

Ensuring greater protection for fundamental rights in developing EU counter-terrorism policies

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While the global pandemic has reframed consideration of threats to safety and security, the attacks in [France](#) and [Austria](#) are a reminder of the continued dangers from terrorism in Europe. The EU has played a pivotal role in developing European counter-terrorism law and policy since 2001. It has adopted over 200 counter-terrorism related measures in the last two decades. However, the [EU Fundamental Rights Agency](#) has warned that its 'efforts to provide safety for its citizens', through 'stringent law enforcement - without thorough fundamental rights safeguards' risk undermining the freedoms citizens enjoy. Taking heed of such concerns, the 2017 [Directive Combatting Terrorism \(DCT\)](#) called for an evaluation of the Directive's impact on fundamental rights and the Rule of Law. In anticipation of the Commission's evaluation report, the European Network Against Racism (ENAR) undertook research to examine the experiences of counter-terrorism and counter-radicalisation measures by members of groups that are at heightened risk of facing discrimination and racism in five EU states: France, Germany, Hungary, Poland and Spain.

Starting in October 2018, researchers spent two years meeting, speaking and listening to over two hundred individuals. This included interviews with 96 experts that ranged from policymakers and practitioners to lawyers and leaders of civil society organisations. Through focus groups, researchers heard directly from 113 ordinary individuals from the minority groups that feel the most directly targeted by counter-terrorism measures.

Key findings were presented this week at an OSCE Office for Democratic Institutions and Human Rights (ODIHR) expert roundtable on human rights and counter-terrorism, and have been published by [ENAR](#). Here, we highlight some of the key findings and their implications for EU policymaking processes.

EU counter-terrorism policies

ENAR's analysis and research recognises that EU counter-terrorism measures, while playing a role in structuring and influencing national developments, fall into a policy landscape that is shaped by heterogeneous, competing national and international institutional actors. Furthermore, security policies, practices and discourses are moulded by local, social, political, economic and cultural contexts.

Nevertheless, EU laws and policies have contributed to embedding and sustaining important innovations in the response to terrorism. First, this has been achieved through the expansion of the scope of criminal law to 'pre-emptive offences'. This criminalises conduct that is remote, both temporally and causally, from the ultimate harm that it is designed to stop. In particular, the DCT required criminalisation of activities that support, provoke or encourage others to terrorism and actions, like training and travelling, that do not involve direct harm to others. In such cases, prosecutions frequently rely on the implied dangerousness of a

person (rather than their actions) to prove a terrorist intent.

Secondly, the DCT reinforces an emphasis on developing policies to prevent radicalisation to violence - it calls on states to support professionals with 'training and awareness raising measures aimed at enabling them to identify and address signs of radicalisation'. The problem here is that the evidence base for identifying signs of radicalisation is, at best, deeply contested. This is particularly problematic where the focus is on the ideas people hold. As [McCauley and Moskalenko](#) caution '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'. In Britain, the [Royal College of Psychiatry](#) warns that the 'epidemiological database needed to construct a valid risk instrument does not exist' and that 'methodologies that aim to forecast rare events, such as acts of terror, yield consistently poor results'. The indicators range from personal trauma, experiences of discrimination and the search for identity, to political and religious beliefs. Such broad and vague indicators widen the reach of counter-terrorism policies.

While the banality of many indicators means that they could apply to anyone, at their 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 they enabled discrimination. As Member 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.

Three key themes of increased racialised suspicion, discrimination and surveillance emerge from the research data.

Suspicion of Muslim identity and 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 policies do not target conservative religious dogma or practice, only 'extremist' or 'radical' beliefs. The problem is the inherent elasticity and ambiguity of the terminology.

This is not helped by comments from politicians. For example, France's interior minister suggested that '[rigorous religious practice](#)', particularly during Ramadan, should trigger investigation. He also named growing a beard, not kissing a person on the cheek, and regular and ostentatious practice of prayer as potential signs of radicalisation. In Spain, [a newspaper obtained a covert recording of a counter-radicalisation training](#) in which teachers were called to monitor Muslims for a range of ordinary religious practices including eating halal food or growing a long beard. Other apparent signs included not wearing make-up, not celebrating Christmas or St George's day, and removing piercings. EU support for measures on Islamic education, the training of imams and the governance of mosques in the name of security reinforces the association of Islam and mosques with terrorism. Furthermore, attempts by policymakers to draw a distinction between Islam and Islamism, and moderate and extremist Muslims, while perhaps well intentioned, reinforced the need for everyone to keep a watchful eye on all Muslims as potential extremists.

Discrimination, Harassment and Abuse

The second theme to emerge from the research interviews is the link between counter-terrorism and experiences of discrimination, harassment and abuse. European commitments to equality and non-discrimination ensure that explicit discrimination in laws and policies are rare. However, many Muslims interviewed for the research reported experiences of religious and racialised profiling by police and other security officials in the exercise of discretionary powers.

The research participants also drew a clear link between the everyday abuse they faced in the streets or in workplaces and Islamophobic political discourse and state security policies that presented Muslims as being at risk of radicalisation. The research

documents numerous examples of verbal and even physical abuse, in which the abuser made clear they saw Muslims as a security threat, as potential terrorists or extremists. The fear of abuse caused many to avoid actions or activities that revealed their Muslim identities. They changed their appearance and censored their use of Islamic and religious expressions.

Surveillance and suspicion

The third theme to emerge from the data is the experience and impact of state and social surveillance and suspicion in the name of counter-terrorism. Here, the greatest impact came from states adopting counter-radicalisation and counter-terrorism policies that call on everyone in society to be involved in looking out for signs of radicalisation and danger. The conscription of all citizens into this activity left participants feeling vulnerable and under continuous surveillance by the state, their neighbours and their colleagues. By calling on all citizens to report their suspicions, while providing no indication of what to look out for, the state authorised the population to fall back on their racialised imaginaries of the terrorist threat. The testimony of respondents showed Muslims having to be alert to their neighbours' potential misreading or misunderstanding of everyday activities, particularly any expression of religious identity that could be misread as a sign of extremism.

Policy implications

The report's conclusions, that counter-terrorism and counter-radicalisation policies supported and developed by the EU have infringed fundamental freedoms, should be a cause for deep concern. EU security and counter-terrorism policies have paid insufficient attention to protecting human rights and upholding the Rule of Law. In the DCT, safeguards for human rights and Rule of Law are elaborated in non-binding recitals while the binding text is limited to restating the standard phrase that the Directive 'shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles'.

There has been insufficient human rights and Rule of Law impact analysis in the development of EU counter-terrorism measures. Since 2001, [less than three percent](#) of counter-terrorism legislative measures have been subject to public consultations and three-quarters of counter-terrorism measures were adopted without any impact assessment. The DCT was adopted without any ex ante impact assessment. The lack of attention to potential human rights harms is evidenced by [judgments](#) of the Court of Justice of the EU in which EU measures attempting to enable broad and enhanced data collection and data sharing were ruled to violate individual rights.

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. In this context, the review of the human rights impact explicitly mandated in the 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.

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 for 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. 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, and the broad definition of terrorism and the vague concept of violent extremism have allowed States to label and stigmatise critics in civil society as "terrorists", "violent extremists" or "threats to national security". Meaningful consultation and dialogue with civil society organisations, particularly those that have direct understanding and experience of the groups impacted by counter-terrorism and counter-radicalisation measures, would enable greater understanding of how these measures affect fundamental rights and freedoms.

Groups like ISIS seek to ferment polarisation, fuelling hostility and suspicion of Muslims. Provoking repressive state responses [is part of their strategy](#). It is therefore vital that EU counter-terrorism measures and policies do not contribute to increasing hostility, suspicion and discrimination of racialised minority groups.

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