EU Policy on Counterterrorism: Evidences and Alternatives to Penal Populism

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Abstract

The ongoing rise of populism across the European Union (EU) has relaunched a lively debate on its implications for democracy and the rule of law. Conversely, there has been little discussion about penal populism; namely, a legislative strategy meant to restore the weakened authority of the State and capable of affecting crime perception and principles of criminalisation. Yet, to what extent does penal populism affect the EU policy-making process? To answer this question, we see penal populism in the context of the EU policy on counterterrorism. Our ultimate objective is to prove whether such EU policy shows evidences of penal populism, to later understand how to balance and moderate them. Against this background, Section 1 names penal populism. Section 2 provides an overview of the EU counterterrorism policy. Sections 3 and 4 examine the intersection between the securitisation and prevention approaches to counterterrorism and penal populism. Ultimately, conclusions are provided.

Introduction

In 2018, ten Member States of the European Union (hereafter: EU or the Union) included populist parties in their governments; whilst, between 2014 and 2018, the voter support to these parties increased by 33% across the Union[1], as also shown by the establishment of the 'Identity and Democracy' populist bloc in the European Parliament after the 2019 election. Generally, such electoral salience is considered to stem from: 1) the European sovereign debt crisis that, along with its austerity policies and the following economic stagnation, has increased socio-economic inequalities across the Union[2]; 2) the perceived fear to lose national identity, arising from both the process of European integration and the ongoing migration flows, and so resulting in the drawing of new boundaries meant to build the national community and to exclude those who do not belong to it[3]; 3) the crisis of governability, owing to state policies of neoliberalism and reflected in the perceived governments' incapability to represent the interest of their citizens[4].

Because of this rise and since the concept of populism has been used to describe ideologies and movements that vary according to time and places[5], a growing body of literature

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[1] TIMBRO (ed.) 'Timbro Authoritarian Populism Index' (February 2019) <https://populismindex.com/report/#post-87-_3q7m5qakg2re> accessed 30.03.2020
[2] Karl Aiginger, 'Populism: Root Causes, Power Grabbing and Counter Strategy', [2020] 55 *Intereconomics* 38, 38-39
[3] Nira Yuval-Davis, 'Autochthonic Populism, Everyday Bordering and the Construction of the Migrant', in Gregor Fitzi et al. (eds.), *Populism and the Crisis of Democracy*, vol. 3 (Routledge, 2019) 74
[4] Ibid. 71
[5] Cristóbal Rovira Kaltwasser, et al., 'Populism: An Overview of the Concept and State of the Art', in Cristóbal Rovira Kaltwasser, et al. (eds.), *The Oxford Handbook of Populism* (Oxford University Press, 2017) 22-25

has recently relaunched the debate on its definition. Simultaneously, extensive research has examined the implications of populism for democracy and the rule of law, while addressing the populist politicisation of specific issues, such as migration. Instead, far too little attention has been paid to the specific notion of penal populism explained in the next section.

Consequently, our first objective is to enrich the understanding of penal populism; later, we position it within a broad analysis of the EU policy on counterterrorism, as being at the top of its security agenda and given its relevance to criminal law. Far from arguing that such policy is populistic, our aim is to prove whether and where it shows some evidences of penal populism, to subsequently understand how to moderate them.

After naming penal populism and its implications on criminal law (Section 1), we will provide a brief overview of the EU counterterrorism policy (Section 2). Later, we will examine the securitisation and prevention approaches to counterterrorism and see them in the context of penal populism (Sections 3 and 4). Finally, conclusions are provided.

1. Understanding Penal Populism

Originally, penal populism was understood as the adoption of criminal policies for electoral advantages[6]. Going beyond such political opportunism, Pratt developed this concept, looking at it as a new feature of criminal justice that have stemmed from socio-economic and political changes since the 1970s onwards. Briefly, the author identifies the declining authority of the State to demand obedience, the increasing distrust in politics and democracy and the rise of global insecurities as key factors in the growth of penal populism. In this context, Pratt shows how, the 2008 financial crisis (and, more generally, the neo-liberal governance of the last decades) aggravated already existing inequalities and left law-abiding citizens resentful and abandoned in their own powerlessness, whilst governments were apparently blind to their concerns[7]. Likewise, such socio-economic precariousness and the following citizens' resentment against the State occurred in conjunction with the perceived rise of new risks, such as migration flows, terrorism and pandemics[8]. Additionally, the internet has strongly affected the growth of penal populism because it contributed to the definition of parameters of public debate and knowledge about crime and punishment, thereby opening a gap between the State and the public. Simultaneously, it continued identifying crime as the most obvious and immediate source of danger, albeit the onset of its fall, and disproportionately favoured crime news able to attract large audiences, while exaggerating and dramatising them[9].

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[6] Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing', in Chris Clarkson and Rod Morgan (eds.), *From Policing of Sentencing Reform* (Oxford University Press, 1995) 17-49

[7] John Pratt and Michelle Miao, 'Penal Populism: The End of Reason' [2017] *The Chinese University of Hong Kong Faculty of Law Research Paper no. 2017-02*, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903819> accessed 23.04.2020

[8] Ibid. 11

[9] John Pratt, *Penal Populism* (Routledge, 2007) 66-93

Owing to such root causes, penal populism results in a legislative strategy meant to restore the said weakened authority of the State[10], thereby proving that the political establishment can still fulfil the citizens' interests. To this end, since the provision of security to citizens has been traditionally considered a fundamental competence of the State and crimes constitute the most immediate symbol of insecurity, penal populism conflates the above-mentioned insecurities with criminality[11]. By doing so, it shifts the citizen's focus from the disillusion towards the State to potential sources of risk arising from social outsiders and criminals. Yet, such strategy involves equating criminality with the fear of otherness that, to date, is usually embodied by migrants and terrorists as menacing Western values, security and identity[12]. All in all, in the last decades, the perceived fear of the otherness has been periodically fuelled by an unprecedented media coverage of migration flows and terrorist outrages, proving the dangers that these outsiders may be capable of and the helplessness of potential victims[13]. In this context, crime and punishment is considered the most immediate means to address such fear, with the aim of protecting the community and restoring order and social cohesion; precisely, penal populism requires further control of potential threats and enhanced punishment. Nevertheless, considering that fears and threats do not cause any harm, the use of criminal law corresponds to a mere practice of risk management, where criminal law identifies potential dangers in advance and takes preventive measures to minimise or curb them. Although criminalisation used for preventive purposes is far from being a novelty, such use has been adversely considered by scholars and courts concerned about the change in purposes of this branch of law, and the potential breach of human rights[14]. This was evident in the British case of *A v. Secretary of State for the Home Department* (2004), where the House of Lords recognised the application of indefinite detention exclusively for foreign nationals (who were suspected of the crime of terrorism) in breach of the right to liberty and the prohibition of discrimination.

To sum up, penal populism diverts attention away from the root causes of the disillusionment amongst citizens and seizes it on the fear of the otherness, as well as on the need to control and punish any risk arising from them. By doing so, however, penal populism questions our criminal system and its underpinning principles. Since the aftermath of World War II, fundamental rights have been a defensive weapon for the individual against criminal

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[10] John Pratt and Michelle Miao, 'The End of Penal Populism: The Rise of Populist Politics' [2019] 41, 2 *Archives of Criminology in Poland* 29

[11] Pratt (n. 9) 64

[12] Generally speaking, the term 'otherness' (also sometimes known as 'othering') derives from a discursive process, where a group (the 'Us') constructs another one (the 'Other') out of a difference, which turns into a reason for potential discrimination. In other words, the 'Us' establishes a fixed criterion that classifies the humankind into two groups: one that symbolises the norm and whose identity is worthy and another that is identified through its differences and shortcomings, thereby being subject to discrimination. Inasmuch as the 'otherness' process derives from any asymmetry of power (where the 'Us' is in a position to impose the value of its identity), it can be applied to several research areas, such as gender (*e.g.* de Beauvoir) and post-colonial studies (*e.g.* Camus, Fanon). It is nonetheless the case that we will refer to the field of EU counterterrorism; consequently, the term 'otherness' will conflate with the 'terrorist' and will be constituted in opposition to the EU identity. Section 3 will elaborate more on this topic.

[13] Pratt and Miao, 'Penal Populism: The End of Reason' (n. 7) 16

[14] See, for instance, Andrew Ashworth, et al., *Prevention and the Limits of Criminal Law* (Oxford University Press, 2013)

law[15]. This is exemplified by the principles of legality (no one can be held guilty of any act or omission which did not constitute a crime at the time when it was committed), non-retroactivity (an individual cannot be charged with a crime, if it does not constitute an offence when committed), proportionality (punishment should be commensurate with the severity of the crime and the offender's degree of responsibility), harm (the acts of individuals should be only limited to prevent harm to others) and *ultima ratio* (criminalisation should be used whenever alternative means have been ineffective), as well as the prohibition of inhuman and degrading treatment or punishment and the presumption of innocence, that currently comprise the common heritage of the Union. Conversely, because the first aim of penal populism is to safeguard the community against any perceived threat at any cost, the fundamental rights of (even potential or presumed) offenders are impaired. Therefore, penal populism increasingly expands the boundaries of criminalisation, by embracing the framework of preventive justice, exacerbating the punitiveness and stressing the perceived culpability of a certain category of individuals.

Before concluding, we briefly highlight how some root causes of penal populism, as identified by Pratt, are also observed across the Union. As already said in the introduction, since 2008 the Union has experienced the sovereign debt crisis, which, *inter alia*, has resulted in the adoption of domestic austerity measures and in the rise of socio-economic inequalities amongst EU citizens. Simultaneously, the public opinion towards the EU has deteriorated, revealing a shared sense of distrust of EU institutions[16]. Besides, in the last decades, EU citizens have experienced new global insecurities (such as the 2015 migration crisis, frequent terrorist attacks and the Covid-19 pandemic). Ultimately, both the crisis and the events leading to further insecurities have generally drawn high media attention[17].

Although such root causes may reinforce the policy plan of populist parties, penal populism can also be identified as a strategy inherent to any political establishment, as being meant to re-establish the declining authority of the State. Consequently, in Section 3, we outline some evidences of penal populism in the EU policy on counterterrorism, irrespective of the electoral salience of populism mentioned in the introduction.

2. The EU Policy on Counterterrorism: An Overview

Before examining how penal populism and counterterrorism might intertwine, an overview of the existing EU policy on counterterrorism is required. In addition, it is important

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[15] Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' [2011] 9 *Journal of International Criminal Justice* 577, 578

[16] EU Commission (ed.), 'The Geography of EU Discontent' [2018] Working Paper 12/2018 <https://ec.europa.eu/regional_policy/en/information/publications/working-papers/2018/the-geography-of-eu-discontent> accessed: 27.04.2020

[17] See, for instance, Robert G. Picard (ed.), *The Euro Crisis in the Media. Journalistic Coverage of Economic Crisis and European Institutions* (I. B. Tauris, 2015); Maria Georgiou and Rafal Zaborowski, 'Media Coverage of the Refugee Crisis: A Cross-European perspective' [2017] Council of Europe Report DG1(2017)03; Mohammed Elshimi, 'Thinking about the Symbiotic Relationship between Media Coverage and Terrorism', [2018] *Policy Brief, OCP Policy Center*

to emphasise that there is anything close to a uniform or a common interpretation of what counts as 'terrorism' in academia[18]. By contrast, as it will emerge from the following Sections, the EU has sought to provide a comprehensive definition in order to facilitate cooperation amongst Member States and to ensure an area of freedom, security and justice within its borders. Generally speaking, the Union has thus popolarised the term 'terrorism' to describe a set of crimes that violates all those fundamental values and principles on which the Union and its Member States are founded.

EU Member States started experiencing terrorist attacks within their territories in the 1970s. These outbreaks were mainly committed by ethno-nationalist, separatist and left-wing terrorist groups, such as the *Brigate Rosse* in Italy; to a lesser extent, acts of terrorism were perpetrated by foreign groups, like the Black September. It was under the impact of these attacks that some Member States started cooperating in the field of counterterrorism. In 1975, for instance, the Terrorism, Radicalism, Extremism and International Violence Group (hereafter: TREVI Group) was established in order to exchange information and provide mutual assistance on terrorism and relating international crimes[19]. Created outside of the competence of the European Community (hereafter: EC), the TREVI Group lasted until 1992 when it was replaced by the Third Pillar of the Maastricht Treaty, also involving police cooperation for the purposes of preventing and combating terrorism (Article K.1). Nevertheless, all these forms of cooperation were intergovernmental, inasmuch as Member States were differently affected and shared concerns about their national sovereignty[20]. All in all, since the emergence of the modern State in the XVII century, the provision of security to citizens has been part of the essential justification and legitimacy of the State[21]; therefore, any transfer of this competence to the EC (and later to the EU) framework has always remained sensitive.

Such intergovernmental approach was abandoned following 9/11. The terrorist hijack into the Twin Towers of New York showed that the nature of terrorism was changing and threatened the *open, democratic, tolerant and multicultural* societies prevalent in Western countries[22]. Consequently, the Union began to develop a new policy, by fostering intelligence efforts against terrorism and enhancing judicial cooperation[23]. Such objectives were later included in the Conclusions and Action Plan of the Extraordinary European Council Meeting

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[18] See, for instance: Timothy Shanahan, 'The definition of "terrorism"', in Richard Jackson (ed.), *The Routledge Handbook of Critical Terrorism Studies* (Routledge, 2016) 103-113

[19] In addition to the TREVI Group, the Member States of the European Community (hereafter: EC) created and joined several arrangements with no official affiliation to the EC and with the aim of simplifying cooperation amongst national anti-terrorism units: this has been seen in the case of the Club of Berne (1971), the Vienna Group (1978) and the MEGATONNE (1987) – In Oldrich Bures, 'Informal Counterterrorism Arrangements in Europe: Beauty by Variety or Duplicity by Abundance?' [2012] 47,4 *Cooperation and Conflict* 495

[20] Christian Kaunert and Sarah Léonard, 'The Collective Securisation of Terrorism in the European Union' [2019] 42, 2, *Western European Politics*, 261, 263-264

[21] Jörg Monar, 'EU Internal Security Governance: The Case of Counter-Terrorsim' [2014] 23, 2 *European Security* 195

[22] Kaunert and Léonard (n. 20) 268-269

[23] Joint Declaration by the Heads of the State and Government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy [2001] DOC/01/12

on 21 September 2001, where the need to adopt a *coordinated and interdisciplinary approach embracing all [its] policies*[24] was emphasised. In this vein, the Union's agenda setting began covering a wide range of fields, issues and aims, such as increasing the counter-terrorist measures of Europol and Eurojust, fostering data exchange amongst Member States and reinforcing border control[25]. In other words, because terrorism had a cross-border dimension able to exploit divergences in national laws (thereby avoiding prosecution and benefiting from financial and logistical resources), harmonisation of counterterrorism policies across the Union had to be progressively promoted.

Against this background, the Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (FDEAW)[26] was adopted in 2002 and tried to facilitate the surrender of individuals accused or convicted of serious crimes across the Union. Shaped as a mutual recognition instrument and meant to coordinate collaboration amongst judicial authorities at the national level, the FDEAW was still intergovernmental. Instead, the Framework Decision on Combating Terrorism (FDCT)[27], which was likewise enacted in 2002, provided a first approximation of national legislations, as it laid down common definitions of what may constitute a terrorist offence; more specifically, Article 1 of the FDCT lists several acts (such as kidnapping, seizure of aircraft and release of dangerous substances) which*, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: 1) seriously intimidating a population, 2) unduly compelling a Government or international organisation to perform or abstain from performing any act, or 3) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation*. Nevertheless, the aftermath of such policy-making process showed its crisis-driven nature, inasmuch as it slowed down once the memories of the attacks started fading; similarly, all the policy developments were not immediately implemented at the domestic level, as it became clear after the Madrid bombings in 2004[28].

In response to the terrorist attack committed in the Spanish capital, the Council of the European Union (hereafter: the Council) issued a Declaration on Combating Terrorism, demanding the implementation of existing measures and the adoption of new ones[29]. To this end, a new Plan of Action on Combating Terrorism developed seven strategic objectives based on international cooperation; combating terrorism financing; the detection, investigation, prosecution, and prevention of terrorist attacks; transport security and border control; adequate response capacity after a terrorist attack; preventing support for and recruitment into terrorism;

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[24] Conclusions and action plan of the extraordinary European Council meeting on 21 September 2001 [2001] SN140/01
[25] European Council, Anti-terrorism roadmap [2001] SN4019/01
[26] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1
[27] Council Framework Decision on combating terrorism 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164
[28] Javier Argomaniz, 'Post-9/11 Institutionalisation of European Union Counter-Terrorism: Emergence, Acceleration and Inertia' [2009] 18, 2 *European Security* 151, 157
[29] Council of the European Union, Declaration on combating terrorism [2004] 7906/04

and prioritising external action[30]. Such policy, however, was ultimately redesigned one year after, following the London bombings.

In 2005, the European Union Counter-Terrorism Strategy was launched and never updated[31]. Built on four pillars, this document tried preventing individuals from turning to terrorism, protecting the Union against attacks and their impacts, pursuing terrorist activities through police and judicial cooperation, and responding to the consequences of terrorist acts. Additionally, great emphasis was put on the need to combat terrorism and foster an area of freedom, security and justice within the Union, while also respecting fundamental rights. In such context, we identify two policy tendencies in addressing terrorism, namely securitisation and prevention. In support of securitisation, the 2008 amendment to the FDCT extended the existing criminalisation of terrorism to preparatory acts, as well as to incitement[32]; similarly, in 2004 and 2005, the Council stressed the need to address terrorist financing[33]. On the other hand, the prevention pillar was transposed in the 2004 Strategy for Combating Radicalisation and Recruitment to Terrorism, where non-security actors were likewise included in the fight against terrorism, so as to address its root causes.

In 2015 and 2016, further terrorist attacks affected the EU. Paris, Brussels and Berlin are well-known illustrations of this new wave of violence and, in its response, the Commission recognised the need to *go beyond the concept of cooperating to protect national internal security to the idea of protecting the internal security of the Union as a whole[34]*; simultaneously, it stressed the enhanced nexus between internal and external security. Precisely, the latter link stemmed from the phenomena of foreign fighters and lone-wolfs; namely, whilst the former involves the travel of EU citizens to join conflicts triggered by terrorist groups, like the so-called Islamic State; the latter proves how the internet facilitates terrorist organisations to radicalise people and inspire them to launch attacks in their own countries. Accordingly, from 2015 onwards any policy development in the field of counterterrorism has mainly paved the way for further securitisation, as linked to border controls, information sharing and broadened criminalisation. This is evident in the case of Directive (EU) no. 2016/681 on the use of passenger name record data for the prevention, detection investigation and prosecution of terrorist offences and serious crimes[35], and of Directive (EU) no. 2017/541 on combating terrorism (hereafter: the Terrorist Directive or the

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[30] Council of the European Union, EU Plan of action on combating terrorism [2004] 10586/04

[31] Council of the European Union, The European Union counter-terrorism strategy [2005] 14469/4/05 Rev.4

[32] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21

[33] Council of the European Union, The fight against terrorist financing [2004], 16089/04; Council of the European Union, Revised strategy on terrorist financing [2008] 11778/1/08 Rev.1

[34] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council Delivering on the European agenda on security to fight against terrorism and pave way towards an effective and genuine security union [2016] COM(2016)230 final

[35] Directive (EU) no. 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record data for the prevention, detection investigation and prosecution of terrorist offences and serious crimes [2016] OJ L119/132

Directive)[36]. On such premises, the next Sections examine the securitisation and prevention approaches to the EU counterterrorism policy in light of penal populism.

3. Securitisation and its Evidences of Penal Populism

Because the root causes of penal populism identified in Section 1 are also observed across the Union and terrorism is one of the global insecurities currently perceived, the EU counterterrorism policy could be seen as meant to prove that the EU political establishment is still willing and able to represent the interests of its citizens. On such premises, the securitisation approach arguably accommodates general evidences and consequences of penal populism, like the crisis-driven nature of the policy-making process (as meant to restore the weakened authority of the political establishment), the salience of criminalisation (as able to provide an immediate response) and the construction of a threat built on the fear of the otherness.

Starting from the crisis-driven nature of counterterrorism, EU measures have been the policy results of waves of terrorism. Precisely, a study commissioned by the European Parliament emphasises how the adoption of strategies and legislative instruments steeply increased in 2001, 2005-2006, 2008 and 2015-2016, therefore coinciding with terrorist outbreaks and alternating with periods of legislative inertia[37]. Such irregular law-making process also depends from the pressure that media coverage has put on politicians, thereby conveying a sense of urgency in responding to the security threat affecting the Union. Indeed, by involving sensation-seeking content, terrorist attacks have always drawn an unprecedented media attention capable of disproportionately framing terrorism to its real menace and impact[38].

Simultaneously, the crisis-driven nature of the EU counterterrorism policy has often led to the lack of procedural guarantees. For instance, although counterterrorism involves a sensitive balancing between security and individual liberties, between 2001 and 2017 only one quarter of the legally binding measures and none of the Council's initiatives were subjected to impact assessments able to evaluate the legitimacy, potential effects and foreseen effectiveness of the drafted legislations; similarly, public consultations and *ex post* evaluations failed[39].

Additionally, as being crisis-driven, counterterrorism measures are often considered 'a paper tiger[40]'. In fact, once the sense of urgency, the media attention and the political pressure

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[36] 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

[37] At first sight, 2008 seems an exception, but may be explained by several revisions of earlier measures and strategies - Wim Wensink, et al., 'The European Union's Policies on Counter-Terrorism. Relevance, Coherence and Effectiveness' [2017] 30-31 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf> accessed: 23.04.2020

[38] Elshimi (n. 17) 4

[39] Wensink, et al., (n. 37) 17

[40] Oldrich Bures, 'EU Counterterrorism Policy: A Paper Tiger?' [2006] 18, 1 *Terrorism and Political Violence* 57

have faded away, the domestic decision-making process for the implementation of EU counterterrorism measures have been shown to delay. The reports from the Commission on the FDCT and the FDEAW are good illustrations of the complex and divergent transposition of EU provisions into national frameworks[41]. Likewise, in November 2018, two months after the deadline for the transposition of the Terrorist Directive, the Commission launched infringement procedures against sixteen out of twenty-eight Member States[42].

The crisis-driven nature, the wide media coverage and the policy salience underpinning counterterrorism also favoured repressive measures and strong-arm approaches, so as to provide an immediate and sensational policy response. In this context, although the EU counterterrorism strategy includes policy pillars based on terrorism prevention and response, more emphasis has been put in security concerns and terrorism has been first identified as a crime, thereby overshadowing its causes. Accordingly, criminal law has played a pivotal role in any policy-making process, with the consequence of increasingly pushing its boundaries. For example, whilst the FDEAW has influenced the approximation of criminal procedures law in the fight against terrorist[43], the criminalisation of terrorism provided in the FDCT and in the Terrorist Directive has expanded, by targeting preparatory acts and public provocation.

Ultimately, the EU counterterrorism policy addresses a terrorist threat, which first menaces the area of internal freedom, security and justice established within the Union in light of Article 3.2 of the Treaty on the European Union (hereafter: TEU). Consequently, since security is a fundamental principle of state politics and the terrorist threat affects EU citizens regardless of their geographical location, its countermeasures fall within the Union's responsibility, as shared competence with Member States on the basis of Article 4 of the Treaty on the Functioning of the European Union (hereafter: TFEU). Moreover, the terrorist threat has been constructed as 'societal'; namely, because the terrorist attacks that have drawn media attention (such as 9/11, the Madrid and London bombings in 2004 and 2005 and the Charlie Hebdo and Bataclan shootings in 2015) and have resulted in immediate political responses were all related to jihadism, the relating threat has been socially understood with regard to the Union's identity and in opposition to the terrorist 'other'[44]. In this vein, the Council Declaration on the EU response to the 2005 London bombings considers that *the attacks are an affront to universal values on which the democratic and open institutions and societies governed by the rule of law within which people of all faiths and background can live, work and prosper together[45].*

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[41] European Commission, Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism [2004] COM(2004)409 final; European Commission, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2006] COM(2006)8 final

[42] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council on the twentieth progress report towards an effective and genuine security union [2019] COM(2019)552 final, 11

[43] Argomaniz, (n. 28) 158

[44] Christopher Baker-Beall, 'The Evolution of the European Union's 'Fight Against Terrorism' Discourse: Constructing the Terrorist 'Other' [2014] 49, 2 *Cooperation and Conflict* 212, 221

[45] Council of the European Union, Declaration condemning the terrorist attacks on London [2005] C/05/187

All the described features pertaining to securitisation show general signs of penal populism. To briefly sum up, because terrorist attacks have recently occurred with sufficient frequency, ubiquity and lethality to constitute a perceived and shared threat across the Union, the EU institutions have mostly conflated such public anxiety with criminality, have equated terrorism with the jihadist threat (as socially constructed in opposition to the Union's values) and have preferably adopted repressive measures, as being the most immediate policy response to protect the community. Yet, the adoption of such policy partially occurred out of line with reality, given that, in the last years, the EUROPOL annual reports have proved the fact that ethno-nationalist and separatist terrorist attacks constantly outnumber other types of terrorism; whereas the highest proportion of the overall arrests and proceedings are related to jihadism and concern attack planning at an early stage[46]. In addition, although there has been a gradual decline in the number of terrorist attacks completed, failed and foiled in the last years, the number of arrests for suspicion of terrorist-related offences remains nearly steady[47]. Consequently, the ultimate aim to re-establish the authority of the political establishment is apparently realised.

Such preliminary remarks do not seek to conclude that securitisation and penal populism overlap; yet, they aim at showing some similarities. Therefore, building on such premises, the following Section goes even further, taking the Terrorist Directive as a case study and highlighting further evidences of penal populism. The choice of this directive derives from its crisis-driven nature, its impact and relevance in the field of criminal law, and its recent enactment.

3.2. The Terrorist Directive

In response to the 2015 terrorist attacks targeting Paris, the Commission proposed a directive aimed at recasting the FDCT and including new measures meant to broaden the scope of counterterrorism, as well as to foster the ongoing development of cooperation at the international level.

Based on Article 83(1) TFEU, the Directive was adopted following the ordinary legislative procedure. Nevertheless, given the urgent need to increase the Union's security, the proposal was exceptionally introduced without an impact assessment[48]. Furthermore, the explanatory memorandum on the subsidiarity principle mostly relied on the opportunity to incorporate international standards in the field of counterterrorism, so as to avoid legal jeopardisation across Member States[49]. Similarly, the argument supporting the proportionality principle was circular, inasmuch as it justified the legislative intervention to what was necessary and proportionate to implement international obligations and to adapt the existing

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[46] EUROPOL, 'European Union Terrorism Situation and Trend Report' [2020] 11, 12, 25, 28 < https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020 > accessed: 08.09.2020

[47] Ibid.

[48] European Commission, 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 [2015] COM(2015)625 final, 12

[49] Ibid. 9-10

legal framework to the 'new' terrorist threat, including the phenomena of foreign fighters and lone wolfs[50]. Considering this weakening of procedural guarantees, the EU legislator apparently regarded this proposal as an emergency measure. Yet, to what extent does this crisis-driven nature challenge the effective safeguarding of essential principles of criminalisation and fundamental rights?

Briefly, the Directive provides the harmonisation of the definition of crimes and sanctions in the area of the terrorist offences linked to terrorist groups and activities, while attributing liability to both natural and legal persons; additionally, it lays down measures of protection and assistance to victims, as well as rules on jurisdiction and prosecution. Without dwelling on details, the Directive recognises terrorist offences, as well as offences related to terrorist activities, as the combination of the objective element (corresponding to a list of serious criminal conducts) and the subjective one (namely, the specific intent to commit such crimes for terrorist purposes)[51]. Whilst the understanding of what the legislator meant with the concept of 'terrorist purpose' remains vague; the criminalised conducts range over attacks upon the physical integrity of a person (Article 3.1.b), the manufacture, possession, acquisition, transport, supply or use of explosives or weapons […], as well as research into, and development of, chemical, biological, radiological or nuclear weapons (Article 3.1.f), the public provocation to commit a terrorist offence (Article 5), the providing and receiving training for terrorist (Articles 7-8), the travelling for the purpose of terrorism (Article 9) and the financing of terrorism (Article 10). Ultimately, Article 14 provides for the criminalisation of aiding and abetting, as well as inciting and attempting nearly all the offences included in the Directive; whilst Article 15 increases penalties for natural persons.

Two frequent criticisms in the literature on the Directive concern its lack of legal certainty and its impairment of freedom of expression. For example, the broad definition of terrorism provided in Article 3 leaves a wide discretion to Member States that may result in divergences across the Union, as well as in a lack of clarity for suspects regarding the applicable law[52]. As regards potential violations of freedom of expression, an abuse of criminal law has already been reported in several Member States[53]. For our purposes, though, the key problem is the preventive nature underpinning the legal text, as particularly reflected in Article 13 providing that *it shall not be necessary that a terrorist offence be actually committed.* In other words, the Directive criminalises conducts relating to terrorism prior to the causation of any tangible and direct harm, and this on the basis of the societal threat examined in the previous Section.

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[50] Ibid. 10-11

[51] Ibid. 15-16

[52] See the classification of the Munich rampage case (2016) in: Mirja Gutheil, et al., 'EU Member States' Policies and Laws on Persons Suspected of Terrorism-Related Crimes' [2017] 19 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf> accessed: 23.04.2020

[53] Commissioner for Human Rights of the Council of Europe, 'Misuse of Anti-Terrorist Legislation Threatens Freedom of Expression' [2018] < https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression> accessed 23.04.2020

On the one hand, the Directive mainly frames offences of abstract endangerment; namely, it criminalises conducts without requiring proof of actual or potential harm in the specific situation, due to the unacceptable level of danger arising from the conduct. In this vein, counterterrorist measures are considered an apparatus of risk management whose objectives are risk prevention, security and fear reduction, thereby abandoning the traditional purposes of criminal law, like prosecution, punishment and criminal justice[54]. Additionally, by separating formal consummation of the offence and harm-causation, there is a risk of miscalculation by the legislator and a shift towards empirical questions on how to prevent crimes[55]. Such approach, though, could severely undermine fundamental rights of the individual, as well as disregard the principles of *ultima ratio* and minimal intervention of criminalisation. In this context, a study commissioned by the European Parliament highlights the increasing trend to impose restrictive measures on individual who are suspected to commit a terrorism-related crime, although the receding point of criminalisation makes increasingly unclear whether an offence has been committed[56]. In theory, in order to restrict such State's coercive and intrusive powers, the right to liberty and security should be balanced in the law-making process; nevertheless, we already said that the EU legislator did not performed an impact assessment and poorly justified its proposal with regard to the proportionality principle.

Given the lack of any tangible harm, another issue that needs to be examined is the legislative emphasis that has been put on the perceived culpability inherent to the individual, rather than on her externally visible conduct. Specifically, counterterrorist measures mostly rely on the terrorist aim corresponding to the intent on the part of the perpetrator, with the consequence of reflecting a legal theory under which terrorists are considered enemies[57]. Whilst law-enforcement authorities identify the enemies through surveillance and profiling, the legislator socially constructs it, by drawing the line between the citizens and the outsiders who do not abide by the values and rules of the community. In this vein, as already said in the previous Section, the terrorist has been understood against the Union's identity, as being founded *on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,* […] and *on a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail* (Article 2, TEU). Such legislative approach, however, defines 'the other' in light of the political situation and is thereby subject to potential abuse. Simultaneously, by being laden with the distinction and fear of the otherness, any piece of law risks being discriminatory and limits the respect of fundamental rights, as well as of the principle of the general applicability of the law, to the sole

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[54] Ali Emrah Bozbayindir, 'The Advent of Preventive Criminal Law: An Erosion of the Traditional Criminal Law?' [2018] 29 *Criminal Law Forum* 25, 37

[55] Petter Asp, 'Preventionism and Criminalisation of Nonconsmmate Offences', in Andrew Ashworth, et al. Tomlin (eds.) (n. 14) 33

[56] Gutheil, et al. (n. 52) 48

[57] The *Feindstrafrecht* (namely the legal theory of criminal law) was developed by Günter Jacobs in 1985. For further reading: Dominique Linhardt and Cédric Moreau de Bellaing, 'La Doctrine du Droit Pénal de l'Ennemi et l'Idée de l'Antiterrorisme. Genèse et Circulation d'une Enterprise de Dogmatique Juridique' [2017] 3 *Droit et Société* 615, 621-625

members of the community. By doing so, the purpose of punishment also changes, namely from re-educating the perpetrator to neutralising the threat she embodies[58].

Against this background, the more extensive use of criminalisation, as well as the uptrend in penal severity and the crisis-driven law-making relating to the Directive show further and more detailed signs of penal populism in the realm of securitisation. More specifically, in 2017, the piece of law was enacted following shocking terrorist attacks, with the aim of showing responsiveness to this new threat to the Union's security and irrespective of reality. One year before, indeed, the Eurobarometer showed that 40% of respondents in the EU considered the risk of terrorist attacks high[59], although the frequency of terrorist attacks had significantly decreased, in comparison with the end of the XX century[60]. Yet, as an immediate and sensational response of such perceived threat, the Directive broadened the boundaries of criminal law, by targeting conducts relating to terrorism prior to the causation of any harm and emphasising the culpability of (even suspected) offenders, as socially constructed in opposition to the Union's identity. By doing so, counterterrorism has been shown to disregard rules of procedures in the law-making process, to undermine essential principles of criminalisation, and to impair fundamental rights of (even presumed) perpetrators. Ultimately, additional evidences of penal populism have been found in the complex transposition into the Member States' legal framework (as seen in the previous Section) and by its perceived ineffectiveness. Whilst the Directive had effects in terms of arrests and convictions[61], assessments on effectiveness remain occasional and limited to the legal theory behind preventive justice[62].

3.3. Final Remarks on Securitisation and Penal Populism

The arguments provided in the previous Sections do not seek to demonstrate that securitisation entirely overlaps with penal populism; rather, they intend to outline the recurrence of further evidences relating to this legislative strategy, as well as the negative consequences they bring about. To sum up, the root causes of penal populism concerning the declining authority of the State and the increasing distrust in its politics and democracy are also observed across the Union, where terrorism is also one of the global insecurities currently perceived. We therefore recognised securitisation in counterterrorism as being deployed to divert attention from the contemporary disillusionment and so to demonstrate that the EU political establishment is still willing and able to represent the interest of its citizens, by providing them with an area of security within its borders at any cost. In this context, the EU legislator has associated terrorism with criminality and the fear of otherness; by doing so, any law-making process has disregarded the driving factors behind terrorist outbreaks and has socially constructed the jihadist threat in opposition to the Union's values. Furthermore, the securitization approach has adopted the most immediate and sensationalistic response to

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[58] Valérie Nardi, 'La Punibilità dell'Istigazione nel Contrasto al Terrorismo Internazionale' [2017] 1 *Diritto Penale Contemporaneo*, 115, 118

[59] 'Europeans in 2016: Perceptions and Expectations, the Fight against Terrorism and Radicalisation' [2016] <https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/europeans-in-2016-perceptions-and-expectations-fight-against-terrorism-and-radi> accessed: 23.04.2020

[60] Gutheil, et al. (n. 52) 27

[61] EUROPOL, (n. 46) 12, 25

[62] Wensink, et al., (n. 37) 73

successive waves of terrorist attacks and their relating unprecedented media coverage, with the consequence of lacking procedural guarantees and favouring a tough-on-crime posture. As a result, such response mostly has resulted in the expansion of the boundaries of criminal law, while introducing terrorism-related offences prior to the commission of any direct and tangible harm and emphasising the objective culpability of the socially constructed offender (namely, the jihadist terrorist). Ultimately, besides exacerbating the punitiveness and overstepping the threshold of criminalisation based on harm causation, securitisation does not respect the fundamental principle of *ultima ratio* and minimal intervention of criminal law. Yet, is there any other means alternative to such scenario? Considering that the EU counterterrorism strategy is composed of several policy fields, our next focus is on (de-)radicalisation, as being the cornerstone of the prevention pillar mentioned in Section 2.

Before proceeding, however, it is important to clarify the overlapping meanings of 'prevention', so as not to attribute it to an array of contradictory measures and approaches adopted by the Union in the field of counterterrorism. On the one hand, we identified the preventive nature of the Terrorist Directive as an apparatus of risk prevention prior to any harm causation; on the other hand, the prevention pillar relating to the EU Counter-Terrorism Strategy include all the public policies and private initiatives, other than the enforcement of criminal law, designed to avoid (or, at least, to mitigate) the risks of harm caused by terrorist acts defined as criminal offences by the Union. Yet, although the purpose of both understandings seems to equate (namely, the attempt at minimising the menace of terrorist outbreaks from occurring, given their potential harmful effects on individuals and society), the approaches and their consequences totally differ. In fact, whereas preventive criminal law deals with offending prior to its occurrence and shows a strong-arm approach severely affecting fundamental rights and principles of criminalisation, the prevention pillar centres on early intervention by addressing the conditions that give rise to terrorism in a non-discriminatory and participative way. Yet, the different implications arising from the adoption of the latter policy option will be examined in the following Section.

4. Prevention and its Clash with Penal Populism

The Madrid and London bombings of 2004 and 2005 were committed by EU citizens, thereby shedding light on the phenomenon of home-grown terrorism and demanding to manage terrorism inside the Union's borders. Accordingly, the following EU counterterrorism strategy included the prevention pillar[63] and, by adopting a long-term approach grounded on evidence-based assessments, the European legislator started integrating terrorism into narratives about social changes, so as to address the causes of terrorist recruitment.

Against this background, both policy makers and scholars have begun keeping radicalisation at the top of the counterterrorist agenda. In fact, although there is still no consensus on how to specifically comprehend this concept[64], terrorism has been generally

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[63] Council of the European Union, The European Union counter-terrorism strategy, (n. 31) 7

[64] See, for instance: Alex P. Schmid, 'Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review' [2013] International Centre for Counter-Terrorism Research Paper

considered a potential consequence of an individual or collective radicalisation process that results in the legitimation of the use of violence[65]. In this vein, in 2005, the European Commission (hereafter: the Commission) first defined radicalisation as the phenomenon of individuals embracing opinions, views and ideas which may lead to terrorism and adopted a cross-extremist perspective, including jihadism, nationalism, separatism, as well as left and right extremism[66]. Moreover, it acknowledged that root causes ranged from socio-economic conditions, over religious or political ideologies, to identification and cultural process[67]; it called for a context-specific approach and considered the evolving trends of the phenomenon, like the increased use of the internet for radicalisation purposes[68].

On such premises, since 2005 the prevention pillar has sought to promote good governance, democracy, education and economic prosperity across the Union; to address incitement and recruitment in key environments (such as prisons); to develop inter-cultural dialogues and non-emotive lexicon for discussing the issue; as well as to advance a communication strategy to better explain existing policies. Lastly, the prevention pillar has tried fostering and sharing the dissemination of knowledge and experiences, so as to further understand radicalisation and develop effective policy responses.

In such context, the Commission has established a High-Level Commission Expert Group on Radicalisation, several EU Cooperation Mechanisms (including the Steering Board on Union Actions on Radicalisation) and countless networks for collaboration and exchange (such as the Radicalisation Awareness Network). Simultaneously, it has also financed projects and initiatives aimed at comprehending and curbing radicalisation, by identifying key influencing factors, extremist ideologies and recruitment mechanisms, as well as by developing good practices and concrete guidance. The rationale behind the overall framework falls within the supporting role played by the Union in preventing radicalisation and terrorism. After all, such policy domain mainly lays within the Member States' competences[69], given that local actors are better placed to identify and prevent such context-specific phenomena[70].

These preliminary remarks already show how the prevention pillar clashes with penal populism. Specifically, it abandons the crisis-driven nature and, instead, provides a long-term

<https://www.icct.nl/download/file/ICCT-Schmid-Radicalisation-De-Radicalisation-Counter-Radicalisation-March-2013.pdf > accessed: 23.04.2020
[65] European Crime Prevention Centre, 'Monitor Radicalisation and Violent Extremism' [2019] 1, 7 https://eucpn.org/document/monitor-radicalisation-and-violent-extremism accessed: 23.04.2020
[66] European Commission, Communication from the Commission to the European Parliament and the Council concerning terrorist recruitment: addressing factors contributing to violent radicalisation [2005] 313 final
[67] Edwin Bakker, 'EU Counter-Radicalisation Policies: A Comprehensive and Consistent Approach?' [2015] 20, 2 *Intelligence and National Security* 281, 298-302
[68] European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions supporting the prevention of radicalisation leading to violent extremism [2016] COM(2016)379 final
[69] Rik Coolsaet, 'Radicalisation: The Origins and Limits of a Contested Concept', in Nadia Fadil, et al. (eds), *Radicalisation in Belgium and The Netherlands. Critical Perspectives on Violence and Security* (I.B. Tauris, 2019) 33
[70] European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions supporting the prevention of radicalisation leading to violent extremism (n. 68)

policy perspective. It does not spread a sense of fear of the otherness, by comparing the terrorist threat to jihadism, defining it as in breach of the Union's values and addressing it with repressive measures; conversely, it adopts a cross-extremist perspective, as well as an intercultural and society-based dialogue, while also promoting the understanding and evaluation of the phenomenon. On such premises, the following Subsection takes the EXIT Europe project as a case study, to practically prove the effectiveness and advantages of prevention, in comparison to the thorny issues arising from securitisation and its evidences of penal populism.

4.1 The EXIT Europe Project

Because the prevention pillar aims at identifying and tackling the factors that contribute to radicalisation, one of its main approaches is exit intervention; namely, a process of deradicalisation and disengagement from radical ideology and violent behaviour. At first sight, we might wonder whether it is ethically and legally legitimate to change an individual's ideology, belief and conduct within a democratic and pluralistic society, given the lack of any harm; yet, exit interventions are characterised by the participants' voluntariness and seek to guide some opinions and acts into legal modes of operation within democracy[71].

In this vein, the EU funded EXIT Europe project was launched in January 2019, so as to develop local exit programmes in France, Italy and Slovakia, building on the experiences of the Austrian exit pilot and the German 'Live Democracy!' intervention[72]. As explained below, the development of the programmes is civil society-based, multi-agency and embedded in local community networks. Furthermore, it covers a cross-extremism perspective inasmuch as Slovakia is affected by far-right and paramilitary groups, whilst Western European partners mostly face the risk of jihadist radicalisation.

Building on the design of a methodology on distancing and exit mentoring, as well as on the provision of training to exit practitioners[73], the project's main focus is on the performance of exit intervention in local settings. To this end, the operational partners (namely, those who will perform exit interventions) had to first establish a local community network and a team of local practitioners. On the one hand, by encompassing actors from law enforcement agencies, as well as from civil society organisations and the public sector involved in secondary prevention (e.g. healthcare, youth and probation services), the local community network ensures referrals of potential participants, provides opportunities of after-care and re-integration after the intervention, and fosters the social acceptability of the programme. On the other hand, while creating the team of local practitioners, diversity both in background, experience and other personal features is favoured, so that communication with the participant is more dynamic and impactful. On such premises, operational partners have started carrying out exit intervention where, following successful entrance into the program, a diverse team of two practitioners is supposed to work with one participant up to 18 months; whilst further meetings are potentially held with family members and social context individuals. More

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[71] Preben Bertelsen, 'Danish Preventive Measures and De-Radicalisation Strategies: The Aarhus Model' [2015] 1, 1 *Panorama. Insights into Asian and European Affairs*, 241

[72] The project is funded by the European Union's Internal Security Fund-Police under Grant Agreement no. 823675. For further information: <https://www.bmi.gv.at/210_english/start.aspx> accessed: 23.04.2020

[73] Tobias Meilicke and Harald Weilnböck, EXIT Europe Deliverable 2.1 'EXIT Europe Training Manual. Exit Methodology, Training and Coaching of Exit Practitioners' [2019]

specifically, each exit intervention is built on the voluntary engagement of the individual, as well as on a relationship of trust and confidentiality with the practitioners. Additionally, by being similar to a therapeutic process, the intervention focuses on personally lived-through experiences (e.g. biography, family, gender identity, peer relations, power struggles, recruitment, engagement) and avoids any ideological-argumentative discussion.

During their implementation, local exit programmes are subject to three levels of evaluation. Briefly, each operational partner appoints a local, formative evaluator in charge of providing consultancy and assessment of the exit work; simultaneously, further evaluations are carried out by the EXIT Europe scientific coordinator and the external experts from the Österreichisches Institut für international Politik[74]. Ultimately, another key feature of EXIT Europe rests on the legal framework developed by the Vrije Universiteit Brussel (hereafter: VUB). Because an open exchange on the individual's experiences is a precondition for successful intervention, the aim is to balance the fundamental rights of participants with the need of Consortium partners to disseminate their successes and mistakes. Therefore, VUB has independently identified and assessed relevant legal, ethical and social concerns, which are likely to be touched upon during the project, and later provided recommendations so as to avoid or minimise possible negative consequences[75].

Although the EXIT Europe project will terminate in March 2021, we can already draw some conclusions on its effectiveness and advantages, in comparison with securitisation and penal populism. First, exit programmes are based on the participant's voluntariness, involve a quasi-therapeutic process based on personal experiences and aim at an ideological and behavioural change; accordingly, it apparently pursues that re-educative function that, in the context of penal populism, the penalty has lost. Second, exit programmes are established following a multi-agency approach and within a civil-society network; besides, they may involve family members and social context individuals. The objective is to provide broader prevention, offer after-care and possible options of re-integration and employment, as well as foster social cohesion and raise awareness amongst society. Exit programmes therefore show long-term effectiveness beyond the short-one enshrined in targeted criminalisation. Third, rather than comparing radicalisation with jihadism, exit interventions have adopted a cross-extremist and context-specific perspective, where the process of radicalisation might range over diverse ideologies and stem from various causes, thereby avoiding stigmatisation towards socially constructed target groups. Ultimately, whilst assessing the effectiveness of securitisation is complicated due to the involvement of classified and confidential information, exit programmes are increasingly evaluated in an adequate and transparent way. Indeed, policy makers are interested in the effectiveness of the exit programmes because they are accountable for their citizens' security and are often the ones commissioning and funding them; likewise, exit practitioners and researchers need to examine and share lessons learnt[76].

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[74] Harald Weilnböck, et al, EXIT Europe Deliverable 5.1 'Scientific Framework' [2019]
[75] Carlotta Rigotti, et al., EXIT Europe Deliverable 6.3 'Impact Assessment of EXIT Europe against the ARTES Requirements' [2020]; Carlotta Rigotti, et al., EXIT Europe Deliverable 6.1 'Data Protection and Legal Framework' [2019]
[76] Lieke Wouterse and Maarten van de Donk, RAN Ex-Post Paper 'Evaluating Disengagement, Deradicalisation and Resocialisation Effort' [2019] <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-

Conclusions

We first sought to examine the intersection between two shifty concepts, namely penal populism and counterterrorism. On the one hand, we developed the understudied concept of penal populism, as a legislative strategy meant to restore the weakened authority of the State and capable of affecting crime perception and fundamental principles of criminalisation. On the other hand, we provided an overview of the EU policy on counterterrorism, as being mainly founded on the securitisation and prevention approaches. Against this background, our ultimate aim was to prove whether and where such legal framework shows some evidences of penal populism; to later understand how to moderate them.

The results of our analysis have shown that the legal discourse on securitisation has a crisis-driven nature, socially constructs the terrorist threat in opposition to the Union's values, mostly enhances repressive measures and is positioned in the context of several crisis affecting the Union. More specifically, the Terrorist Directive has revealed further signs of penal populism, where its emergency nature, as well as its features arising from preventive justice and the 'criminal enemy law' doctrine, have increasingly broadened the boundaries of criminalisation and so impaired fundamental principles and rights. Yet, such instance of overcriminalisation clashes with reality, given that terrorist attacks have decreased in the last decades and, notwithstanding its higher rate of prosecution and arrest, jihadism does not represent the main threat. Instead, albeit not free from criticisms, the prevention pillar on counterterrorism has demonstrated to clash with penal populism, therefore offering an alternative means. Notably, by focusing on the case of the EXIT Europe project, we outlined several advantages in terms of long-term effectiveness, improved social cohesion and non-discrimination. To conclude, we claim for greater efforts to ensure the prevalence of prevention measures over the legislative strategy of penal populism.

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do/networks/radicalisation_awareness_network/about-ran/ran-exit/docs/ran_exit_policy_practice_evaluation_exit_programmes_spain_08112019_en.pdf> accessed: 23.04.2020