


The Mutation of European Anti-Terrorism Law (2015-2020): Balancing Security and Fundamental Rights in the Face of the Preventive Imperative

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Abstract:

This article examines the strategic transformation of European counter-terrorism policies between 2015 and 2020. It demonstrates that this reorientation was not merely political, but largely imposed by binding jurisprudential injunctions issued by the Court of Justice of the European Union and the European Court of Human Rights. In response, European States institutionalised a more comprehensive preventive framework, notably through national prevention strategies and mechanisms. However, the analysis highlights a displacement of the conflict of legitimacy towards the increasing normalisation of mixed administrative security measures (MICAS). The article argues that the resilience of the European legal order ultimately depends on its capacity to reconcile security imperatives with democratic legitimacy, by subjecting preventive instruments to robust judicial oversight and by grounding risk management policies in ethical safeguards and scientifically validated evidence.

Keywords: Anti-Terrorism Law, Fundamental Rights, Jurisprudential Injunction, Prevention, Proportionality.

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1. INTRODUCTION

The period spanning 2015 to 2020 constitutes a turning point in the history of European public policy, marked by a profound strategic reconfiguration triggered by an unprecedented wave of terrorist attacks and the emergence of the Foreign Terrorist Fighter phenomenon¹. Confronted with these cumulative threats, Member States rapidly became aware of the structural limits inherent in traditional counter-terrorism approaches, historically anchored in a predominantly repressive paradigm and the logic of exceptional criminal law². While such instruments demonstrated a certain degree of short-term operational effectiveness, particularly in terms of immediate reaction and logistical neutralisation, they proved incapable of addressing the deeper ideological, social, and psychological dynamics underlying radicalisation³.

More fundamentally, the shift towards a preventive paradigm did not result solely from a voluntary policy reassessment. It was largely imposed by a binding legal constraint stemming from the intervention of Europe's highest judicial authorities⁴. Through a series of landmark decisions, these courts invalidated some of the most intrusive counter-terrorism mechanisms -most notably generalised data retention and large-scale surveillance- on the grounds of their incompatibility with the European Union Charter of Fundamental Rights and the European Convention on Human Rights. This jurisprudential dynamic exposed a systemic crisis of legality, compelling States to reconsider both the normative foundations and the operational modalities of their security policies, and to institutionalise a more comprehensive approach integrating social, educational, and corrective dimensions.

The emerging model, centred on the prevention of violent extremism and early-stage intervention, is thus explicitly designed to restore the legitimacy of public action. At its core, this transition raises a question of a distinctly legal nature: how can the imperative of public security be articulated with the unconditional protection of fundamental rights, particularly when state intervention shifts from criminal sanction to administrative risk management?

It is against this backdrop of structural tension between a discredited repressive framework and the demands of supranational legality that the central research question of this study is formulated.

So, our research problem revolves around a significant line of inquiry and a concept that warrants further study. Specifically, one might say: How were European counter-terrorism policies legally constrained to evolve from a logic of criminal repression to an integrated preventive approach, and to what extent has this paradigm shift enabled the construction of a sustainable and legitimate balance between public security and the protection of human rights, particularly in light of supranational judicial intervention and the growing reliance on mixed legal instruments?

This analysis is grounded in several structural hypotheses. *First*, that the European turn towards prevention results from a jurisprudential injunction following the invalidation of core repressive instruments by the European Court of Human Rights and the Court of Justice of the European Union for violations of fundamental rights. *Second*, that the emerging legal framework is characterised by the proliferation of mixed instruments, which have displaced the locus of legitimacy disputes from the criminal courts to the administrative judiciary. *Finally*, that this evolution remains uneven across Member States, reflecting the persistent confrontation between diverse national security models and the normative requirements of the Rule of Law.

To address these issues, the study is structured in two main parts. *The first* part analyses the foundations and inherent limitations of the dominant repressive model prior to 2015, with particular emphasis on demonstrating its legal and jurisprudential failure. The second part examines the post-2015 transition towards preventive and inclusive strategies, critically assessing the transfer of legitimacy conflicts to administrative mechanisms and the ongoing challenges related to ethical and scientific validation.

If Europe was compelled to revise its counter-terrorism paradigm, it is because the very foundations of the repressive model collapsed under the combined weight of supranational jurisprudence and growing societal delegitimisation. Understanding this imperative for change requires, as a

preliminary step, a rigorous analysis of the pre-2015 legal framework one whose pursuit of immediate effectiveness ultimately entered into direct and irreconcilable conflict with the legality requirements enforced by the courts of Luxembourg and Strasbourg.

2. The Foundations and Limitations of the European Repressive Model: The Structuring Legal Failure (Pre-2015)

To understand the nature of this decaying structure, an analysis of the constituent instruments of anti-terrorism criminal law is necessary. This Part will detail the legal arsenal established by the Union, which prioritized the speed of criminal enforcement over classic procedural guarantees, examining the architecture of anti-terrorism criminal law and the cross-border instruments used to criminalize intent⁵.

2.1 The Legal Framework and the Imperative of Anticipatory Criminal Law

This framework operates on two interconnected levels: *first*, the legislative shift toward anticipating criminal intent in a cross-border context, and *second*, the judicial reaction that ultimately sanctioned these mass surveillance practices.

2.1.1 The Prevalence of Intent and the Cross-Border Arsenal

The fundamental instrument of this strategy was the 2002/475/JAI Framework Decision. This legislation allowed for targeting preparatory acts by criminalizing actions such as financing or participation in a terrorist group. National judicial statistics confirm this focus: in France, the most frequent charge is the « participation in a criminal association with a view to preparing a terrorist act », signaling an early network dismantling strategy⁶.

From an operational standpoint, the European Arrest Warrant epitomized this prioritization of efficiency. Although effective, by reducing national judicial controls, this tool raised the delicate question of balancing mutual trust among Member States with respect for individual rights, opening the door to jurisdictional challenges⁷.

2.1.2 Constitutional Invalidation: The Sanction of Mass Surveillance

The true deficiency of the repressive model manifested when its key tools faced rigorous examination by European courts. These judgments

demonstrated irrefutably that the security approach had failed to integrate the principles of necessity and proportionality required by the Rule of Law.

The invalidation of generalized data retention by the Court of Justice of the European Union marked a decisive turning point. In its *Tele2 Sverige* judgment of 21 December 2016⁸, the CJUE ruled that the obligation for generalized and indiscriminate retention of traffic and location data is incompatible with Articles 7 « right to respect for private life », 8 « data protection », and 52(1) « proportionality of limitations » of the EU Charter of Fundamental Rights⁹.

In a complementary vein, the European Court of Human Rights, in the *Roman Zakharov v. Russia* judgment of 2015¹⁰, had already highlighted control requirements regarding interceptions. The Court ruled that the secret surveillance system violated Article 8 of the Convention due to the lack of independent and external control¹¹ over the officials carrying out the surveillance.

While the initial repressive arsenal delivered certain tactical efficacy, the injunction from the supranational courts revealed its intrinsic fragilities. It is, however, equally crucial to analyze how the concrete application of this model, beyond its formal legality, generated counter-productive abuses that accelerated the crisis of legitimacy.

2.2 Counter-Productive Abuses: Illegitimacy and Community Stigmatization

The failure of the repressive model is not limited to its censure by the judge; it extends to its direct societal consequences, where the focus on symptoms alone created a crisis of legitimacy. It is therefore fundamental to analyze the security approach's inability to address ideology, a failing that paradoxically turned the state apparatus into a factor of radicalization and involuntary recruitment.

2.2.1 Incapacity to Address Ideology: The Repressive Apparatus as a Factor of Radicalization

It is essential to understand how the repressive model failed to address the ideological and social nature of extremism. One of the sharpest criticisms

leveled against the repressive model is its fundamental ineffectiveness in deconstructing extremist narratives¹².

By focusing on the «hardened criminal» profile, the security apparatus neglected the network dynamics and identity quests of vulnerable individuals¹³.

This approach created a dramatic vicious circle: systematic repression of targeted communities, combined with the perception of disproportionate control, reinforced the sense of injustice and exclusion. International bodies, such as the UN Security Council, recalled that the failure of States to meet their obligations regarding human rights and the Rule of Law « is one of the factors contributing to increased radicalization». The State, by derogating from its foundational principles in the name of security, involuntarily fuels extremist propaganda by validating the narrative of an oppressive and discriminating State¹⁴.

2.2.2 The Risk of Erosion of Liberties through Scope Expansion

In Addition to the social impact, the broadening of the definition of terrorism and the increasing reliance on the notion of « apology » created a chilling effect on freedom of expression.

Of even greater concern, the Ligue des droits de l'Homme raised major concerns about restrictions on liberty enacted under the state of emergency regime, then transposed into ordinary law¹⁵. Restrictions on movement, justified solely by the prevention of terrorist acts, raise serious questions regarding the right to private, family, and professional life guaranteed by constitutional and conventional norms «Articles 5 and 8 of the European Convention on Human Rights»¹⁶. By targeting at-risk profiles rather than proven criminal acts, these measures erode the foundation of the Rule of Law by creating a presumption of dangerousness without judgment. The French National Consultative Commission on Human Rights also warned about the restriction of civic space¹⁷.

The exhaustion of the repressive model, sanctioned by the judiciary and discredited by its perverse effects, rendered the transition to prevention inevitable. Part II must therefore begin by analyzing the legal mechanisms

through which Europe formally integrated fundamental rights into the new PVE doctrine, marking the entry into the era of institutionalization.

3. The Institutionalization of Prevention and the Shifting Locus of Legitimacy (2015–2020)

The formalization of the new security doctrine required a concrete translation into legal texts and institutional structures. This section will therefore examine how the post-2015 period saw Europe « memorize » the jurisprudential injunction by formalizing PVE and formally integrating fundamental rights guarantees into its renewed legislative arsenal.

3.1 The Legal Formalization of Prevention and the Inclusion of Fundamental Rights

This institutionalization is characterized by a dual dynamic: the formal incorporation of fundamental rights into legislative directives and the simultaneous struggle to ground preventive risk assessments in scientific evidence.

3.1.1 Directive 2017/541: The Formal Incorporation of Guarantees

The adoption of Directive (EU) 2017/541 on combating terrorism is significant. Although it expands the scope of criminalization, it formally integrates the obligation for Member States to ensure implementation that complies with human rights and Rule of Law standards¹⁸.

The implementing Guide for this Directive stresses the necessity of respecting the European Convention on Human Rights and the EU Charter of Fundamental Rights. Crucially, legal scholars warned that the breadth of the new offenses raises concerns regarding compatibility with the principle of legality *Nullum Crimen Sine Lege*, demanding a strict and proportionate interpretation by judges¹⁹. This formal integration of legal constraints into the renewed repressive arsenal is the most concrete proof of the lasting impact of the Court of Justice of the European Union and the European Convention on Human Rights judgments²⁰.

However, the formal legal structuring of guarantees is insufficient on its own. It is crucial to analyze how preventing violent extremism attempts to manage risk on the ground, particularly in closed settings, where the

scientific deficit of assessment tools undermines the legal legitimacy of coercive measures²¹.

3.1.2 The Challenge of Risk Assessment: The Scientific Deficit in Correctional Settings

The integration of Preventing Violent Extremism has manifested through the development of national models that engage social actors, particularly in correctional settings. Work targeting violent extremist offenders raises a fundamental legal and ethical question regarding the reliability of risk assessment²².

This area reveals a critical scientific deficit. Risk assessment for radicalized offenders relies largely on a structured professional judgment approach, due to insufficient data to establish statistically validated models. This methodological weakness is a major legal issue: the justification of coercive measures (isolation, placement) before a judge relies on an evaluation whose empirical basis is uncertain²³, reintroducing the tension between the subjective security imperative and the objective evidence required for restricting liberties²⁴.

While preventing violent extremism formalized the inclusion of rights into doctrine, operational reality shows that the repressive temptation persists, not in its classic criminal form, but through the perpetuation of administrative tools. If administrative law provided the Executive with the means to bypass the rigors of criminal law, it did not resolve the fundamental ethical conflict of preventive interference. This new challenge requires analyzing preventing violent extremism through the lens of the ethical dilemma that threatens to transform social work into a form of « behavioural » policing subject to security imperatives.

3.2 The Testing of the Balance: The Normalization of the Exception through Administrative Law

If administrative law provided the Executive with the tools to bypass the rigors of criminal law, it did not resolve the fundamental ethical conflict of preventive interference. This new challenge requires analyzing preventing violent extremism through the lens of the ethical dilemma that threatens to

transform social work into a form of « behavioural policing » subject to security imperatives.

3.2.1 PVE Facing the Ethical Dilemma: From Prevention to «Behavioural Policing»

PVE generated new ethical controversies, raising the risk of drifting towards «behavioural policing» through the instrumentalization of social actors. This subsection analyzes the ethical dilemmas generated by the broadening of the risk concept.

The adoption of preventing Violent Extremism generated new ethical controversies, raising the risk of drifting towards «behavioural policing»²⁵. By extending to the detection of non-criminal «precursor signs»²⁶, it instrumentalizes social and educational professionals as auxiliaries of security.

This dilemma creates a conflict of loyalty: the duty of care and confidentiality of the social worker clashes with the obligation to report. The institutionalization of ethical reflection risks, as analysts note, being reduced to an « ethical airbag »²⁷, serving more as institutional window dressing than encouraging deep questioning of security practices. The legitimacy of preventing violent extremism therefore requires a strict separation of roles²⁸, ensuring that social assistance is never perceived as a security trap, thereby breaking community trust²⁹.

3.2.2 The Shifting Locus of Legitimacy Conflict: From the Criminal Judge to the Administrative Judge

The most salient aspect of the post-2015 mutation is the perpetuation of administrative security measures inherited from the state of emergency, notably in France with the 2017 SILT Law³⁰. These mechanisms (Individual Administrative Control and Surveillance Measures) illustrate a trend where administrative police increasingly competes with criminal repression³¹.

This massive recourse to Individual Administrative Control and Surveillance Measures represents a shifting locus of legitimacy conflict. The Executive bypasses the substantial guarantees of the criminal process to base restrictions on liberty solely on risk and public order necessity³².

The administrative judge, responsible for control, applies the principle of proportionality. The European Convention on Human Rights, as the ultimate arbiter, has adjudicated on a case-by-case basis. In the *M.B. v. FRANCE* case³³, the Court validated a residence restriction measure taken after 2017, despite the seriousness of the interference, relying on the fact that the applicant's profile and behavior were « particularly worrying » and that the measure was « adapted » and « reviewed » adequately. This jurisprudence shows that the mixed model is tolerated, provided that proportionality control is rigorous and the restriction is justified by an individual necessity.

The Constitutional Council itself insisted on the respect for the principle of proportionality of penalties, reinforcing the idea that even administrative law must be framed with maximum vigilance to avoid the normalization of the exception that would empty fundamental freedoms of their substance³⁴.

In the final Analysis, the detailed analysis of the post-2015 mixed model reveals a fragile legal compromise constantly negotiated between executive efficacy and judicial vigilance. It is now time to synthesize the outcomes of this transition and outline strategic recommendations that will enable the Preventive Rule of Law to secure its long-term legitimacy.

4. CONCLUSION

The period from 2015 to 2020 can be understood as the crystallisation of a new paradigm in European counter-terrorism law. The demonstrable failure of predominantly repressive instruments, combined with the binding jurisprudential injunctions issued by supranational courts, compelled European States to progressively abandon logics of mass surveillance in favour of the institutionalisation of policies aimed at preventing violent extremism.

The results of this study confirm that this strategic reorientation was not merely a political option, but a legal necessity arising directly from the requirements of the European Union Charter of Fundamental Rights, as interpreted in particular by the *Tele2 Sverige* judgment. The normative response adopted by States took the form of an expanding body of mixed legal instruments, which relocated the conflict of legitimacy from the criminal courts to the administrative judiciary. While this transformation

facilitated the integration of the human and social dimension -through mechanisms such as national prevention strategies and the Radicalisation Awareness Network- it also generated new legal and ethical controversies. These relate notably to the instrumentalisation of social actors for security purposes and to the inherent fragility of administrative security measures when tested against the principle of proportionality. In this context, the equilibrium between security and rights can only be conceived as a dynamic compromise, continuously shaped by executive action and sustained by judicial oversight.

The capacity of democratic societies to withstand extremist threats will ultimately depend on the ability of the law to reconcile security objectives with legitimacy. Such reconciliation presupposes that preventive and administrative instruments satisfy a dual requirement of legitimacy. *First*, a legal legitimacy, ensured through strict guarantees of proportionality, effective judicial review, and the reviewability of Individual Administrative Control and Surveillance Measures. *Second*, an ethical and scientific legitimacy, which requires strengthening the empirical foundations of risk assessment methodologies and preserving the professional independence of social and educational practitioners involved in prevention policies.

In order to consolidate prevention strategies while safeguarding the Rule of Law, several priorities emerge. It is essential, *first*, to institutionalise systematic human rights impact assessments, both *ex ante* and *ex post*, for any legislation or programme related to the prevention of violent extremism. *Secondly*, a clearer separation of roles must be established through binding ethical frameworks, formally distinguishing the missions of educators and social workers from those of intelligence and security services, in order to preserve community trust, prevent forms of behavioural policing, and avoid the so-called « ethical airbag » effect. *Thirdly*, the use of administrative security measures, particularly Individual Administrative Control and Surveillance Measures, must be subject to stricter regulation, including expedited and systematic judicial review whenever fundamental freedoms are significantly restricted, supported by reinforced reasoning and

circumstantial evidence. *Finally*, greater investment is required in the scientific validation of risk management tools, through comparative research and harmonised data collection, to assess the reliability and effectiveness of assessment models in correctional and probationary contexts.

Moving further than these immediate recommendations, the future of European security law no longer lies in a binary opposition between repression and legality, but in the full integration of ethical safeguards and scientific evidence into the democratic governance of risk. This trajectory, dictated by European law and the protection of fundamental rights, points towards the emergence of a preventive Rule of Law whose legitimacy constitutes its most durable form of defence.

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