GERMANY

Suspicion, discrimination and surveillance: the impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe
Counter-terrorism has been an area of increasing global and European policy coordination. The Council of the European Union issued its first Framework Decision on Combatting Terrorism in 2002 and first adopted a counter-terrorism strategy in 2005,\(^1\) as well as a Strategy for Radicalisation and Recruitment to Terrorism.\(^2\) The 2017 Framework Directive on Combatting Terrorism requires the European Commission to submit a report by September 2021 on the Directive’s impact “on fundamental rights and freedoms, including on non-discrimination, and the rule of law”.\(^3\)

ENAR has examined the experiences of counter-terrorism and counter-radicalisation measures by members of groups that are at heightened risk of facing discrimination and racism in France, Germany, Hungary, Poland and Spain. Our research contributes to understanding how state policies are experienced and their impact on the exercise of fundamental rights and freedoms.

This summary identifies the key themes and emerging findings from the research in Germany and draws on:

- In-depth qualitative interviews with seven policy makers and practitioners working in the field of counter-terrorism, counter-radicalisation and national security;
- In-depth qualitative interviews with nine key actors from civil society, including those working in community organisations most impacted by security measures, and human rights organisations;
- Three focus groups with 23 individuals from different Muslim communities in metropolitan areas of northern and western Germany; and
- A review of existing research literature and policy and civil society reports.

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1. Council of the European Union, 14469/4/05 REV 4
2. The European Union strategy for combating radicalisation and recruitment, EU Council document 14781/1/05, 24 November 2005
In Germany, a piecemeal approach to policy, together with the complex distribution of powers and responsibilities across different federal and state government departments, and non-state actors, makes it difficult to gain a comprehensive understanding of all the relevant laws, programmes and measures and their linkages and interactions. For example, counter-radicalisation work in education, social work, and prisons are under the competencies of individual federal states. States have, therefore, varied in their approach to preventing Islamist extremism. The lack of an overarching national directive results in different states working with different NGOs, conceding different powers to security agencies in education, and funding projects with different target groups and approaches.

To navigate our way through this complex matrix, the research for this project pursued an explorative approach to data sampling; focusing on collecting data around key nodal points. For example, data from focus group interviews in one area were contrasted with data from interviews from representatives of NGOs, federal state officials and activists from the same area. This technique provided insights into the progression of legal frameworks and programmes from the conceptualisation by policy makers to implementation on the ground and the perception of targeted persons.

While there is now growing recognition of the threat of far-right terrorism, over the past decade, German officials focused on ‘Islamist’ terrorism as the greatest national security threat. This research focuses on the experiences of Muslims in Germany, as they face a significant risk of discrimination and the violation of their rights in the implementation of counter-terrorism and counter-radicalisation laws and policies.

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1. Expansion of pre-crime

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, 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. A person identified as Gefährder has not been convicted of a crime. However, because of suspicion, they can face significant restrictions on their rights, including liberty and freedom of association. 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’.

Following the ISIS inspired terrorist attack that killed 12 people in Berlin in December 2016 and in light of attacks in other European states, laws were passed to extend administrative control measures at the federal and federal state level, which extended powers to curtail the rights of persons deemed to pose a threat to public security, so-called “Gefährder”. For those living in Germany, but without German citizenship, designation as Gefährder can be a basis for deportation. In 2017, 550 Muslims were identified as Gefährder. Human Rights experts interviewed for this report claim that certain groups, such as Chechens or Palestinians are criminalised as Islamists and labelled as Gefährder in order to facilitate deportations.

Preventive measures rest on interpreting current lawful behaviour as predictive of future unlawful action. A key concern is that discriminatory assumptions about individuals, based on stereotypes about the groups to which they are thought to belong or are associated with, inform decisions for imposing preventive measures that restrict an individual’s rights. Several interviewees argued that stereotypes of Islam and Muslims as dangerous and violent play a role in the assessment process.

Such concerns are reinforced by reported incidents of racial profiling which appear to be downplayed. For example, police justified the detention of ten Muslim men wearing traditional Islamic clothing for Eid prayers in Cologne on the basis that it was a necessary and logical reaction to “a situation which causes people to be frightened and which gave the impression of being potentially dangerous”.

2. The logic of Verfassungsschutz and ‘guilt by association’

From its inception, the Federal Republic of Germany adopted a robust approach against threats to the democratic political order. Since the 1950s, the federal office and state offices for the protection of the constitution (Verfassungsschutz) have played a key role in alerting the state to emerging threats. The Federal Interior Ministry, to which the Verfassungsschutz is subordinated, identifies Islamist terrorism as the most significant security threat currently facing Germany. The Verfassungsschutz identifies both violent and non-violent movements as Islamist and therefore sees them as posing a threat to the constitutional order. The lack of transparency in deciding who is or might be Islamist is criticised for contributing to the perception of all Muslims as potentially problematic. This is exacerbated by the fact that

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5 Landtag Brandenburg, Drucksache 6/6272.
6 ibid and Deutscher Bundestag, Drucksache 19/3701.
10 Interview, human rights expert; see also Eberhard Schultz, Feindbild Islam und institutioneller Rassismus: Menschenrechtsarbeit in Zeiten von Migration und Anti-Terrorismus; [Vsa Verlag, 2018] 210
12 Werner Schiffauer, ‘Sicherheitswissen und Deradikalisierung’ in Handlungsempfehlungen zur Auseinandersetzung mit islamistischem Extremismus und Islamfeindlichkeit (Friedrich-Ebert-Stiftung, 2015) 217-245.
the Verfassungsschutz’s identification process extends beyond problematic groups to encompass those who could become problematic in the future.

Furthermore, its view that Islamism stems from failed integration,13 significantly extends the boundaries of policy domains in which it wields influence.

Policy makers consider Verfassungsschutz officials as “expert(s) in the field of Islamism”14. Officials find it “hard to debate anything around Islam without the involvement of the Verfassungsschutz”15. They extend their influence by sharing “knowledge and information with civil society actors”16. While the Verfassungsschutz has a clear and constitutionally mandated role to provide intelligence and analysis on potential threats to the German constitutional order and to scrutinise ‘borderline’ lawful groups, our research finds that the acceptance by state and civil society actors of their analysis as a scientific study of Muslims in Germany is problematic. Critics are concerned that their analysis, which is produced for a particular security function and is not open to public scrutiny or challenge, is too readily and uncritically accepted by those working outside the security context. For example, the mere information that an individual linked to an organisation is under scrutiny of the Verfassungsschutz, can have adverse consequences for those involved.

A common and recurring theme emerging from respondents is the extent to which the Verfassungsschutz perpetuates a logic in which the presumption of innocence no longer applies to Muslims active in civil society. Instead, they face ‘guilt by association’. This is a particular risk for Muslim organisations that work with a diverse range of actors and associations who in turn have members who have (or had) an affiliation or link to organisations, communities or persons accused of being Islamist. In one example, the Verfassungsschutz criticised the Zentralrat der Muslime in Deutschland (ZMD) for the alleged links of some of their members to organisations linked to the Muslim Brotherhood, which is regarded as an Islamist movement by the Verfassungsschutz. The mere association of the ZMD with the Muslim Brotherhood led a state integration office to terminate a joint project aimed at training imams to counter Islamist propaganda.

Another respondent testified to the profound adverse impact they experienced from being identified as an Islamist organisation by the Verfassungsschutz, a label that was later reversed following legal challenge. During the period they were labelled as an Islamist organisation, they were ostracised. Public authorities and other civil society organisations were reluctant to cooperate with them, and members of their congregation were dismissed from their employment, had applications for citizenship rejected, or extensions to residence permits declined.

In a third case, the evidence against an organisation centred on their work with a mosque community that was scrutinised by the Verfassungsschutz. The interviewees felt that it was unfair to hold this against them, as there was no way they could have known at the time that the organisation they collaborated with was under security observation. Although successful in the end, they nevertheless found it difficult to challenge the identification of their organisation as Islamist as the evidence against them was opaque and their designation was based on the Verfassungsschutz’s ‘expert opinion’.

The Verfassungsschutz’s technique of insinuating ‘guilt by association’ is adopted by anti-Muslim activists and media against vocal and active Muslim civil society organisations in an attempt to close the civic space to Muslims.

3. The securitisation of Muslim religious behaviours

German counter-radicalisation policies target ‘Muslim youth’ as a group that is at risk of radicalisation by Islamists. With religion and age as the only common factors in this categorisation, this approach stigmatises young Muslims and reinforces the “connection between Islam and violence”17. Suggesting that all Muslim youth are at potential risk of radicalisation reinforces the stereotype of Muslims as dangerous and suspect, particularly when they make their religious identity visible. Interviewees suggested that this reflects a lack of confidence among state actors in understanding religiosity among young people with a migration background.

14 Interview, security practitioner.
15 Ibid
16 Ibid
17 Interview, security practitioner.
The focus on ideology as an indicator of Islamist radicalisation leads to conservative or orthodox Muslim religious practices and behaviours becoming a source of suspicion and surveillance:

“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 it was really radical or whether she just wanted to live out a pious behaviour she had heard of. […]”

According to one practitioner, even experienced teachers escalate situations when religious behaviour such as praying is involved, mainly by reporting to the [Verfassungsschutz] in order to be “on the safe side before anything serious might happen”. 18

The logic of state suspicion seeps into everyday encounters. Focus group respondents reported the closure of prayer rooms in a number of German universities where the authorities feared that such spaces were used to radicalise people. Those who tried to pray in quiet discrete corners of the university were interrogated by security guards. Such everyday micro-level interactions contribute to a social context in which manifestations of religious practice by Muslims are seen as violations of ‘neutrality’ and as a threat to German secular values 19. With several states having introduced so-called neutrality laws which prohibit public display of religious belief, it has been observed that Muslim religious practices in particular are seen as “strange” in a seemingly neutral liberal-secular matrix 20. Muslim respondents who claimed their right to freedom of religion in seeking to re-establish prayer spaces at their university, felt they were viewed with suspicion by the authorities.

Actions such as a university administration closing prayer spaces, are not part of state-controlled prevention programmes but rather reflect an intention to make all actors of society responsible for prevention. Consequently, such dispersed individual initiatives to prevent Islamist extremism are rarely documented or monitored and there are no instruments or guidelines to ensure non-discriminatory standards or evaluation.

4. Everyday discrimination

The perception of Muslims as dangerous and a threat to public safety were a dominant feature of respondents’ experiences of discrimination.

“My trousers were torn once. So, I wore a cúbbe. That’s a piece of clothing that the imam wears. I wore it over my trousers so that the torn spot wouldn’t be seen and then I went out on the street. When a grandma passed by on her bike, she asked me ‘Where do you want to blow something up?’”

“There are certain groups out on the street that want to make other people feel bad. For example, people look at women who wear a headscarf and cover themselves suspiciously because they think they carry a bomb under their clothing.”

“When I am outside with my friends and someone sees us with full beards, maybe with a prayer cap, maybe with a prayer chain, then they would think: ‘Terrorism. They are terrorists’.”

“It feels to me as if all Muslims are under general suspicion. Somehow we have to put into our subconsciousness that we are regarded as potential terrorists.”

Respondents drew a link between their everyday encounters of discrimination on the one hand, and security policies and debates that emphasise the threat posed by Islamism and target ‘Muslim youth’ as a group at risk of radicalisation on the other.

5. State, media and social surveillance

State surveillance measures have intensified in recent years. For example, 2017 §100b StPO (”Strafprozesсходrung”, code of criminal procedure) allows an ‘online search’ when a person is suspected of having committed or planning a serious violent offence. This allows the authorities to access a person’s IT system without their knowledge and the collection of data from this system 21.

18 Interview, counter-radicalisation practitioner.
19 For example, in the state of Berlin, wearing a headscarf is prohibited for teachers by the neutrality law.
Respondents linked the potential of being under surveillance to particular ‘suspect’ profiles and characteristics.

“Personally, I don’t know for certain how I am monitored. It is clear to me though that we are all monitored, all people in society. But then there are the particularly monitored and I know that as a Muslim convert who goes to a mosque I might be of particular interest. I feel that I am perceived as standing somewhere between an ordinary citizen and a jihadi – as someone who could under certain circumstances be on his way to becoming a terrorist. And yes, somehow it is therefore blatant to me that my telephone calls, data exchanges on the Internet, lending books in the library, could all be monitored. Of course it is not a nice feeling to know this. In general, it is not nice for any of our citizens to know that everything is tapped, the landline and so on. […] It all has been massively pushed forward in the name of terror prevention and I think that is a problem for anyone, convert or no convert. We are all affected, more or less.”

Those who feel they are perceived as Islamists or attend mosques linked to Islamist movements or organisations feel they live under constant surveillance. Such surveillance comes not only from the state, but also from the media and in their everyday interactions with fellow citizens.

Demands by politicians22 and representatives of civil society23 for Muslims to condemn terrorism (in a way that others are not asked) or to show their loyalty and commitment to democratic values are subtle forms of social surveillance. The need for Muslims to place themselves on the right side of the moderate/extremist binary as a precondition to entering the public space erodes their sense of equal citizenship.


Our interviews also reveal the ways in which Muslims have internalised the need for surveillance of other Muslims and even see the surveillance of themselves as an opportunity to police and reinforce the moderate/extremist binary by showing their ‘good’ citizenship. The harms of such broad social surveillance are not captured by ideas of individual rights to privacy, as they are experienced at community rather than individual level: the internalisation of the need for surveillance leads to an erosion of solidarity towards particular groups, such as young Arab men, and suspicion that any individual could be an informant hinders collective action.

6. Lack of critical perspectives

Key actors from civil society and some policy makers expressed concerns about the general lack of critical perspectives in Germany’s public debates on counter-terrorism and counter-radicalisation.

This may reflect a (self)-perception that Germany, compared to other European states, is conscious of the need for state policies to respect human rights. Such a perception may be leading to the chilling of criticism of preventive measures. In one human rights organisation, staff members expressed concerns that activities highlighting discriminatory effects of existing counter-terrorism and counter-radicalisation measures could be seen as too sympathetic towards Islamist extremists.

Another interviewee who formerly worked for a civil society organisation engaged in the prevention of Islamist extremism observed an overall highly self-referential and sealed-off culture of debating amongst both practitioners and researchers in the field of preventing Islamist extremism, with often-repeated anecdotal and non-verifiable knowledge confirming stigmatising conceptions of radicalisation and Islamist extremism.

24 Interview, community civil society organisation.
RECOMMENDATIONS

1. The Verfassungsschutz plays a critical role in the German constitutional order. Its views and judgment carry weight and authority. Given the imbalance of power between the state and individuals, it should not be left to individuals and organisations to challenge the conclusions and assessments of the Verfassungsschutz. There needs to be clear and independent oversight of the actions and judgements of the Verfassungsschutz. In addition, the expert opinions, advice and knowledge produced by the Verfassungsschutz should be developed in consultation with Muslim civil society organisations.

2. Remove the emphasis on funding ‘anti-Islamist’ prevention projects: Federal and federal state programmes for the prevention of Islamist extremism have large budgets. Removing this emphasis would help to counteract the general fear and stigmatisation of Muslims as a problem group. In addition, funding to organisations engaged in prevention work should include a binding agreement on anti-discrimination.

3. Exchange on discriminatory impacts and possible counteractions: Representatives from civil society organisations, representatives of targeted groups, policy makers and academics need more opportunities to exchange and discuss impacts of counter-terrorism and counter-radicalisation policies. Ideally, practitioners should consequently formulate binding anti-discrimination standards and highlight good practices.

4. Establish a comprehensive action plan to fight Islamophobia, racism and discrimination. Understand Islamophobia as a form of structural racism.