to question herself and her hijab a lot.   (Focus group, France)

The clear picture that emerges from the testimony of focus groups across all five states is one in which many Muslim women's experiences of verbal abuse have become a normalized part of their daily life. Women in focus groups in all five countries gave numerous examples of the harassment and abuse they encountered. In one vivid example a young student who wears a headscarf provided details of prolonged verbal abuse she that faced on a train journey:

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353 According to the EU FRA, 'Muslim women who wear headscarves (or the very few who wear niqabs) in public are more likely to experience bias-motivated harassment than those who do not – 31%% compared with 23%' See European Union Agency for Fundamental Rights (n159) 41. See also Chris Allen, Arshad Isakjee and Ogtem Young, '*Maybe we are hated': The experience and impact of Anti-Muslim Hate on British Muslim Women* (Birmingham, University of Birmingham, 2013); Dermana Seta, Forgotten Women: The impact of Islamophobia on Muslim Women, (ENAR, Brussels, 2016); Tell Mama, *Gendered Anti-Muslim Hatred and Islamophobia*, (Faith Matters, London, 2018); Ragazzi, *The Effects of Counter-Terrorism and Counter-Radicalisation Policies* (n300).

> The other day [...] I was simply yelled at while passing by because of my religion, which happens to me more often, that I get yelled at on the street, which is why I had to laugh again because it happens to me so often. One of the most blatant moments, which was also stupid for me at that moment, was that my sister was on the phone at that moment. [...] It was hard for her to see that this was happening and that she couldn't do anything. I was insulted by someone in the train for almost half an hour, I was yelled at, I was almost attacked, and nobody reacted. In front of me was someone who was scared, and I was the one who was being attacked, but I just tried to calm her down because I'm so used to it, unfortunately, that I went into the defence mode and said OK, nothing happens, everything is fine [...] You've gotten used to it a little bit, like when you have toothache you don't go crazy, and the bad thing for me was that my sister was on the phone and she went crazy because she was afraid, because she heard all that, how she shouted and insulted me from a to z, that I was a suppressed something else, which I also found funny. Because it sounds paradoxical that she insulted me and at the same time said that I would be oppressed.
>
> (Focus group, Germany)

Among the disturbing details in this narrative is the brevity with which she passes over the first incident of being yelled at in the street since this happens 'so often', to focus on her experience in the train. Here, equally worrying is the calmness with which the participant reacted to the abuse because she was 'so used to it'. Earlier experiences had taught her how to act and behave to survive such verbal assaults. The testimony from participants in this report suggest that for most women such experiences are no longer exceptional but are viewed as part of the routine of life, 'like a toothache'.

The consequence of such hostility is that some Muslim women are forced to think twice before they wear a hijab or wear a headscarf to reduce their risk of exposure to violence and abuse. A Polish Muslim woman admitted that she sometimes chose to wear a hoodie instead of a headscarf, avoiding being identified as Muslim and so protecting herself from potential incidents. The visibility of the difference signified by the headscarf is captured in a comment by a Hungarian Muslim woman: 'We are a good enemy because we can be seen well; we are visible with the headscarf'. However, the majority of female interviewees who wore the hijab continued to do so after encountering abuse.

6.5 Reporting Discrimination

The findings in this research are consistent with survey data that find that the vast majority of Muslims do not officially report the harassment and abuse they experience.[354] While most respondents did not report discrimination and abuse to the police, those who did try to do so were often dissatisfied with the response. A student in Hungary who reported an incident of verbal abuse in the street to the police found that she was not taken seriously, and remembers the experience as humiliating and traumatic.

In many cases where verbal abuse took place in the street and the perpetrator was not known to the victim, reporting it to the police or other authorities was seen as ineffective and unlikely to result in any action. For some, harassment and abuse has become such an everyday occurrence that it is no longer seen as serious enough to report:

> In my case it has to be something very, very, very serious [...] Because I can't imagine going to a police station to say that they have verbally assaulted me on the street [...] They won't even pay much attention to me. I don't know, it's the perception I have, I think, I never would, it has to be very serious.
>
> (Focus group, Spain)

The comment suggests that everyday low-level harassment and abuse are not seen as something that will be taken seriously and so the time and effort of reporting abuse is retained only for 'very, very, very serious' incidents. Many comments pointed to a belief that Islamophobic abuse would not be recognised or understood, and consequently its impact is marginalised:

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354 'Overall, nine in ten Muslim respondents (91%) did not report the most recent incident of harassment they experienced to either the police or any other organisation or service [...] The most often-cited reasons for not reporting the most recent incident of bias-motivated harassment was that nothing would happen or change by reporting it (43%). 41% of respondents who experienced bias-motivated harassment did not report the incident anywhere because they thought it to be minor; 13% said that reporting would have been too bureaucratic; 9% that they were able to deal with the problem themselves; and 8% that they would not be believed or taken seriously.' European Union Agency for Fundamental Rights (n159) 46.

> The police wouldn't take such things seriously. In Germany our religion is not so highly regarded. In the eyes of the police officers we are not harassed, or we are just seen as small and unimportant. If we say something to them we are not taken seriously, but if someone else would say something to the policemen, then they would help him. So for example if I would say that some person has insulted me in a racist way then the policeman would say: 'Well, the person certainly didn't mean it like this' or 'Don't take it personally'.
>
> (Focus group, Germany)

> At the time and even now, you are saying, we are in France, it might disturb them. There's a point where you feel like you actually might be the problem. I don't know if you understand. I went through different phases with my hijab. At one time, it's true, you are wondering why so much fury, it's crazy. Maybe it actually really is a problem. [...] it's like with the girls who were assaulted on public transport. When they go to file a complaint they are told 'it's your fault' [...] so yes, I felt like it is kind of the same. We don't really trust [the police]. We're afraid of being humiliated.
>
> (Focus group, France)

This comment points to the way in which negative public discourse relating to Islam and Muslims informs the respondent's anticipation that any complaint will be dismissed and its damage minimized. Many who recalled examples of abuse did not feel that their experience would be viewed by police or other authorities as harassment. For some the perception that abuse would not be taken seriously contributed to a feeling of marginalisation, of being considered 'small and unimportant'. A Hungarian Muslim civil society organisation reported that the police failed to take their concerns about intimidation and harassment seriously in the days leading up to a planned far-right anti-Muslim demonstration outside their mosque.

Official state policies seen as unfairly targeting and discriminating against Muslims contributed to some interviewees' reluctance to seek protection from unlawful discrimination and harassment from public institutions. The French woman assaulted in a library mentioned earlier explained that she had not reported it to the police as she feared that she would not be taken seriously, and would in fact be blamed for provoking the attack by wearing the veil:

Interviews with civil society organisations and comments in focus groups suggest that Muslims in **Hungary** are reluctant to report hate crime and abuse because they see the rise in Islamophobia as instigated and driven by the government and ruling party politicians. One interviewee referred to the police as 'Orban's soldiers' and said that she would not report abuse to them 'because I don't trust the police as much as I don't trust the person who hurt me'.

7. SURVEILLANCE AND SUSPICION

This chapter examines experiences of surveillance and the impact on individuals and communities of thinking that they are or could be being watched for signs of radicalisation or activities suggesting they supported terrorism, by public officials (state surveillance), by fellow citizens (social surveillance) or by other Muslims (community surveillance). These three layers of surveillance are interconnected. A crucial part of surveillance is, as John Fiske observes, the 'coding' of that which is 'normal' and that which is 'abnormal' or 'dangerous'.[355] For Muslims, coding through surveillance inscribes understanding of the moderate and extremist Muslim. The testimony of the focus group participants highlights two responses to state and social surveillance, generated to placate fears and suspicion: the performance of 'safe' identities, showing themselves as 'moderate' Muslims that condemn terrorism, and connected to this always being careful when expressing their thoughts and ideas in case these are misinterpreted or misunderstood as signs of extremism or support for terrorism. The research also found that a key impact on a community of being under surveillance is fear of expressing solidarity with those who are suspected by the state.

The most direct experience of state surveillance for young Muslim men in particular is police and security-led checks and stops in the street. The previous chapter noted perceptions of discrimination and profiling in encounters with law enforcement officers. In this chapter the qualitative data from the interviews provide an insight into the impact of state surveillance. Young male interviewees reported being stopped by the police multiple times. A participant in a focus group in **Spain** described the experience of constant police stops, particularly when young men are in a group, as leaving them knowing they are watched and 'feeling under constant guard'. The qualitative data offers an insight into the cumulative experience of multiple regular police stops. While being stopped once may be a small interruption or inconvenience in the course of a day, the collective impact of multiple stops accumulates over time. An interviewee sought to convey the range of feelings triggered by police stops:

> [A]t the family level it generates more insecurity and more fear. You know that [the police] ask for identification... You say 'well, they want identity [documents]... nothing ...nothing has happened' [...] In reality it is something that weighs you down more and more every time.　　(Focus group, Spain)

The interviewee here was trying to convey the modulation between the momentary annoyance in each individual instance when 'nothing happens' and the collective psychological force of multiple stops that 'weighs you down more and more'.

Focus group participants also expressed concerns about covert state surveillance of their communications and online activities. The lack of judicial checks and oversight of the increased executive power to monitor communications were prominent issues in the public debate about Poland's 2016 Anti-terrorism Act and were echoed by some interviewees in Poland, who gave examples of questioning by state officials that led them to believe that their calls and online activities were being covertly monitored.

The approach to counter-radicalisation and counter-terrorism that calls on everyone in society to be involved in looking out for danger widens the net of state surveillance. It co-opts not only a wide array of public officials but all citizens to the surveillance of Muslims. France and Spain have set up websites and telephone hotlines to enable citizens to report their suspicions. In 2015 **Spain** launched a 'stop radicalism' campaign and within its first year 2550 reports were made to the state, of which 935 were classified as 'of interest'.[356] The campaign did not specify a particular focus but rather called on citizens to report 'any indication that may lead to radicalisation or extremist, intransigent or hateful behaviour for racist, xenophobic, belief or ideological reasons'.[357] By calling on citizens to report their suspi-

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355 John Fiske, 'Surveilling the City: Whiteness, the Blackman and Democratic Totalitarianism' (1998) 15 *Theory, Culture & Society* 67, 72.

356 Laura L Caro, 'Avisos ciudadanos identifican a 12 yihadistas unidos a Daesh' (Citizen notices identify 12 jihadists who joined Daesh) *ABC Espana* (31 October 2016), <https://www.abc.es/espana/abci-avisos-ciudadanos-identifican-12-yi-hadistas-unidos-daesh-201610310722_noticia.html> accessed 1 February 2021.

357 <https://stop-radicalismos.ses.mir.es/ , En esta página tienes todos los canales para comunicar cualquier indicio que pueda derivar en radicalización o conducta extremista, intransigente o de odio por razones racistas, xenófobas, de creencias o ideológicas.' [On this page you have all the channels to communicate any indication that may lead to radicalization or extremist, intransigent or hate behaviour for racist, xenophobic, belief or ideological reasons.]

cions while providing no indication of what to look out for, the state authorised the population to fall back on their racialised imaginings of the terrorist threat.

In **Spain** coordination and collaboration between security forces and frontline workers was previously restricted to those belonging to a terrorist organisation. This has now been extended to anyone deemed as risk of radicalisation. This expansion in the scope of the surveillance has generated concerns about the stigmatising impact of counter-radicalisation policy's exclusive focus on Muslims.[358] The lack of a profile for identifying incipient terrorists and references to migration as well as ethnic and religious identities as salient factors in vulnerability to radicalisation enable extensive state surveillance deep into Muslim communities. The Catalan protocol on counter-radicalisation, the PRODERAI, describes radicalisation as the outcome of multiple 'risk factors' that encompass all areas of life for young Muslims including personal development, the family environment, and the educational and social contexts.[359] The PRODERAI sees the development of identity and belonging and loss of contact with family in the diaspora as risk factors for radicalisation and incipient terrorism, securitising otherwise commonplace experiences of immigration, integration and adolescence. According to data provided by the government of Catalonia, between 2016 and 2018 just over 5,500 professionals received training in relation to the PRODERAI, and during this period schools in Catalonia activated the counter-radicalisation protocol in over 300 cases, resulting in information being sent to the Ministry of the Interior. There is no further information provided on the characteristics of these cases or whether they resulted in police or judicial action.

In **France**, calls for increased state and social surveillance intensified following the killing of police at the Paris police headquarters in 2019. President Macron called for France to become a 'society of vigilance', arguing that 'the administrative services alone, and all the combined services of the state alone, will not be able to overcome the Islamist "Hydra"'. He called on everyone to be vigilant for signs of radicalisation, to 'be on the lookout at school, at work, in places of worship, close to home, for the slackenings, the

deviations, the little gestures that signal a distancing from the laws and values of the republic'.[360]

The conscription of all citizens to report signs of radicalisation leaves Muslims feeling vulnerable and under continuous surveillance by the state, their neighbours and their colleagues. A research participant in Spain gave a vivid description of the psychological impact of this:

> [...] you feel that you are watched, observed, you know. And that happens, from the police to the people, you know, because in the end your neighbour, even if he is your neighbour, can be a police watchman [...] I think they are sometimes waiting for some Moor to do something [...] While their Catalan or Spanish children are playing in the same neighbourhood, you know [...] But if a Moorish child does something. But of course, police surveillance affects neighbours, who eventually end up doing police work. You don't feel safe in any context.   (Focus group, Spain)

Muslims feel unsafe and insecure in their homes and find themselves having to be alert to their neighbours' potential misreading or misunderstanding of everyday activities, particularly expressing any aspect of their religious identity that could be misread as a sign of extremism and lead to being reported to security officials, triggering further surveillance, investigation, and questioning. The fear of their comments, actions, and activities being misunderstood or misinterpreted also applies to online digital spaces. Some interviewees were nervous and wary of posting their views on social media:

> I don't know, I choose to restrain myself from writing some comments on the Internet, even in a joking manner. All in all, you never know where it ends up. I'm also conscious of the words I'm using in my conversations, so that it doesn't get misinterpreted. So it does influence the comfort of conversations.
> (Focus group, Poland)

Having to weigh up the risk of comments being misconstrued is an additional constraint that circumscribes Muslims' freedom to express their ideas and opinions. In **Spain** parents were concerned that online surveillance combined with broad counter-terrorism offences concerning viewing 'extremist' material could lead to young

358   Zyab Ibanez, 'Multi-Agency Training Exist Strategies for Radicalized Youth - National Report Spain' (Institut de Govern i Politiques Publiques/Universitat Autonoma de Barcelona, 2019), 4. <https://www.iprs.it/wp-content/uploads/2019/01/1.2-MATES-Informe-Nacional.pdf

359   See Observatory to Prevent Violent Extremism, 'Consideraciones sobre el Protocol de prevenció,
detecció i intervenció de processos de radicalització islamista en Cataluña (PRODERAI)' 6. <https://opev.org/wp-content/uploads/2019/07/Briefing-paper-PRODERAI.pdf> accessed 1 February 2021.

360   Adam Nossiter, 'In Paris Knife Attack, Missed Signals and Calls for Vigilance' *New York Times* (8 October 2019) <https://www.nytimes.com/2019/10/08/world/europe/paris-knife-attack.html> accessed 1 February 2021.

Muslims being unfairly criminalised. The qualitative data here is consistent with surveys of Muslims in **France** showing that counter-terrorism measures have a chilling impact on free expression, with Muslims censoring their discussion of topics related to foreign policy and society.[361] Such self-censorship undermines their ability to participate in public debates and deliberate as citizens on issues of public concern on a basis of equality.

Interviewees recalled how the gaze of suspicion generates pressure to show colleagues, acquaintances and strangers that they condemn terrorism and violence:

> I believe that the fact that we always feel the need to justify ourselves, to leave, to say 'not in my name', is also linked to fear. Because you say, I'm going to express myself, because if I don't the police will come later. It is an unconscious fear.
>
> (Focus group, Spain)

The interviewees here do not enjoy the freedom to express themselves in their own terms, and find themselves having to police their actions and activities and how they present their identities in anticipation of how others will read their identities, actions and bodies:

> You grow up wanting to justify why you aren't guilty. Yes, today I feel more insecure showing my Islam publicly than before. Because it causes me discomfort to show my spirituality in such basic things as going to the mosque, taking a picture and sharing it on social media [...] I already ask 'What will they think?' I already know that there is suspicion about me. I know that there are many people who have thought about it.
>
> (Focus group, Spain)

Stereotypes linking Muslims to violence and terrorism create the background context that shapes their exchanges and encounters with acquaintances and strangers. An interviewee in Hungary reported how Muslims' need to show themselves as 'moderate' and 'safe' inhibits their ability to respond to abuse and harassment.

> [...] so somewhere my rights have to be defended and I have the right to defend myself, so I stand up and if I stand up little bit more strongly then they can say that Islam is a violent religion because then [...] it is turned back on me'.
>
> (Focus group, Hungary)

The interviewee, believing his actions are unlikely to be understood as the free actions of an individual, risks confirming the stereotype of Muslims as violent and aggressive. While enacting strategies to ensure they are seen by others as 'safe' and 'moderate', and therefore not 'extremists', Muslims find that they are actually reinforcing the framework of the moderate/extremist dichotomy.

Many Muslim research participants felt worn down and exhausted from living under suspicion, having to prove their loyalty and belonging, even having to show they are 'normal'. One called it a 'situation of tiredness'. Another described how they expended precious time and vast energy countering stereotypes and proving their 'normality':

> '[...] I consider myself as a nice person, I come from a culture where friendliness is a default. [...] I am still not used to it but now I can deal with it a little bit easier. The thing is that I feel like that I always have to put a lot of effort [...], I don't want to put myself in a situation where the other person reacts in a rude way, where I feel offended, insulted, because that would ruin my day. I feel like a lot of energy is wasted because I always try to be too nice, to be extra nice, even when I go to an officer at the desk, extra careful, extra, extra, so you don't get in any confrontation or something like this. And this makes you feel really frustrated, because you are putting all your energy into looking like a normal person for them and you still get a rude reaction.
>
> (Focus group, Hungary)

The emotional toll of the racialised association of Muslims with terrorism and violence burdens them with the additional labour of proving their humanity and allaying the fears and anxieties triggered by their presence. Across the different case-study states many Muslims have responded to the negative stereotypes of Islam by assuming responsibility for educating people about Islam and Muslims in order to disrupt and control the narrative. At times the line between acknowledging the burden of the imposition of collective responsibility and the internalisation of that responsibility can seem blurred:

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361 Ragazzi, *The Effects of Counter-Terrorism and Counter-Radicalisation Policies* (n300), 46.

> 💬 I think if we Muslims are positive about it – so for example I try to smile, be happy, and have a balanced life, and then actually they make fewer negative comments, [...] So I feel that this depends a lot on how Muslims stand on this issue.
>
> (Focus group, Hungary)

At times the research participants revealed how they had internalised the need for the surveillance of Muslim minds and bodies. In Germany young Muslim men spoke proudly of their participation in Muslim-led demonstrations against radicalisation and terrorism. While feeling that it was unfair that the level of police presence and surveillance at these demonstrations was much greater than at demonstrations about other issues or by other groups, they nevertheless argued that this provided a chance for them to show the police that they were 'good' people.

> 💬 B: Of course it gives us an insecure feeling, but [...] it can also lead [the state] to see us as we are and change their mind about what they thought before and have a good view of organisations like ours.
> A: Actually, now if I think they are watching us it doesn't matter. They can observe us. If they observe us, then they can see that we are not in favour of radicalisation and terrorism. If they don't watch us, nobody will know.
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> (Focus group, Germany)

While the interviewees welcomed state surveillance as an opportunity to show that they were 'good' Muslims, they also recognised that such an opportunity arises in a context of policing that places them under greater surveillance and generates insecurity. They act under the burden of having to prove their good citizenship. Thus their actions are responding to the suspicion and fear that their identities generate.

The harm arising from the fear of constant state surveillance is not fully captured by the individual right to privacy as it is also experienced as communal harm.[362] For example the interviews for this report have shown that the internalisation of the need for surveillance by Muslims erodes the expression of solidarity towards particular groups under suspicion, such as new migrants or young Arab men; furthermore, the suspicion that any individual could be an informant hinders collective action.

The fear of coming under suspicion also prevented Muslims from providing support or expressing solidarity with individuals or families that are under suspicion from the state; such families find themselves ostracised and isolated. Some interviewees saw this as an intentional part of the state's counter-terrorism strategy; creating a hostile environment, driving a wedge between those who are 'at risk' of radicalisation from those deemed dangerous and risky:

> 💬 You can't give emotional support either ... because you're going to count as if you were collaborating ... the idea is to criminalise the environment, how many more suspicious people... So, that affects the relationships between the family, the neighbourhood and the entire community
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> (Focus group, Spain)

> 💬 As [Muslims] have to prove that they are against [terrorism], this creates a tremendous vacuum for a family [under suspicion], [...] the entire Muslim community asked their children not to play with the children of that family. They put you between a rock and a hard place. If I say that I just didn't believe the police, does that mean I am condoning a terrorist? To put it another way, if I know a person better than the police, regardless of any investigation, [...] and I have never detected anything [dangerous] about him, and perhaps I know more about his ideology than that police [...], I should have the right to believe that he is not a terrorist but if you express this, it is like you are justifying a terrorist when he should really be presumed innocent until proven guilty.
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> (Focus group, Spain)

Those who are ostracised in effect lose their right to the presumption of innocence. Members of the wider community fear coming under state suspicion and so feel compelled to prove their own innocence by actively distancing themselves from those already under suspicion.

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362 Diala Shamas, 'Living in Houses without Walls: Muslim Youth in New York City in the Aftermath of 9/11' in Susan Opotow and Zachary Shemtob (eds.) *New York After 9/11* (Fordham University Press, New York, 2018).

Part III: Conclusions and Recommendations

8. CONCLUSIONS

Part 1 of this report outlined the EU's key contributions to the development of Member States' counter-terrorism laws and policies. Through the Frame Decisions and the Directive on Combatting Terrorism (DCT) the EU expanded the scope of European criminal law, requiring states to criminalise 'pre-emptive' terrorism offences. Through funding and coordination, it has supported and encouraged Member States' development and implementation of counter-radicalisation programmes. Its legislation and strategies for countering terrorism and radicalisation shape and influence the implementation and enactment of national policy and practice. In Part 2 this report documented personal experiences of securitised racialisation, discrimination and surveillance gathered from the testimony of 115 focus group participants and insights on the impact of security measures from interviews with 96 key stakeholders.

However, the contribution of EU legislation, strategies and policies outlined in part 1 to these personal experiences, while plain to see, is not always straightforward or linear. It is clear that European policy and legislation enables and supports the construction of Muslims as the natural focus of state concern and suspicion when combatting terrorism. While a wide range of state actions, discourses and strategies maintain this understanding, counter-terrorism and counter-radicalisation policies play a significant and critical role in developing, legitimising and embedding it.

The pre-emptive offences created by the DCT are non-propositional; they do not identify, name, or seek to target Muslims or any ethnic or religious group. They require states to criminalise terrorist acts. What counts as terrorism shapes decisions about the allocation of European and national policing and counter-radicalisation efforts and resources. The DCT's vague and broad definition of terrorism leaves states with significant discretion to determine which of the many actions that fall within the scope of the definition are considered terrorist actions, and just as importantly, what to exclude from this labelling. This allowed **Hungary** to prosecute Ahmed H for terrorism after he threw stones at police at a border crossing, while right-wing violence rarely registers as terrorism. The failure to adequately report, record and charge right-wing violence and activities as terrorism reinforces the racialised association of Islam with terrorism,

naturalising the assumption that Muslims should be the focus of security measures. This is supported further by counter-radicalisation policies that emphasise ideology as the main driver of radicalisation, despite evidence for this remaining contested.

The DCT's 'pre-emptive' offences have tipped the balance of prosecutions towards offences of preparation, participation and public provocation. By criminalising conduct before any terrorist conspiracy or attempt materialises evidence of identity and ideology become salient to securing convictions. This risks ensnaring fantasists and 'loud mouths' in the criminal justice system. Reliance on evidence of utterances and associations infringes on fundamental freedoms of expression and association. It raises the spectre of a 'criminal law of the enemy', in which prosecution emphasises the dangerousness of the individual in the absence of evidence of dangerous actions. Pre-emptive offences that shift the focus of the criminal law to earlier points in time also enable the earlier deployment of state investigation and surveillance powers.

Surveillance and suspicion are central to counter-radicalisation measures that enrol the whole of society in watching for signs of radicalisation. The EU's initial approach to counter-radicalisation explicitly and exclusively focused on Muslims and Islam and was echoed, replicated and reinforced by states as they adopted, developed and implemented counter-radicalisation plans. Without explicitly naming Muslims it is clear to many of those implementing and enacting the policies who should be the focus of attention and surveillance.

The research in this report has documented frequent and numerous instances of the religious practices, beliefs and views of Muslims attracting the attention of security actors and prompting investigation and questioning. The participants' testimonies have documented how the racial and religious identity of Muslims inform the concerns that take shape in the imagination of state actors and the possible explanations that they develop in interpreting and understanding the views, comments or actions of Muslims. EU and Member State policies that have contributed to framing mosques as objects of suspicion have grown into wider societal suspicion of mosques, Islamic schools and the act of praying. The association of

Islam with violence, and suspicion of Muslims as potential terrorists has left many Muslims feeling forever vulnerable to discrimination and abuse that is rooted in fear of their Muslim identity.

EU and national-level strategies and policies have combined to produce a moderate/extremist dichotomy which implies that all Muslims have the potential for incipient violence. Understandings of who is an extremist are informed by counter-terrorism policies and practices, and circumscribe permissible and legitimate ways of being Muslim. The search for the extremist legitimises the use and deployment of 'indicators of radicalisation' that enable and authorise state and social surveillance. Muslims find themselves having to show that they are 'moderate' by vocally and actively condemning terrorism. Many live with the fear that careless expressions of thoughts and ideas risks being misconstrued and will lead them to be labelled extremist.

The research finds that counter-terrorism and counter-radicalisation policies and practices supported and developed by the EU have eroded the rule of law and infringed on the enjoyment of fundamental freedoms of religion and belief, association and expression, and rights to liberty, fair trial and non-discrimination. While recognising that local social, political, economic and cultural contexts generate counter-terrorism policies, practice and discourses, there are ways in which the EU can bolster the protection of human rights and ensure adherence to the rule of law.

There should be more detailed consideration of equality, human rights and rule of law in the processes for formulating legislation and policy on counter-terrorism and counter-radicalisation. Furthermore, an informed public debate and assessment of the proportionality and necessity of security measures requires information on the nature of the threat of terrorism in Europe, as well as data on the use of counter-terrorism and counter-radicalisation laws and policies. Equality data is vital to monitoring the impact of counter-terrorism and counter-radicalisation measures on different groups.

The protection of human rights, non-discrimination and the rule of law must be more clearly and effectively embedded into EU counter-terrorism strategies, normative frameworks and policies. One example of how this can be achieved is the UN Global Counter-Terrorism Strategy, in which 'measures to ensure respect for human

rights' account for one of the strategy's four pillars.[363] This ensures attention, action and resources on human rights and the rule of law.

Civil society plays a critical role in empowering communities, enhancing resilience, and supporting accountability and transparency. Yet, counter-terrorism and counter-radicalisation measures have been used to limit civic space; the broad definition of terrorism and vague concept of violent extremism has allowed States to label and stigmatise critics in civil society as "terrorists", "violent extremists" or "threats to national security". Meaningful consultation and dialogue with CSOs, particularly those that have direct understanding and experience of the groups impacted by counter-terrorism and counter-radicalisation measures would enable greater understanding how they affect fundamental rights and freedoms.

While the research for this report was completed by October 2020, the trends that we identify in this research - intensified suspicion, discrimination and surveillance of Muslims - persist in the response of Member States and the EU to the terrorist attacks in France and Austria in October and November 2020. In **France**, this included government closure of the leading anti-racism organisation, and ENAR member, the Collective Against Islamophobia in France (CCIF)[364]. In **Austria**, armed police raided the home of Dr Farid Hafeez, one of Europe's foremost academic experts on Islamophobia.[365] The European Commission's a new Counter-Terrorism Agenda, published in December, proposes worrying measures for further surveillance through data-sharing, and misses an opportunity to more fully and effectively address concerns about discrimination, human rights and the rule of law.[366] The following recommendations, addressing the findings from the research in the report, are important steps towards ensuring the EU and Member State are able to counter-terrorism while ensuring respect for human rights, equality and the rule of law.

363 UNGA Res 60/288 (20 September 2006) UN Doc A/RES/20/288.

364 Amnesty International, 'France: shutting down anti-racist organisations risks freedoms' 20 November 2020. <https://www.amnesty.org/en/latest/news/2020/11/france-shutting-down-antiracist-organisation-risks-freedoms/> (accessed 14 March 2021)

365 'Austria: Outrage after authorities target academic as part of 'terrorism' crackdown' Middle East Eye (2 March 2021), <https://www.middleeasteye.net/news/austria-farid-hafez-academic-targeted-terrorism-crackdown-outrage> (accessed 14 March 2021).

366 European Commission, 'A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect and Respond' COM(2020) 795 final, 9 December 2020.

9. RECOMMENDATIONS

1 EU counter-terrorism and counter-radicalisation strategies should emphasise and detail measures, actions and activities to support and promote the protection of human rights, equality and the rule of law.

2 The EU should reject the development of any new 'pre-emptive' criminal law offences and should review the DCT, to ensure that its pre-emptive offences are only retained to the extent they are strictly required by UN Security Council Resolutions.

3 All EU counter-terrorism legislation should contain a sunset clause (that is, they should be temporary and automatically expire after a fixed time unless explicitly renewed) and should require national implementation measures to also have a sunset clause.

4 Counter-terrorism legislation, strategy and policy documents should draw on and explicitly reference the international standards, principles and guidelines on human rights, non-discrimination and the rule of law that should inform and shape the implementation of counter-terrorism and counter-radicalisation measures.

5 Europol's annual EU Terrorism and Situation Trends Report (TESAT) should provide more comprehensive and detailed data. In particular, it should separate data on convictions from data on acquittals. It should also present full data on arrests, charges and convictions or acquittals for different types of offence, allowing clearer understanding of the role of pre-emptive, membership and propaganda offences as well as offences involving violence or direct harm to others.

6 All EU counter-terrorism measures should be subject to effective ex ante human rights, equality and rule of law impact assessment. This could be conducted by the European Commission and European Parliament with the support of the EU Fundamental Rights Agency

7 There should be greater role for national parliaments and national human rights bodies in commenting on counter-terrorism proposals.

8 Member states' human rights and equality bodies should have the powexr, mandate and resources to conduct regular assessments of the impact of counter-terrorism legislation and policies on equality, human rights and the rule of law.

9 EU institutions should regularly and proactively engage with civil society organisations on counter-terrorism and counter-radicalisation measures to understand their efficacy and impact on human rights, equality and the rule of law.

10 EU institutions should provide funding to support civil society organisation to monitor, document and assess the impact of counter-terrorism and counter-radicalisation measures on human rights, equality and the rule of law.

11 EU institutions should publicly condemn Member States' abuse of counter-terrorism and counter-radicalisation measures against civil society.

12 The EU should refrain from using vague and general labels such as Jihadism, Islamism, and political Islam. They should recognise that any analytical value of these terms is outweighed by their stigmatising impact. The term ISIS-inspired terrorism and Al-Qaeda-inspired terrorism should be used where appropriate.

13 Individuals and organisations that are the target of false denunciation should be recognised as victims so that they can have access to legal, financial and psychological support.

14 Member States must ensure there are accessible, confidential and independent complaint mechanisms for individuals disproportionately affected by security and counter-terrorism measures.

15 The EU should adopt the draft 'horizontal equality' directive to ensure more comprehensive protection against discrimination on the grounds of religion and belief.

16 The EU and Member States should collect equality data on the implementation of counter-terrorism and counter-radicalisation policies.

17 The EU and Member States should collect equality data on the implementation of counter-terrorism and counter-radicalisation policies.

NOTES

Part III: Conclusions and Recommendations

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