RADICALISATION: NO PREVENTION WITHOUT JURIDICALISATION

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"We cannot run the criminal justice system … unless there is real trust. Once that breaks down, it becomes a real problem. It is almost like making a pre-emptive strike: "If they're going to see me like this, this is how I'm going to be." That undermines trust and does not allow things to work as smoothly as they might."

(Baroness Young, Justice Committee, Oral evidence: Young adult offenders, HC 397, 12 January 2016)

I. CORRECTIONALISM, MONITORING AND DERADICALISATION

The debate surrounding the theme of so-called 'radicalisation' has accelerated a process of transformation of prevention systems that, in Europe and the United States, has already been under way at least since the 1970s. Today, through the prism of radicalisation, we begin to see the effects of this new 'liquid' security culture[i] started over 40 years ago, in a more marked form.

David Garland (2001) traces this transformation to the contrast between correctionalist welfare models addressing prevention of deviance via sociological or psychological methods, as opposed to emerging methods of surveillance focused on the rational responsibility and control of criminals. [ii] According to Garland and large sections of criminology, the result of this comparison is the prevalence throughout the West of 'theories of criminal opportunity' (Wortley and Mazerolle 2011) [iii], commonly known as Situational Crime Prevention (SCP), based on the triad of routine ideological activity theory (Cohen and Felson 1979), rational choice theory (Cornish and Clarke 1986) and crime pattern theory (Brantingham and Brantingham 1993). According to this analysis, the 'postmodern' doctrines of security – including their political nuances, and the strong moral condemnations – would not consider the socio-psychological factors at the root of the criminal phenomena, and therefore the possibility of rehabilitating criminals – once called 'correctionalism' – and would be aimed solely at guaranteeing order through control, to the benefit of the wealthy[iv].

The dichotomy of welfarism v. security (or correctionalism v. surveillance) also characterises the current debate on radicalisation, especially where we discuss, with a degree of banality, whether more psychosocial 'deradicalisation' interventions or firmer monitoring practices for the prevention of terrorism and violence are needed. In short, it is the eternal debate on the roots of crime: a debate that has always been sterile, especially in the case of radicalisation, where there is no crime, at least until now. It is therefore difficult to imagine a punishment, since there is neither a crime nor any conviction. In many European states today, there are exercises in the re-education, the 'deradicalisation', of the other, with a lot of good will but little memory of the historical precedents of past 're-education' efforts by regimes of every colour. Above all, they do not fully understand the legal, institutional, operational and political implications of prevention.

Rather than welfarism v. surveillance, the phenomenon of radicalisation clearly brings out another latent trend in the evolution of security systems today, the scope of which the criminological debate has not grasped: the

prevalence of administrative prevention measures with respect to the *juridicalisation* of processes, i.e. a latent conflict of elites between police and judicial structures within states and supranational organisations.

We address this in the following paragraphs, first from a historical perspective, and then from the technical-operational perspective.

II. THE HISTORICAL PERSPECTIVE

The debate on radicalisation is flawed due to a fundamental confusion about its relationship with terrorism - and therefore also between prevention and punishment in a broader sense of preventive and afflictive measures. This depends in large part on how the security systems have evolved over the last 4 decades of judicial and police cooperation. This is why we first consider it necessary to frame the phenomenon of the prevention of radicalisation in a historical dimension.

Seen from a historical/evolutionary perspective, and with an eye to operational practices, the alleged dichotomy between 'welfarists' and 'situationists' is only apparent, although authoritatively supported and politically appealing. On the one hand, Garland clearly grasps the stages of the evolution and transformation of prevention policies [v]. On the other, he does not recognise how some of the models and practices underlying the great judicial and security transformation processes are common to both schools of thought - both the welfarists and the SCP. More than a dichotomy, there seems to be a fundamental continuity on some great themes between the two great models of prevention of the twentieth century, such as predictive profiling strategies or public-private collaboration. What emerges least of all is the struggle between institutional elites and between states under the new world governance: essential elements in prevention policies and practices today.

II.1-The Common Passion for Profiling

In fact, if it is true that the framework of ideological and moral justification differs between welfarists and SCP theorists, common to all these models are prevention doctrines and practices based on the presumed early identification of future potential criminals from a multidisciplinary perspective - before they can commit a crime - in order to implement multi-agency protective actions.

For the '*welfarists*', the purpose of early identification of potential criminals has always been to correct the alleged socio-psychological 'roots' of deviance. These include great historical projects such as *The Early Childhood Nurse Home Visitation Program*, started by David Olds in the USA, *The Cambridge Somerville Youth Study*, commissioned in 1936 by Richard Cabot or Shaw's *Chicago Area Project* , to mention only a few examples.

The SCP has always criticised these socio-psychological approaches [vi], but from the 2000s onwards, suspect profiling also became the central theme of SCP prevention practices. In fact, since its dawn, Brantingham and Faust (1976) had advanced a tripartite security model (triage) [vii], which integrated the socio-psychological approaches of primary prevention with those aimed at secondary and tertiary prevention. This evolutionary path towards the identification of high-risk offenders through population screening continued with motivational analysis of crime by Richard Wortley (2001), which puts 'perpetrators' and their ideologies back at the centre of criminal analysis; ultimately, these peaked with the 'situationist' practices and policies on anti-terrorism. The exact date when SCP turns into SPT – i.e. Situational Prevention of Terrorism – is 2007, when Joseph Clare and Frank Morgan (2009) presented their theses at the Perth conference, thus anticipating the 'situationists' work on anti-terrorism presented at the 17th Annual Environmental Criminology and Crime Analysis of July 2008 by a year. From that moment on, the traditional situationist doctrines – not inclined to researching the 'roots of crime' – instead merged with Rose's (1992, 2001) methodologies of epidemiological analysis and, above all, with one of the major theorists of the conflict with radicalisation: Fathali M. Moghaddam (2005 [viii]). The integration of the 'Staircase of Terrorism' theory, based on the 'multi-casual approach', with the soft terror prevention techniques used by the situationists,

marked a crucial step, both for policies to combat radicalisation, and for the transition from SCP to SPT.

On a practical level, this long, complex process, which we have condensed here, will bring new psychological manipulation, profiling and technological surveillance practices to the heart of crime prevention analysis, giving reference to the guidelines of '*Policing Terrorism: An Executive's Guide* by Graeme R. Newman and Ronald V. Clarke in 2008, and all the other works of the situationist school, as well as the practices of combatting radicalisation via counter-insurgency and 'deradicalisation' tools.

These prevention theories will mainly have relevance for the areas of radicalisation seen as soft terror prevention techniques, leading to new policies, operating practices and analytical tools that will change the entire European judicial and security landscape[ix].

As in the film 'Minority Report', at the centre of all the new preventive security practices there are strategies aimed at identifying suspects, ideas and behaviours during the pre-crime phase – i.e. in the absence of any crime – and at implementing a myriad of preventive, personal and patrimonial actions, whether mandatory or voluntary, administrative or judicial, before any crime is committed. These include the conquest of the hearts and minds of the adversary – an established counterinsurgency technique.

The implementation of these pre-crime identification policies is based today on a series of risk management tools that are well funded by the Commission. The best known of these on a regional scale are the Revised Religious Fundamentalism Scale, VERA2R, ERG22+ and the "Violent Radicalisation – Recognition of and Responses to the Phenomenon by Professional Groups Concerned" project check-lists; various tools made available by the European agencies (such as the FRONTEX Common Risk Indicators Booklet, and Europol's FTF Risk Indicators Guide, also used by national police forces such as the Greek police); as well as other products on a local scale, such as the 'Arrel' system used by the regional prisons administration in Catalonia to supplement the 'Riscanvi' model.

III. THE CONTRADICTIONS IN CURRENT PREVENTION

The result of this historical process, which sees the separation of criminology from jurisprudence, is the current model of radicalisation prevention based on surveillance, the predictive profiling of suspects, a broad use of administrative practices and, finally, new models of multi-agency public-private partnerships, with a strong reduction in the role of the magistrature in favour of administrative prevention practices.

The rhizomatic development of the prevention model over a period of almost forty years has, however, created numerous contradictions of various kinds, which pose serious problems to the effectiveness of the model and, above all, the risks that this entails for its ability to balance re-socialisation policies with security, and the resulting implications for the democratic stability of the member countries.

III.1 Prevention and Deradicalisation Tools

In Europe, the different indication models mentioned above are based on the assumption that there is a predictive relationship between radicalisation and terrorism, somehow generated by the adoption of ideas and behaviours that are different from the majority.

For this reason, the various indication systems proposed by governmental and para-governmental entities focus on what is right or wrong in Islam or, more generally, in the ideologies of the prisoners. In the French and Italian systems [x], for example, even commentaries on political events, such as '*criticism of Western intervention in Muslim countries*', or '*criticism of the Italian government and institutions*', are becoming relevant.

APPARENCE/ COMPORTEMENT / VIE QUOTIDIENNE	Oui	Non	Observations/Motifs
Porte des signes ostensibles de sa confession			
Détient des objets religieux			
Adopte un régime alimentaire spécifique (sans porc, végétarien, ne prend pas le plateau)			
Refuse la télévision / tout objet avec représentation humaine en cellule			
S'intéresse particulièrement à l'actualité			
Adopte ou tente d'adopter une attitude de domination vis-à-vis des autres détenus			
S'entoure de personnes détenues identifiées comme radicalisées			
Se montre influençable par les autres détenus			
Adopte une attitude de repli sur soi			
Refuse d'avoir affaire au personnel féminin			
A subitement modifié son comportement en détention			
Organise sa cellule d'affectation de manière rigoureuse et très entretenue			

APPARENCE/ COMPORTEMENT / VIE QUOTIDIENNE	Oui	Non	Observations/Motifs
Porte des signes ostensibles de sa confession			
Détient des objets religieux			
Adopte un régime alimentaire spécifique (sans porc, végétarien, ne prend pas le plateau)			
Refuse la télévision / tout objet avec représentation humaine en cellule			
Adopte ou tente d'adopter une attitude de domination vis-à-vis des autres détenus			
S'entoure de personnes détenues identifiées comme radicalisées			
Se montre influençable par les autres détenus			
Adopte une attitude de repli sur soi			
Refuse d'avoir affaire au personnel féminin			
Organise sa cellule d'affectation de manière rigoureuse et très entretenue			

DISCOURS	Oui	Non	Observations/Motifs
Tient un discours empreint de religion, d'une identité religieuse affirmée			
Emet des commentaires négatifs sur les événements d'actualité			
Manifeste de l'hostilité à l'égard de la République française			
Adopte un discours sur la théorie du complot			
Manifeste de la sympathie pour des organisations terroristes ou se revendique d'elles			

INCIDENTS EN DETENTION	Oui	Non	Observations/Motifs
Remet en cause le règlement intérieur pour un motif religieux ou politique			
Adopte un comportement hostile et/ou agressif pour un motif religieux ou politique			
Refuse l'affectation d'un codétenu non musulman dans sa cellule voire de tout détenu dans sa cellule			
Est l'auteur de violences verbales ou physiques à l'encontre des personnels ou des codétenus			

RELATIONS AVEC L'EXTERIEUR	Oui	Non	Observations/Motifs
Ne reçoit pas de visite			
Ne reçoit aucun subside			

(Fig. 1 Example of Old Checklists)

Methods that adopt and modify forensic psychiatry (such as the traditional HCR-20 and SAVRY) to determine potential risks of extremism and terrorism are more widespread at a European level compared to these raw indicators based on religion.

Vera2R[xi] and ERG22+[xii] - the first of Canadian-Dutch, the second of English derivation - are used most frequently today.

Item I.D.	Factors
A.	Attitudes/Mental Processes
A.1	Identity confusion/problems
A.2	Strong feelings of injustice and grievances
A.3	Group, country cause of injustice
A.4	Dehumanization of the identified responsible cause
A.5	Internalized martyrdom, die for cause
A.6	Need for political/religious/ideological cause
A.7	Attachment to ideology justifying violence
A.8	Need for group bonding and belonging
A.9	Alienation from society
A.10	Low empathy for those outside own group
A.11	High level anger and frustration
A.12	Rejection of society and values
A.13	Low self-esteem
A.14	High need for approval and acceptance
A.15	Desire for revenge
C.	Contextual/Social Factors
C.1	Participant/user of extremist websites
C.2	Peer/community support for violent action
C.3	Contact with violent extremists
C.4	Anger at political/foreign policy actions of country
H.	Historical Factors
H.1	Early exposure to violence in home
H.2	Family support for violent action
H.3	Prior criminal violence
H.4	Military, paramilitary training at home
H.5	Travel abroad for non-state sponsored training/fighting
H.6	Glorification of violent action
P.	Protective Factors
P.1	Shift in ideology
P.2	Rejection of violence to obtain goals
P.3	Change of vision of enemy
P.4	Constructive political involvement
P.5	Significant other/peer support

(Fig. 2 Risk Assessment factors of VERA2- First Version)

The comparison between Rating Sheets such as HCR-20 and VERA2 clearly shows that the difference is entirely in the relevance of ideological and religious themes. That is, VERA2 as well as ERG22+ are tools of a strong ideological and political character, while HCR20 is a clinical tool.

HCR-20[V3] Rating Sheet for Version 3 of the HCR-20

Kevin S. Douglas, Stephen D. Hart, Christopher D. Webster, & Henrik Belfrage

Name	Record Number
DOB	Gender
Nature/Purpose of Evaluation	

HCR-20[V3] Items	Presence: Omit	N	P	Y	Relevance: Omit	L	M	H
Historical Scale (History of problems with...)								
H1. Violence	☐	☐	☐	☐	☐	☐	☐	☐
H2. Other Antisocial Behavior	☐	☐	☐	☐	☐	☐	☐	☐
H3. Relationships	☐	☐	☐	☐	☐	☐	☐	☐
H4. Employment	☐	☐	☐	☐	☐	☐	☐	☐
H5. Substance Use	☐	☐	☐	☐	☐	☐	☐	☐
H6. Major Mental Disorder	☐	☐	☐	☐	☐	☐	☐	☐
H7. Personality Disorder	☐	☐	☐	☐	☐	☐	☐	☐
H8. Traumatic Experiences	☐	☐	☐	☐	☐	☐	☐	☐
H9. Violent Attitudes	☐	☐	☐	☐	☐	☐	☐	☐
H10. Treatment or Supervision Response	☐	☐	☐	☐	☐	☐	☐	☐
OC-H Other Considerations	☐	☐	☐	☐	☐	☐	☐	☐
Clinical Scale (Recent problems with...)	Rating Period: _____							
C1. Insight	☐	☐	☐	☐	☐	☐	☐	☐
C2. Violent Ideation or Intent	☐	☐	☐	☐	☐	☐	☐	☐
C3. Symptoms of Major Mental Disorder	☐	☐	☐	☐	☐	☐	☐	☐
C4. Instability	☐	☐	☐	☐	☐	☐	☐	☐
C5. Treatment or Supervision Response	☐	☐	☐	☐	☐	☐	☐	☐
OC-C Other Considerations	☐	☐	☐	☐	☐	☐	☐	☐
Risk Management Scale (Future problems with...)	Rating Period: _____				Context: ☐In ☐Out			
R1. Professional Services and Plans	☐	☐	☐	☐	☐	☐	☐	☐
R2. Living Situation	☐	☐	☐	☐	☐	☐	☐	☐
R3. Personal Support	☐	☐	☐	☐	☐	☐	☐	☐
R4. Treatment or Supervision Response	☐	☐	☐	☐	☐	☐	☐	☐
R5. Stress or Coping	☐	☐	☐	☐	☐	☐	☐	☐
OC-R Other Considerations	☐	☐	☐	☐	☐	☐	☐	☐

Future Violence/ Case Prioritization	Serious Physical Harm	Imminent Violence	Recommended Reassessment Date
☐Low ☐Moderate ☐High	☐Low ☐Moderate ☐High	☐Low ☐Moderate ☐High	YY/MM/DD: _____

Evaluator	Signature	Date

Comparing VERA2R and ERG22+, we note how the two tools are similar in terms of psychometric properties and some assessment parameters, but differ in their use.

ERG 22+	VERA 2-R
Engagement	Beliefs
Intent	Context-Intent
(included in intent and engagement)	Commitment and motivation
Capability	History and capacity
(considered as being the positive side of risk factors)	Protective items

(Fig. 4 comparative chart)

The common peculiarity of these psychometric systems is that they mix structured forensic analysis models (SPJs), traditionally focused on mental illness and deviance, with other models of intelligence analysis, with strong ideological and political connotations [xiii]. These psychometric tools – such as those based on religion – all use ambiguous factors of ideological and political evaluation, such as '*Anger at political/foreign policy actions of country', 'Need for political/religious/ideological cause', or 'Strong feelings of injustice and grievances*', etc. ..

From this perspective, the process of radical escalation, whether linear or not, would be the result of

"*an incorrect representation of cultural and religious tradition. In this regard, it is shared opinion – also at an international level – that correct teaching and religious practices can be counted among the appropriate measures for fighting ideological indoctrination, as they constitute support for prisoners in the development of their personalities, which are often fragile in terms of culture, family and economics, putting them at risk of becoming victims of jihadist propaganda*. "[xiv]

From this derives the basic idea of a form of prevention going by the name of 'deradicalization', according to which it would be the task of states, police forces, intelligence agencies and civil society to identify, oppose and repress extremist and dangerous ideas, even when these do not represent a crime or are not connected to any 'fact'.

According to the theorists of VERA2

De-radicalization is the opposite of radicalization. It is the process of becoming less radical. De-radicalization as a process requires the rejection or moderation of a belief or ideological system. Groups or individuals may renounce a radical ideology. This may occur when the decision is taken that radical or violent actions are no longer relevant to the world view. Disengagement occurs when there has been a voluntary behavioural disconnect from the extremist organization. Disengagement is not sufficient to guarantee de-radicalization, but it often can precede de-radicalization.

Rehabilitation, re-socialization and de-radicalization programs are all designed to support a shift in attitude and ideology. The violent extremist who is committed to an ideology will be difficult to de-radicalize unless he or she has already experienced some doubt (a cognitive opening) and some disengagement. Complete de-radicalization on a collective level means that the movement has ceased to exist or at a minimum has changed its goals. De-radicalization on an individual level means that an individual has ceased violent activities. De-radicalization programs have been developed in Saudi-Arabia, Egypt, Singapore, Iraq, Libya, Yemen, Jordan, Malaysia, Indonesia, Great Britain, and Norway. (Pressman E.D., 2009, pg. 21)

This model of 'deradicalization', which is spreading everywhere in society from the prisons, even into the virtual world, where the private individual replaces the state in the function of preventive censorship, presents many risks, firstly for its detachment from criminal and legal practices, and secondly for the prevalence of psychiatric factors in the preventive criminal analysis.

However, criminologists as well as psychiatrists, seem to have forgotten that their interventions in these areas are intricately bound up with the legal issue of rights.

The Joint Settlement Process between the New York Police (NYPD) and the mosques in the legal case 1:13-cv-03448-PKC-JO before the NY District Court concretises the matter.

The case directly concerns countries such as Italy because its model of prevention indicators is the fruit of an old European project called "*Violent Radicalization - Recognition of and Responses to the Phenomenon by Professional Groups Concerned*" [xv] which, by explicit admission of the ministries in member countries that have adopted it, is based on the famous manual of the NY Police entitled "*Radicalization in the West*"[xvi].

In the American case, the NYPD was accused of

"have engaged and continue to engage in a policy and practice of targeting individuals for suspiciousness surveillance and investigation on the basis of their religion of Islam, stigmatizing Plaintiffs and violating their rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Free Exercise and Establishment Clauses of the First Amendment, and the Free Exercise Clause of the New York State Constitution (the "Complaint")"

The legal settlement led to the forced withdrawal[xvii] of the text that forms the basis of the various European models for its

"*religious profiling, adding a provision for considering the impact investigations have on people who are not targets of investigations, establishing reasonable time limits for certain investigations, and adding a civilian member to an internal NYPD Handschu Committee. As part of the settlement, the NYPD has also agreed to remove from its website the 2007 report "Radicalization in the West", which the NYPD does not and never has relied upon to open or extend investigations*." [xviii]

This example of the NYPD, among many, highlights how all these risk assessment products aimed at profiling on the basis of multiple risk scales, whether they are 'Moghaddam's Staircase' or the English Home Office's 'Pyramid of Terrorism'[xix], VERA2R and ERG22+, expose the administrations and their users to various risks due, on the one hand, to an excessive emphasis on ideas and 'types of perpetrators' with respect to the 'facts', who are normally the subject of criminal investigations, and, on the other, a corresponding underestimation of the phenomenon of multiculturalism in European prisons and societies. As we shall see, both these aspects have important legal and practical implications, since they implement "preventive measures of belonging" based on the insertion of a subject in a category of alleged risk with respect to the legal asset that is intended to be defended.

These models come within the scope of what legal scholars have defined as 'types of perpetrators':

"The common assumption of all these measures is not the committing of a crime or other offence, but belonging, according to the" type of perpetrator" scheme, to one of the categories of people listed in art. 1 (December 27, 1956, No. 1423) and mostly identifiable according to generic symptomatic elements" [xx].

Furthermore, those who designed these tools and their indicators, as well as having a very poor knowledge of Islam, did not take into consideration Pareto's sociological theory on ideas as derived. On the contrary, from current practice we know that ideas or narratives can often be justifications for different and deeper human actions, through which individuals manipulate reality. An inmate can take on Muslim narratives and repeat slogans on '*Ummah* or the *Khilafah*, full of *'Allah huwa al-Akbars'*, simply for protection, due to identity problems, to obtain better food or for a thousand other reasons, not least anger against foreign policy or the state, regardless of whether or not they are well-founded. Judging the external aspect - the narratives - is only a small part of the work of observation, and the use of labels such as 'Salaphite', 'radical', 'Wahhabite', 'jihadist', etc. does not help, also because often, those who use these terms do not understand their polysemic import in their specific cultural context, which is precisely the work of us orientalists.

The main limit of all European deradicalisation models risks becoming (1) the indeterminacy of the social risk criteria, tainted by prejudice, politicisation or specific ignorance, which (2) generates unpredictability in the monitored subjects/communities, which they often do not even understand, given their cultural distance, and therefore (3) they open up wide spaces to the arbitrariness of the administrative authorities in the practices of prevention, (4) above all in the absence of judicial supervision.

In Europe, too, Muslim communities and the Old Continent's NGOs will, sooner or later, become active in the European courts (ECtHR), as happened in the NY District Court. As a consequence, the whole apparatus of the analysis profiles used by the DAP, by the police forces and intelligence services, will be put at risk, with serious legal consequences for the prevention actions undertaken in the meantime, which risk being branded as discriminatory. However, it will also have serious

consequences for European security, because we all need to prevent threats.

Also on this question, moreover, the EU and many member states have not so far grasped that the very idea of 'deradicalisation' is increasingly the subject of strong criticism from many parts, not least the United Nations, who define it as an

'ideology conversion system' which was applied in a discriminatory fashion with a view to altering the political opinion of an inmate'[xxi]

Hence the UNODC's decision not to use the concept of 'deradicalisation', but to replace it with 'disengagement' from violence in its work on the subject. The distinction is significant, since 'deradicalisation' refers to the framework of ideas, while 'disengagement' refers to the distinction between a 'fact' (violence), which is often a crime, and preventive behaviour.

When one tries to seriously define 'risk indexes', one cannot but note the quite evident fact that in European penitentiary systems the detained population is increasingly multicultural, multi-religious and multiracial. This poses new challenges for police forces and justice systems on how to interpret behaviours, ideas, polysemic indicators and cultural patterns that are different from those to which we are accustomed. This aspect increases the risks connected to the operators' ability to identify actual risk signals with respect to prejudices or even simple misunderstandings. Every false positive or negative that derives from it hides very large risks, which can produce unwanted effects on the order of the penitentiary system or on security, as well as on the legal level. However, it also increases the difficulties of prisoners to understand what is required of them, which affects the *predictability* of prevention actions.

This is perhaps the main reason why the academic and scientific world have expressed harsh criticism [xxii] of these predictive preventive tools. They saw the risk not only of discriminating against entire social, ethnic and religious groups or individuals, but also the objective danger of encouraging escalation towards terrorism due to the detachment that invasive practices of profiling, intelligence and deregulated pre-investigation create in minority communities with respect to institutions and democratic methods of social transformation.

In short, as many studies have shown for some time, the radicalisation/terrorism relationship cannot be considered as given [xxiii], nor can radicalisation be criminalised when we know that it can contribute to social and political change. There have been radicals and extremists in the histories of every country, such as Mandela or Menachem Begin, who changed the world for the better. From this point of view, it is not easy to use 'radicalisation' as a risk indicator for preventive measures, as is happening indiscriminately today under the pressure of the media and governments. In reality, the problem with the use of these theoretical tools and prevention models goes far beyond these important political, academic, cultural and scientific aspects. In fact, if read in the context of the historical evolution of prevention models, the use of these tools poses much more serious and systemic problems of *policy* and *practice*.

III.2 Risks for Criminal and Intelligence Analysis

We need to take into consideration another aspect when deciding on the use of these assessment tools. This is a specific risk which exposes both law enforcement and intelligence agencies.

Although criminal and intelligence analysis are activities tasked by different 'clients', both have in common the necessity of integral 'premises' manageable through logic-deductive inferences, with the objective to avoid judiciary mistakes or false predictions.

The use of limited and politically influenced premises leads to ideologically conditioned inferences, a major risk for criminal and intelligence analysis. This may produce excessive oversimplifications, inadequate samplings, mistaken causes or the so-called 'false dilemma'.

Unfortunately, the ongoing counter-radicalisation tools are ideologically limiting the complexity of the premises in the multivariable processes of inference. While including some 'factors', they exclude elements such as legislative, social, material facilitators of radicalisation, as well as legitimate aspects of the ethnic-religious belongings, misconducts of institutional (and other) actors, role of media, logistic and structural weaknesses

of the environments, etc.. Moreover, when they include specific factors, mainly behavioural, ideological and religious factors, these premises and facts are framed within pre-judices (within the intelligence community, the phenomenon is known as 'mistaken cause' within the intelligence community).

Considered from the perspective of the criminal analysis, the counter-radicalisation assessment tools belong to the typology of analytical tools classified as 'logic-inductive'. They go beyond the facts and build frameworks which don't grant the qualitative neutral analytical inference, even though some premises may be partially or complete correct.

This results in a string reduction of the statistical probabilities of both, quantity of premises considered as well as relative frequency of the past events, impacting therefore on the theoretical and subjective estimations.

This aspect jeopardizes greatly the strategic intelligence analysis, in addition to the potential consequences on the operational analysis, including those criminal and intelligence models underpinning the effective long-term planning at policy level.

The intrinsic limits of these tools for reliable intelligence analysis can be easily tested by applying their methodology and check-lists to exemplary historical cases ex post. As an example, using Vera2R or ERG22+, the former Israeli Prime Minister and Nobel prize Menachem Begin (or Mandela), would be still in chains within a high security prison…

III.3 Security and Intelligence First?

In most constitutional European countries, information aimed at prison observation[xxiv] is traditionally used in the scientific observation of individuals for the purposes of individualised rehabilitation programmes and treatments, as an essential part of the reconstruction of individual responsibility. At the basis of these models is a clear awareness of the importance of balancing all socio-psychological and security factors within the prison mission. In Italy, too, the security component has grown since 1993 due, amongst other things, to its connection with the different prison circuits. However, even here, it remains subject to specific limitations (where there is "*danger of escape or disturbance of order and security, but contextually ... with regard to probation criteria*"[xxv]). The rationale of the various reforms over time has always been to keep the two pillars of treatment and security in balance, at the same time as jealously guarding the prerogatives: the capital of skills and experience of the different operators, as well as their functional autonomy. The ability to balance 'treatment' and *'security'* remains one of the secrets of successful prevention practices in many countries.

Unfortunately, the prevention policies emerging in several European countries put this balance at risk: the security approach prevails wherever they are faced with cases of multiple vulnerabilities so typical of the radicalisation phenomenon (extremist ideologies taken as a response to social, psychological or mental problems). The risk, then, is that measures for the prevention of radicalisation based on parameters that are too indeterminate in terms of risk turn out to be *desocialising* as a result of the restrictions imposed on the person or prisoner, thus making one of the two pillars of the system fail. The recurring criminogenic effects of these choices have been known to criminology for some time.

This leads us to the paradox that the new security policies, with their potential desocialising effect, lead to the impossibility of applying other instruments of community legislation, such as Framework Decisions 2008/909-829-947.

From the Italian Ministry of Justice's DERAD project, it is clear that detainees who are on the radicalisation radar are neither transferred to their countries, nor benefit from alternative measures. As Bricola (1974) rightly states, the result of applying personal measures aimed at preventing crime can paradoxically lead to new crimes being committed, thus promoting precisely the criminal escalation that we aim to weaken. Seen from another perspective, we could say that extremist deradicalisation practices contribute to developing a phenomenon of radical escalation due to their desocialising component, which is today also evident in the statistics.

This is not just an Italian phenomenon: indeed, Italy inherited it from the EU policies of 2004, when the EU included radicalisation prevention practices within its anti-terrorism strategy[xxvi], building a multi-dimensional and multi-agency model structured on four pillars,

clearly copied by the 'Prevent' system[xxvii], one of the products of which is the radicalisation indicators[xxviii] . With this strategy - which continually repeats the slogan that prison is the cradle of radicalisation – the security pillar is reinforced compared to resocialisation. Everywhere in Europe, as in Italy, the information from prison observation considered relevant to the radicalisation indicators becomes part of a new process of intelligence analysis and profiling, previously unknown to the 'colour' circuits model (white, green, yellow and red), when the evaluations were in any case more objective (crime/sentence, mafia association, disciplinary violations, etc.), despite the broad technical discretion [xxix] . Furthermore, a gradual process of unstructured remodelling of internal decision-making processes begins, as well as the transformation of some key roles of institutional penitentiary architecture.

In this way, without realising it, many European countries have adopted police and judicial cooperation models in their legal systems and practices that were inherited from the principles of Sir Peel (1829) [xxx], according to which critical events such as radicalisation see the prevalence and ownership of the police forces increasingly expanded with intelligence functions that are very different to those of similar, traditional enforcement agencies. The problem is that these models have been adopted without any organic legislative and regulatory framework to regulate them.

One consequence of this is that, with the sudden entry of radicalisation in prison practices as a theme of anti-terrorism, this specific type of religious, ideological and behavioural information derived from prison observations departs from the 'social space of rehabilitation' and , like other confidential information, becomes administrative security data.

How a Muslim prays or dresses, or what a Muslim thinks of foreign policy, is no longer just a sociological fact for the team to work with, but becomes *'investigative or pre-investigative information'*.

His praying and his political judgments do not end up in the prisoner's file, as is the case with the other prison observation data managed by the re-socialisation team (the so-called *équipe*, traditionally responsible for rehabilitation practices), but is managed separately in the appropriate IT structures (like SIAP/AFIS), in the context of targeted applications aimed and set up for security procedures.

Moreover, contrary to judicial information or the hypotheses of crime, the data on radicalisation do not end up on the prosecutor's table, because obviously the crime is missing: there is generally only the risk index according to new, vague prevention criteria defined by a project funded by the EU.

The decisions on profiling, with all the related implications as regards surveillance, are adopted according to intelligence profiling models by a central police body with new functions of an 'intelligence-led police' according to American and Anglo-Saxon models, and no longer by the team, as in the traditional multidisciplinary system of penitentiary circuits.

The information collected through these procedures becomes administrative data. It is classified according to periodic behavioural reports, from which a preliminary intelligence analysis is produced by the Central Investigation Group (CIG), classifying the 'suspect' detainees on a scale of 3 levels of risk.

Internos FIES del grupo A, condenados por pertenencia o colaboración con grupos terroristas. En este grupo existe un riesgo elevado y una presencia de ideología radicalizada constatada que motiva el especial seguimiento al que están sometidos. Se trata de internos condenados por pertenencia o vinculación al terrorismo yihadista con un fuerte arraigo de valores e ideología extremista, amparados, a su vez, por organizaciones terroristas activas.

Internos FIES del grupo B, enmarcados en una actitud de liderazgo captador y proselitista que facilita el desarrollo de actitudes extremistas y radicales entre la población reclusa. Se trata de internos que llevan a cabo una misión de adoctrinamiento y difusión de ideas radicalizadas sobre el resto de internos, llevando a cabo actividades de presión y coacción.

Internos FIES del grupo C, radicalizados o en proceso de radicalización extremista, que incluye todos aquellos internos con un mayor o menor nivel de riesgo y vulnerabilidad hacia el proceso de captación, asumiendo un papel más pasivo pero que pueden protagonizar incidentes regimentales ligados a interpretaciones radicales de la religión islámica. Se trata de internos que han manifestado actitudes de desprecio hacia otros internos no musulmanes o musulmanes que no siguen sus preceptos, y de los cuales puede inferirse, de forma razonable, un proceso incipiente o consolidado de radicalización.

(Fig. 5 The three FIES levels in the Spanish prisons)

Whenever necessary, these 'confidential' data classified R 'confidential' or S 'secret' are shared with central multi-agency bodies (on the model of the Italian C.A.S.A. at the Ministry of the Interior), i.e. with other police forces and intelligence agencies. Once they have entered this circuit, the prison observation data become a piece of intelligence in all respects.

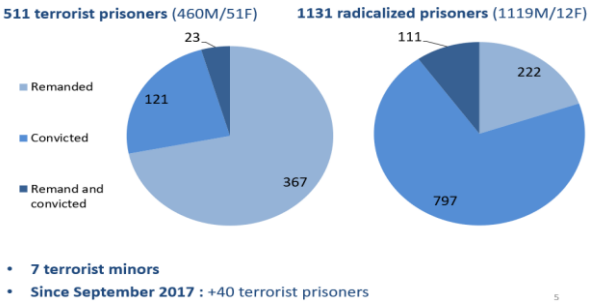
In technical terms, we could define the whole activity as "non-targeted surveillance" aimed particularly at specific groups (Muslims, Arabs or foreigners in prison), regardless of their crime, gender or legal status, in the absence of specific suspicions. [xxxi] This is an activity

which, seen from this perspective, is very different to that traditionally carried out by prison operators because it is focuses on specific type of actors.

This is due to the ethnic-religious nature of the indicators.

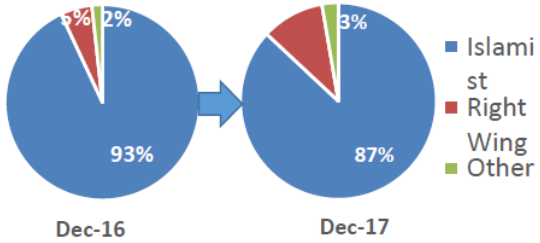
The number are very clear: In Italy, 506 inmates that had come under the radicalization radar by 31.12.2017 are all Muslim.

A very similar situation is evident in France, as shown in the table below



(Fig. 6 France nr. of Muslim Radicals in Prison)

Belgium and the UK are not exceptions:



(Fig. 7 NOMS data on radicals)

Region (# prisons/36)	# Radicalized Prisoners
North (17+1/36)	82
South (16/36)	128
Brussels (3/36)	18
	228

(Fig. 8 number of radicalized in Belgium prisons 1-3-2018)

This data highlights the creation of a specific risk prevention category based on religion.

The exclusion of the magistrates from the decisions concerning the profiling system is a sign of a tendency which is now standard practice in Europe, but which poses problems that are difficult to overcome within procedural law and prevention rules, as we will see later.

More in general, at the European level, data related to the capture and following investigation/indiction/appeal or conviction of people for terrorism related crimes under Directive 2017/541/EU are sending worrying signals on the application of criminal laws based on ethnicity and religion. Muslims, especially those of Arab origins, who went to Syria to fight or collaborate in different ways with groups such as Ahrar ash-Sham and others, different from Da'ish or al-Qa'idah, have been arrested in the majority of the European countries. Some European countries take the citizenship or the permit to stay away from them. On the other hand, Europeans (and Western people in general) that went to the same conflict areas to fight with the groups allied to the Western countries, such as the Curd or Cristian anti-Da'ysh and anti-Turkish militia close to the PKK, will not suffer from the same treatment.

These differences in treatment are used by terrorist groups to discredit the European Justice system.

III.4 When Risk Assessments Replace the Law

The new administrative procedures for risk assessment or 'penitentiary intelligence' – defined as 'investigative *and pre-investigative information*", after which follows the real analysis of profiling shared with intelligence agencies – have very serious consequences for inmates in many European prisons, both in relation to prison life and to the time after completion of the prison sentence, after the end of the term and beyond. They can activate *safety and preventive measures* that, in many countries, increasingly exclude the involvement of magistrates and alter the provisions of the sentence, the resocialisation programmes and even the principle of equality before the law.

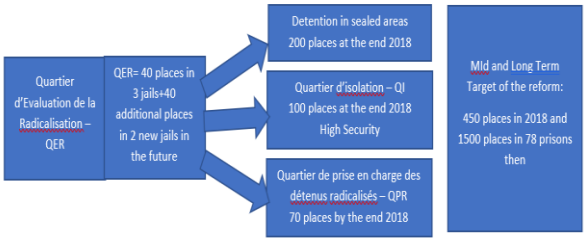
In countries like Italy, where the judicial authorities - both investigative and surveillance - play a very strong third-party balancing role, these effects are less noticeable, with rare but serious exceptions in terms of prevention. However, here, too, the tendency is growing following the recent introduction of new measures[xxxii]. In countries such as France or England,

this new European model heavily promoted by practitioner's networks raises serious issues of law and justice, and threatens an imbalance in the institutional arrangements between the powers of the State and legal coherence with the general legislature and fundamental rights.

In France, for example, if an inmate convicted of property crimes - even if the sentence is short - is labelled as 'radical' following the prison observation, regardless of the conviction and the provisions of the sentence, the inmate may be transferred to specific special prisons ("Quartier de prise en charge des détenus radicalisés – QPR" e "Quartier d'isolation – QI") with very strict regimes and preventive measures, where inmates are forced into re-education processes with 'French values' at their core. The preventive measures concern visits, contact, surveillance and social relations: in short, the whole area of so-called 'civil rights'[xxxiii].

Decisions of this type are the result of the risk assessments conducted with the VERA2R instrument, combined with an indicator checklist very similar to the Italian one, which produce the so-called "QER final synthesis report", a document shared with the penitentiary administration, intelligence and judges.

In France, as in all of Europe, the profiling of Muslim prisoners - especially of Arab origin - and of foreigners in general, is massive today, resulting in the collection, management and exchange of information on a national and international basis.



(Fig. 9 The new management model for radical prisoners in France - Agenfor processing, 2018)

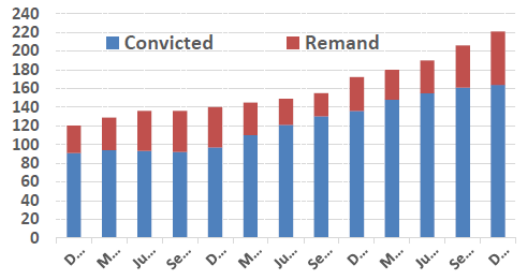
In England, the profiling of inmates defined as 'Tact and Related Offenders' includes both judicial data (sentence over 12 months) and ideological and behavioural observation. Special Extremism Units (ExU) with intelligence functions have been set up within the NOMS.

"responsible for developing the strategic, policy and procedural responses appropriate to the risks presented by terrorists, extremists and radicalisers. It receives intelligence and information on extremism from all prisons in England and Wales and uses this information to produce strategic analysis to assist operational colleagues in prisons and to inform future intelligence gathering. The ExU works with Regional Counter Terrorism Coordinators (RCTCs) based across the regions in England and Wales to develop intelligence and to monitor and manage terrorist or extremist prisoners in custody. RCTCs work with key partners such as Probation, Police and Security Services to share information and help manage the risk these offenders pose. Probation CT leads work closely with the RCTC." [xxxiv]

Ending up on these lists of proscribed persons may have very serious and long lasting consequences for a person that go far beyond the end of the sentence. In fact, Tact Offenders end up being permanently surveilled by the police:

An individual who meets these criteria will need to register with police, on an annual basis, details of their name, address, NI number and date of birth. There may also be the requirement to notify Police of certain information prior to travelling outside of the UK. As with Sex Offender Register, the individual will be required to notify Police of details of any addresses they are resident at for 7 days, or any shorter periods which add up to 7 days. The length of notification requirement may be in force for up to 30 years, and will depending on the sentence initially received.

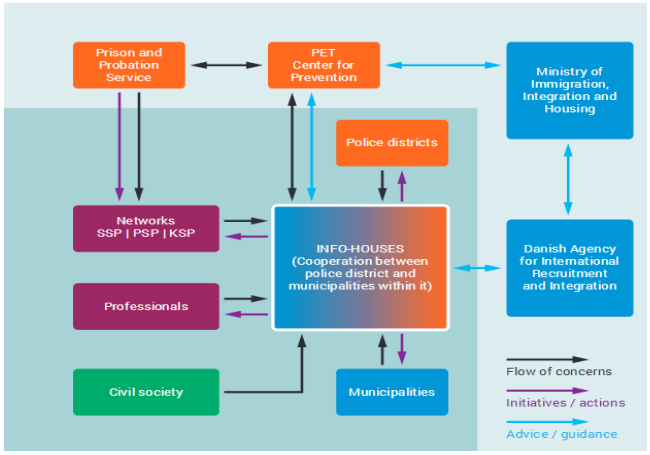
Because the profiling meshes are increasingly narrow, and the intrusive surveillance mechanisms create reactions in communities and minorities, the number of Tact Offenders is growing continuously, with increasing numbers of convicts and remand prisoners, men, women and children, but above all Muslims who are now the main target of surveillance policies.



(Fig. 10 Data from NOMS)

In England since 2016, and more recently in France, inmates classified as extremists by the SC Committee thanks to an extensive use of intelligence information, are allocated to special sections called *Separation Centres*, to prevent them from promoting wrong ideas or recruiting others, with very severe restrictions on their civil rights.

All these preventive decisions are taken by administrative means, through the revision of the Prison Rules and with specific Prison Service Instructions.

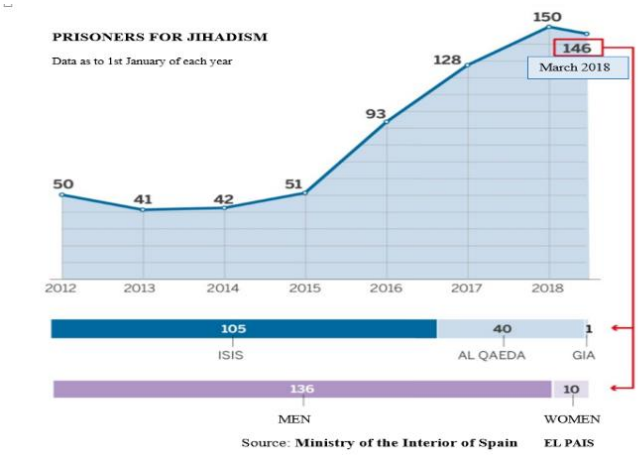


(Figure 11 The Danish model of Info-Houses)

In France, as in England and many European countries adopting these models or the 'Info-Houses' type of assessment systems (Denmark), risk assessment has become a new law added to the conviction and the police, intelligence or administrative bodies, including local public or private entities, and determines almost everything in the life of an individual considered radical. The measures are almost always taken in the absence of judicial procedure, but simply by administrative procedure.

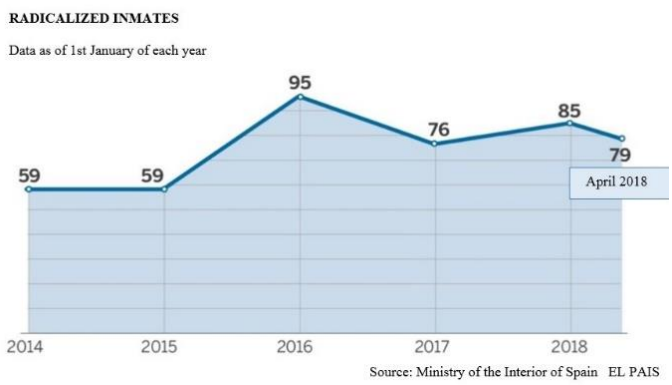
France, England and Belgium are special cases of 'extremism of counter-radicalisation', but the basic trend is common to all EU member states.

Spain, for example, has seen an increase in prisoners for crimes related to terrorism:



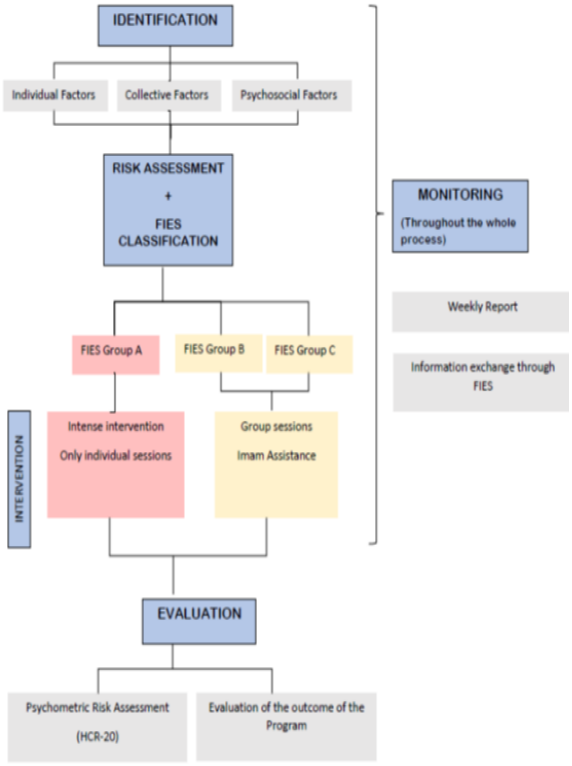
(Fig. 12 – Prisoners for Jihadism in Spain, El Pais)

This dynamic, of course, has led to an increase in risk assessment practices also for prisoners convicted for other reasons, but inserted under the radar of radicalisation:



(Fig. 13 – Radicalized Inmates in Spain, El Pais)

Since 2018, Spain has adopted its own radicalisation analysis model, with a 'triage' risk assessment system based on a 'tool' and associated analysis methodology. [xxxv].



(Fig. 14 - Graph drawn up by CSD, Bulgaria)

To understand the implications of these assessment models well beyond the penitentiary system, it is sufficient to consider that almost all member states participate in the compilation of databases managed by several institutional bodies, both European and international, where suspects of radicalism are registered. These lists are then processed and disseminated by supranational agencies or used by third countries, even the worst ones, to take preventive and surveillance measures that affect transnational mobility, access to social or legal benefits, work, etc.

The difference in radicalization prevention practices among European countries open the problem of harmonization and impact on the concrete possibility of creating a legal formula of judicial cooperation.

To understand how the penitentiary systems started diverging due to counter radicalization measures, is sufficient to compare the procedures for the allocation of radical prisoners in different countries. While in the UK and France practices have mainly an administrative nature based on risk assessment tools, in Italy the AS2 assignment is completely based on the jurisdiction.

The inmates classified as AS2 are organized by the DAP based on the presence of juridical title linked to a National or International terrorism related crime. They can be investigated or convicted, however the judicial system (at least one impartial Judge, GIP/GUP in the preliminary stage of the investigation) should issue a provision on the model of the precautionary custody order, legally challengeable (not even the PM is sufficient for such a decision).

The inmate under AS2 will not experience any limitation of their rights as established by law. Any limitation should be based only on the crime in so far as this crime the person is investigated/ indicted/ appeals/convicted is included in the scope of art. 4 bis of the Penitentiary Code (L. 354/75). This article excludes or limits the access to some benefits, but the denial of any benefit should be done by the surveillance judiciary. The enhanced surveillance or reinforced surveillance is regulated by art 14 bis of the Penitentiary Code and consists in an administrative provision done by the DAP and notified to the subject. This administrative provision should be duly motivated, and its content should comply with the law.

It's difficult to outline the application of these constitutional principles, for example, with the counter-radicalisation practices of a country like Belgium, where the so-called '2-Track Hybrid Policy', is used for the placement in the specialized Wings D-Rad:Ex sections (1 Hasselt + 1 Ittre) or within 5 "Satellite prisons" of *"Prisoners who pose a severe risk regarding radicalization (active or passive) and/or who are showing ongoing commitment in armed/violent actions from religious and/or ideological motives"* (action plan radicalization 11/03/15).

Emerging EU practices, such as those presented above, are just one example among many that touch the heart of the problem, that is not 'what works better' or who is better among the MS: the problem is represented by the risk of inconsistency of the newly established 'deradicalization' policies, often adopted under the pressure of politicians or media, with the fundamental laws and practices at national level, including international legal concepts such as the principles of legality, materiality of the crimes, the presumption of innocence, and even personal freedom (respectively,

articles 25; 27 and 13 of the Italian Constitution, just to mention an example). Today, all this is amplified by the problem of privacy and data processing.

In conclusion, an intrinsic contradiction seems to characterize several policies and practices promoted at EU level. From one side, several governments and agencies promote the public-private approach based on multidisciplinary methodologies; however, on the other side, they securitize the information collected within these 'open partnership', therefore exploiting non-security agencies for 'pre-investigative' activities, thus hindering the deployment of rehabilitative functions through preventive security or police measures and additionally impeding the free exercise of fundamental rights to defence and appeal by secreting large part of the information collected.

The first case-law are already landed on the ECtHR tables, from where clear positions are expected. They are the applications no 46538/11 Bilal GULAMHUSSEIN against the United Kingdom lodged on 21 July 2011 and no 3960/12 Kashif TARIQ against the United Kingdom lodged 10 January 2012.

IV. DIVORCE BETWEEN PREVENTION AND LAW

Precisely what is meant by prevention and, more specifically, the prevention of radicalisation - i.e. prevention of an ideological nature, in an area of pre-crime, halfway between the political and the religious - remains the crux of the matter, just as it remains to be understood (and regulated) who can and should activate practices to prevent radicalisation, with which procedures, and which are the tasks of the various agencies involved. Finally, how can the cognitive functions of judges be exercised in a prevention procedure with respect to purely potestative functions. [xxxvi]

Putting practices that traditionally belong in the field of social policies under the umbrella of security and antiterrorism due to their ideological and religious components has a whole series of practical and political consequences.

IV.1 Prevention of Radicalisation:

Quality of the Law and Predictability of Measures

Normally, preventive measures are detached from the committing of a crime and are applied on the basis of risk indications in accordance with specific laws (according to the medieval principle of *prius ergo est suspicio*).

In the case of radicalisation, preventive measures are not connected to the criminal responsibility of the subject in the field of terrorism, since it is not a crime, nor is it based on the evidence of guilt, of 'the fact', which is an element of the crime, but

"*they find reasons, such as security, in the social-criminal risk; they are implemented through the partial social interdiction of the subject and tend to their recovery into ordered civil life*" (ruling of March 23, 1964 No. 23 and 17 February 1994, No. 48).

They can therefore be afflictive, but not sanctions, [xxxvii] even if jurists have not yet put an end to this debate.

Based on the legislation of different countries, prevention measures require the examination of various risk indicators, normally established by law.

These indicators tend to change with the evolution of society. In Italy, for example, Law 575/1965 (so-called anti-mafia law) extends prevention measures to persons suspected of belonging to mafia associations. Law 152/1975 extends the regulation to further risk categories with the aim of preventing phenomena such as terrorism. Numerous laws reformulate the personal and patrimonial measures in various ways (e.g. 327/1988, 55/1990, Legislative Decree 306/1992, conv. into Law 356/1992). Legislative Decree 92/2008, conv. into Law 125/2008, introduces significant modifications: the extension of the anti-mafia law, and therefore of patrimonial measures, to individuals suspected of committing one of the crimes provided for by art. 51, comma 3-bis, Code of Criminal Procedure, and to persons engaged in criminal trafficking, or who habitually live from the proceeds of crime (as per article 1, Nos. 1 and 2, Law 1423/1956); Legislative Decree of September 6, 2011, 159, which came into force on October 13, 2011, reorganises the subject of prevention measures, followed by some modifications that envisage new risk categories for the prevention of sporting violence (Legislative Decree 119/2014, conv. into Law 194/2014) and international terrorism (Legislative Decree 7/2015, conv. into Law 41/2015, containing urgent measures to combat international terrorism). With this last decree, which is also relevant

for the purposes of radicalisation, new terror-related offences have been included in the Penal Code, in particular the one relating to foreign fighters travelling for the purposes of terrorism. The scope of personal (and real) prevention measures has also been expanded, and a new measure has been introduced that provides for the confiscation of passports and identity cards, anticipating the practices of other European countries and recent Community Directives.

Radicalisation indicators and risk assessment procedures could therefore be legitimately associated with methodologies used to define the risk index that underlies prevention measures.

In some cases, the legitimacy of indexes linked to specific limited groups of people and behaviours has also been recognised, but in this case, there is some doubt related to associating ethnic and religious minorities with risk indexes, as happens in practice.

On the other hand, the legitimacy of the preventive measures applied by the administrative authority restricting freedom of movement alone (with particular attention to the ability to expel foreigners, DASPO and warnings), is recognised as well-founded and in line, for example, with art. 16 of the Constitution. In Italy, this practice is regulated by law (article 13 of Legislative Decree 25-07-1998, No. 286), both in Italy and in most other countries, with rare exceptions. However, critics are emerging for the differentiated legal treatments.

Ben Khemais v. Italy-24 February 2009

Sentenced in Tunisia in his absence to ten years' imprisonment for membership of a terrorist organisation, the applicant had been extradited to Tunisia on account of his role in the activities of Islamic extremists. Although in March 2007, pursuant to Rule 39 (interim measures) of the Rules of Court, the Court had indicated to the Italian Government that it was desirable, in the interests of the parties and of the smooth progress of the proceedings before the Court, to stay the order for the applicant's deportation pending a decision on the merits, the applicant was deported to Tunisia in June 2008.

The Court held that there had been a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention, on account of the applicant's deportation to Tunisia. It further found a violation of Article 34 (right of individual petition) of the Convention regarding Italy's failure to comply with the measure indicated under Rule 39 of the Rules of Court.

See also: Trabelsi v. Italy, judgment of 13 April 2010; Toumi v. Italy, judgment of 5 April 2011; and Mannai v. Italy, judgment of 27 March 2012.

Nevertheless, in general terms, at a European level, the ECtHR recognised the compatibility of personal prevention measures, distinguishing between privative and restrictive measures of personal freedom. The privative measures are subject to rigorous conditions provided for by art. 5 § 1 (letters a) to f). The restrictive measures are instead provided for by art. 2 of the additional protocol 4, which protects freedom of movement with a protection conditioned by different requirements, including: a) provision by law; b) the need to ensure the protection of the interests listed in the same art. 2 in § 3 (national security, public security, public order, prevention of crime, protection of health and morals or the rights and liberty of others; c) proportion between compliance with the law guaranteed by the norm and the needs of the community.

However, in the case of *De Tommaso v. Italy*[xxxviii], the European Court in Strasbourg defined a series of new criteria [xxxix] regarding the applicability of prevention measures and the quality of the law. These criteria can be extended with extreme precision to the phenomenon of radicalisation, understood as an indicator of social risk.

With this very recent judgement the ECtHR reaffirmed some fundamental principles in relation to 'prevention' and recalled its previous well consolidated jurisprudence on the topic:

(1) Prohibition of interference:

104. The Court reiterates that Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement within a given territory and the right to leave that territory, which implies the right to travel to a country of the person's choice to which he or she may be admitted (see Khlyustov v. Russia, no. 28975/05, § 64, 11 July 2013, and Baumann v. France, no. 33592/96, § 61, ECHR 2001-V). According to the Court's case-law, any measure restricting the right to liberty of movement must be in accordance with law, pursue one of the

legitimate aims referred to in the third paragraph of Article 2 of Protocol No. 4 and strike a fair balance between the public interest and the individual's rights (see Battista v. Italy, no. 43978/09, § 37, ECHR 2014; Khlyustov, cited above, § 64; Raimondo, cited above, § 39; and Labita, cited above, §§ 194-195).

(2) Quality of the Law:

106. The Court reiterates its settled case-law, according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects (see Khlyustov, cited above, § 68; X v. Latvia [GC], no. 27853/09, § 58, ECHR 2013; Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC], no. 38433/09, § 140, ECHR 2012; Rotaru v. Romania [GC], no. 28341/95, § 52, ECHR 2000-V; and Maestri v. Italy [GC], no. 39748/98, § 30, ECHR 2004-I).

(3) Foreseeability

107. One of the requirements flowing from the expression "in accordance with law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see Sunday Times v. the United Kingdom (no. 1), 26 April 1979, § 49, Series A no. 30; Kokkinakis v. Greece, 25 May 1993, § 40, Series A no. 260-A; Rekvényi v. Hungary [GC], no. 25390/94, § 34, ECHR 1999-III; and Centro Europa 7 S.r.l. and Di Stefano, cited above, § 141). 108. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (see RTBF v. Belgium, no. 50084/06, § 104, ECHR 2011; Rekvényi, cited above, § 34; Vogt v. Germany, 26 September 1995, § 48, Series A no. 323; and Centro Europa 7 S.r.l. and Di Stefano, cited above, § 142). It is, moreover, primarily for the national authorities to interpret and apply domestic law (see Khlyustov, cited above, §§ 68-69).

Furthermore, the ruling referred to a well-established precedent on civil rights in prisons, a fact that makes this ruling very important for the European penitentiary system.

For the first time, the combined arrangement of these two aspects of the judgement in the case of *De Tommaso v. Italy* opened up a long series of prospective fundamental technical and legal issues for the adoption of prevention measures in the broadest sense, and for the prevention of radicalisation in the strict sense, which force a profound revision of the models of 'deradicalization' and 'disengagement' in place at the European level.

IV.2 Quality of the Law

Some passages of the judgement raise the question of merit concerning the quality of the law as a criterion for the assumption of legitimate personal prevention measures:

117. The Court observes that, notwithstanding the fact that the Constitutional Court has intervened on several occasions to clarify the criteria to be used for assessing whether preventive measures are necessary, the imposition of such measures remains linked to a prospective analysis by the domestic courts, seeing that neither the Act nor the Constitutional Court have clearly identified the "factual evidence" or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures. The Court therefore considers that the Act in question did not contain sufficiently detailed provisions as to what types of behaviour were to be regarded as posing a danger to society.

By analogy, it is quite evident that if they are used today as a '*test*' of the '*sufficiently detailed provisions'* for the purposes of preventive measures - behaviours deriving from the radicalisation indicators used up to now - there is a risk that the entire system of radicalisation prevention will collapse. This is especially so since many

of these indicators could even be challenged before the same court via other articles concerning fundamental rights, as happened in the US in the case of the NYPD.

IV.3 Predictability and Risk of Abuse

A second element is introduced by the Court in its own judgement, where it identifies the criterion of 'predictability' as a precondition for the adoption of personal prevention measures:

122. Lastly, the Court is not convinced that the obligations to "lead an honest and law-abiding life" and to "not give cause for suspicion" were sufficiently delimited by the Constitutional Court's interpretation, for the following reasons. Firstly, the "duty for the person concerned to adapt his or her own conduct to a way of life complying with all of the above-mentioned requirements" is just as indeterminate as the "obligation to lead an honest and law-abiding life", since the Constitutional Court simply refers back to section 5 itself. In the Court's view, this interpretation does not provide sufficient guidance for the persons concerned. Secondly, the "duty of the person concerned to comply with all the prescriptive rules requiring him or her to behave, or not to behave, in a particular way; not only the criminal laws, therefore, but any provision whose non-observance would be a further indication of the danger to society that has already been established" is an open-ended reference to the entire Italian legal system, and does not give any further clarification as to the specific norms whose non-observance would be a further indication of the person's danger to society. The Court therefore considers that this part of the Act has not been formulated in sufficient detail and does not define with sufficient clarity the content of the preventive measures which could be imposed on an individual, even in the light of the Constitutional Court's case-law.

123. The Court is also concerned that the measures provided for by law and imposed on the applicant include an absolute prohibition on attending public meetings. The law does not specify any temporal or spatial limits to this fundamental freedom, the restriction of which is left entirely to the discretion of the judge.

124. The Court considers that the law left the courts a wide discretion without indicating with sufficient clarity the scope of such discretion and the manner of its exercise. It follows that the imposition of preventive measures on the applicant was not sufficiently foreseeable and not accompanied by adequate safeguards against the various possible abuses.

These two important criteria find their rationale in a deep concern of the Court, which is in some way the heart of the relationship between citizenship and freedom: abuses by the State:

118. ….Thus, the Court considers that the law in force at the relevant time …. did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts, and was therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures.

123. The Court is also concerned that the measures provided for by law and imposed on the applicant include an absolute prohibition on attending public meetings. The law does not specify any temporal or spatial limits to this fundamental freedom, the restriction of which is left entirely to the discretion of the judge.

The combination of these three elements - the quality of the law, predictability, and the prevention of abuses deriving from excessive discretion - forces us all to rethink radicalisation prevention policies in a new light.

In fact, if behaving like a 'radical' is not a crime, as it still is not, on the basis of this judgement we now also know that such behaviour can hardly form the basis for preventive measures, given that this is not directly required by law and, moreover, it is difficult for persons belonging to cultures and contexts that are very different from our own to understand or to 'predict'; finally, that it can be applied with extreme discretion in the absence of adequate guarantees against possible abuses, considering above all that the matter is connected to fundamental human rights.

Many of the actions, on the basis of which some entities - often not even the authorities - define the radical dimension and therefore the social risk, are not

perceived as such, or even as 'potential' risks, by entire population groups, both within the member countries and in their countries of origin, whether inside or outside prison. It therefore poses a problem of *unpredictability*, both with respect to the list of persons to whom the measures could be applied, and with respect to the *content* of the measures themselves, i.e. that which is actually measured by the prevention indicators and tools, and reported in the summary reports, which form the basis for profiling and the consequent measures.

IV.4 Procedural Defects

This aspect of the quality of the law and the unpredictability of the measure is all the more serious since no prior warning, nor any warning from the authorities, is given to proscribed radicals, as is the case with other suspects of very serious crimes, such as mafia association.

It is clear from these details, such as the classification of information resulting from the new penitentiary observation, that it makes them inaccessible both to prisoners and their legal representatives, and the involvement of intelligence agencies in the management of data makes any possibility of rights of defence or revision very complex, or in any case makes it very difficult to exercise them[xl].

Equally worrying is that, in administrative proceedings relating to radicalisation, the proscribed persons are not even provided the guarantees provided by the administrative procedure, such as being informed of the start of the proceedings.

The constant use of secret prevention procedures in many European countries, including in court trials, not to mention administrative procedures, is a problem that the European Commission cannot continue to pretend not to see, as recently highlighted by the European Agency for Fundamental Rights (FRA) [xli].

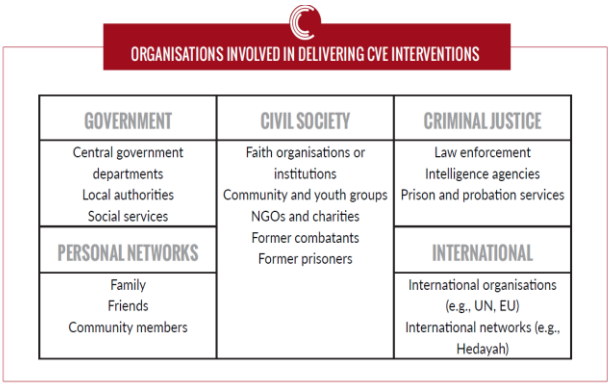
The acquisition of functional tests for prevention measures should, in principle, take place with the so-called summary procedure, i.e. through reference to articles 666 of the Code of Criminal Procedure, and 185 of the transitional implementation arrangements, "*without any particular formalities*". In this case, however, the use of the provisions of Law 3-8-2007 No. 124, which regulates the activities of the secret services, is certainly not a facilitating factor for the parties.

In short, the whole subject appears confused and fragmentary, especially considering the relevance of the threat and the general legal implications in terms of law and civil rights in the broadest sense.

IV.5 Risk of an Institutional Mess

One of the consequences of the historical evolution of the prevention systems that we mentioned at the beginning is the creeping transformation of the profile of the police forces, the intelligence services and their institutional duties with respect to other social bodies, both public and private.

Here, the watershed moment is still the fateful 1970s when, in the wake of preventive socio-psychological theories, the competencies of the police expanded to a greater degree of collaboration, first with civil bodies (municipalities, public agencies, etc.) and then also with the private sector, following the model of the Neighbourhood Watch project, which supports the police community in England. In that famous programme of the 1970s, citizens, organised in patrols, carried out surveillance and reporting duties for the police for purposes of crime prevention. New approaches to modern police prevention were developed from these models in the form of 'crime reduction partnerships', 'broken windows', 'problem oriented policing', or 'intelligence-led policing'. In Europe, this model became the basic anti-terrorism doctrine from 2004 onwards, with the corollary of hybrid European agencies such as Europol, the EU Working Party and diverse networks such as RAN, ESCN and the like, dedicated to the recruitment of civil society in processes of 'deradicalisation'.



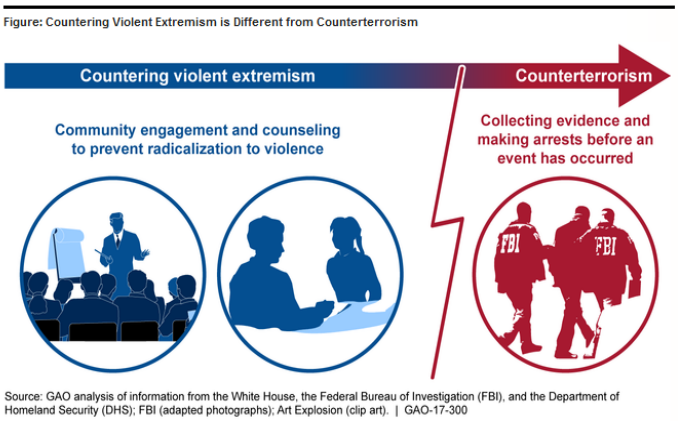
(Fig. 15 Stakeholders and First-line Practitioners in CVE)

Today, in some countries, it is no longer surprising to see a prison run by the private sector, or to read about civil society organisations involved in collecting security information (espionage or denunciations). Neither is it surprising to see police forces, or their special cores (ROS, DIGOS, GICO, NIC, etc.), perform functions considered to belong within the remit of intelligence using special investigative techniques (SIT), nor to see LEAs carrying out activities that were traditionally the prerogative of welfare agencies, or vice versa.

However, there are risks in the 'mess', as we have seen in the previous paragraph. The ancient borderlines between separate jurisdictions and powers, keys, doors and guardians, which guaranteed a fair system of checks and balances, tend to fall in the new model of 'prevention policing', which seems to have freed itself from all the complexes that historically linked this concept to totalitarian regimes and ideological repression. Civil society in the United States has also been a trailblazer on this matter. In fact, this historical process has profoundly reshaped the FBI, its roles, policies and investigative practices, and it is often accused of operating outside the Handschu Guidelines[xlii], i.e. the set of rules and procedures which the NYP Police has been forced to observe since 1985 following the class-action *Handschu v. Special Services Division* [xliii] due to its espionage activities against political, religious and minority groups.

At the core of the Handschu Guidelines was the prohibition of starting an investigation concerning political, ideological or religious activities, without first

"specific information has been received by the Police Department that a person or group engaged in political activity is engaged in, about to engage in or has threatened to engage in conduct which constitutes a crime".



(Fig. 16 – From Civil Society to Investigations)

Since then, the debate surrounding the activities of 'intelligence-led police' and the limits of police intelligence powers in pre-investigations (prevention, in fact) has never stopped, especially after the leakage [xliv] of secret parts of the "Domestic Investigations and Operations Guide", and the legal settlement *Raza vs. City of New York* [xlv] . In the "Raza" case, Muslim communities contested the fact that the police carried out targeted surveillance on entire religious and ethnic communities (community mapping and management of intelligence databases, monitoring of mosques, use of informants and infiltrators, targeted online surveillance, etc.), without them having committed any crime.

The NYPD's warrantless surveillance of our clients profoundly harmed their religious goals, missions, and practices. It forced religious leaders to censor what they said to their congregants, limit their religious counseling, and record their sermons, for fear that their statements could be taken out of context by police officers or informants. It also diminished attendance at mosques, prompted distrust of newcomers out of concern they are NYPD informants, and prevented the mosques from fulfilling their mission of serving as religious sanctuaries. Our lawsuit charged that the NYPD, through its discriminatory surveillance program, violated our clients' constitutional right to equal protection, as well as their right to freely exercise their religious beliefs. [xlvi]

In America, the dispute ended with a tough Settlement, which, among other things, referred the NYPD to the obligations of the Handschu Guidelines; the prohibition of conducting investigations in cases in which race, religion or ethnicity are investigative cues, with the obligation of having detailed facts in the matter before starting investigations, and within well-defined time limits. The provisions of the Settlement are supervised by a specially appointed civilian supervisor who scrutinises their compliance with fundamental rights, and has full reporting powers to the court, and prohibit the mayor from changing the civil representative without the approval of the judge.

Such a scenario is easily projected today onto European investigative activities, with a solid foundation in the Convention on Human Rights before the ECtHR. For this reason, too, it would perhaps be worthwhile to prevent such an outcome, and to review the modalities of pre-investigation on Muslim communities for the purpose of preventing radicalism, defining clear and different roles and competences for the subjects involved. All the more so since this subject also involves professional associations and civil society, who have repeatedly made their voices heard in cases where the obligation to report to the police conflicted with their ethics codes[xlvii].

IV.6 Rights of Radicalisation Suspects

When it comes to radicalisation and risk assessment, the crux of administrative prevention procedures in several European countries opens up another interpretative question, which in reality risks a conflict with some of the fundamental principles of *rule of the law* at the basis of the European legal system.

The question could be put another way: what are the rights of suspects, and how can they be exercised in the procedures in the context of prevention?

While in countries with common law systems, or in member states where states of emergency have been declared, administrative procedures have been used for the adoption of preventive measures (for example Tact Offenders in England). In Italy, as in most constitutional countries, courts require full juridicalisation of the proceeding[xlviii] when it intervenes in single provisions, fully recognising the rights deriving from art. 24, comma. 2 of the Constitution (ruling of June 14, 1956, No. 2 and March 12, 2010, No. 93).

The principle is that, where there are no afflictive measures, and therefore there is no need to duplicate criminal trials, there remains the need for a fair prevention procedure that ensures the rights of all parties involved, ensuring full consultation (the measure of prevention anyway being aimed at limiting freedom of movement). This becomes a mandatory condition with regard to the deprivation of liberty and security measures.

In Italy, all legislative changes regarding prevention, from the first Law 575/1965 up to the last Legislative Decree 7/2015 (conv. into Law 41/2015), have always firmly maintained the full juridicalisation of procedures. The only exception is art. 13, paragraph c) of Legislative Decree 25-7-1998, 286 on immigration, or in cases of DASPO, stalking, urban security or drugs.

The provisions of Legislative Decree 286/1998 have, until now, been applied for the expulsion of radicals from third countries by administrative means, but without ever clarifying whether the administrative procedure followed was in line with the right to information and defence: but we will soon find out, as the first appeals against expulsion have already been lodged. What is certain is that, as the number of citizens involved in these radicalisation processes grows, such rules will tend to lose their impact, and ever more legal preventive procedures will have to be applied. Therefore, these must be built on foundations that hold up during the trial.

The issue is a little more complex at the European level, because the guarantees provided for by the Stockholm Roadmap on the presumption of innocence [xlix], etc. would seem to apply only to criminal proceedings, in the sense given by the interpretation of the European Court of Justice. However, the wording "*without prejudice to the jurisprudence of the European Court of Human Rights*" opens up issues of procedure that do not make this assumption an easy one.

This flaw in the system was remedied, for the first time explicitly, by the De Tommaso judgement. In fact, by condemning Italy for the violation of article 6 of the Convention, the Court established the right of every person to the effect that (Art. 6 Par. 1)

"*their case is examined fairly, publicly and within a reasonable timeframe by an independent and impartial court, built by law, which is called upon to rule on disputes over their civil rights and duties, or on the validity of any criminal charge made against them*."

The public process is a clear condition set by the ECtHR:

138. The Court reiterates that, as it has consistently held, the exclusion of the public from proceedings for the application of preventive measures concerning property amounts to a violation of Article 6 § 1 (see Bocellari and Rizza, cited above, §§ 34-41; Perre and Others, cited above, §§ 23-26; Bongiorno and Others, cited above, §§ 27-30; Leone v. Italy, no. 30506/07, §§ 26-29, 2 February 2010; and Capitani and Campanella v. Italy, no. 24920/07, §§ 26-29, 17 May 2011).

Despite the initial admission of guilt by the Italian government, with the request for a partial revocation of the role, the decision of the Court to admit and discuss this part of the De Tommaso case was motivated precisely by the fact that

138….. *However, it notes that there are no previous decisions relating to the applicability of Article 6 § 1 to proceedings for the application of preventive measures concerning individuals, and thus to the question of public hearings in such proceedings, which, moreover, are conducted in the same way as those for the application of preventive measures in respect of property.*
and by the fact that

146…the present case is characterised by the fact that the preventive measures applied to the applicant did not constitute a deprivation of liberty pursuant to art. 5, c. 1 of the Convention, but restrictions on his freedom of movement."

This choice marks a clear change from previous rulings of the ECtHR, explicitly pointed out by the Court, favourable to the application of the civil aspect of article 6 of the Convention in cases that might initially seem not to affect a civil right, but that can have direct and significant repercussions on a private right of an individual[i].

On this basis, working towards a consolidated ruling, the Court equated the preventive measures restricting freedom of movement with those relating to restrictive measures of civil rights in prison, making them all fall into the same category of preventive limitation of civil rights, protected precisely by art. 6, c.1 of the Convention.

The conclusion was categorical:

149. *The Court also concluded that any restriction affecting the civil rights of an individual must be capable of being challenged in the course of a judicial proceeding, due to the nature of the restrictions (for example, the prohibition of receiving more than a certain number of monthly visits from family members, or the continuous monitoring of correspondence and telephone conversations) and their possible repercussions (for example, difficulty in maintaining family ties or relationships with people other than family members, or exclusion from outdoor physical activity)" (ibid., § 106).*

By analogy, therefore, the question opens up as to the legitimacy (and legality) of the use of preventive measures limiting the 'civil rights of prisoners and restricted persons' on the basis of radicalisation indicators and their profiling, as happens with their placement in special sections (AS2), enhanced surveillance or limitations of their equal rights with respect to all other detainees restricted for similar offences, but who are not 'listed' as radical.

Preventive measures towards prisoners considered radical on the basis of different risk levels, as applied in many member countries - and, in some of them, on an administrative basis - are configurable as those identified by the Court in the cases of Gülmez v. Turkey, No. 16330/02, §§ 27 31, May 20, 2008 (limitation of visits), Ganci v. Italy (No. 41576/98, §§ 20-26, CEDU 2003 XI), Musumeci v. Italy (No. 33695/96, § 36, January 11, 2005) and Enea v. Italy ([GC], No. 74912/01, § 107, CEDU 2009), all related to visits, monitoring of correspondence and telephone conversations and limits to outdoor physical activity, or Stegarescu and Bahrin v. Portugal (No. 46194/06, §§ 37-38, April 6, 2010), which established visits limited to one hour per week and only behind a glass partition, outdoor physical activity limited to one hour per day, and the

impossibility for the first applicant to continue his studies and take exams.

Therefore, in the De Tommaso case, the court also dissolved the crux of both the juridicalisation, and the prevention procedures, in relation to a dispute [li] involving 'civil rights', since

"*In this regard, the character of the legislation governing the methods for determining the matter (civil, commercial, administrative law, etc.) and the authority vested with jurisdiction in this matter (ordinary court, administrative body, and so on) have no decisive consequences*".

In this context, therefore, the problem of relations between the Supervisory Authority and the Prison Officers must be placed in the framework of the decisions concerning the security information on radicalisation, which can no longer remain at a verbal and informal level, since the preventive measures that affect civil rights are all the responsibility of the judicial authorities. This is evidently valid, both in the case of measures pursuant to art. 18-ter (temporary restriction of correspondence, access to newspapers, visas, monitoring envelopes without reading them, etc.), but also and above all in the decisions regarding the benefits of the law and early releases, which the monitoring authority must take, but there have been difficulties formulating the relevant information: A true paradox.

The issue is more complex on a cross-border and European level, as it brings out certain legislative contradictions inherent in European law.
The first concerns the applicability of Framework Decisions 2008/909-829-947 on the transfer of prisoners and on the use of alternative measures at a pan-European level; the second concerns the applicability of the EIO (Directive 2104/41/EU) in transnational investigations.
In both cases, the use in the framework of legal and operational procedures of diversified risk measurement scales, leading to the adoption of very different preventive and safety measures, data collection and transfer, as well as their authorisation, poses problems that are difficult to overcome for European judicial cooperation. In fact, there emerges the risk that pan-European investigations will meet the same end as detainee transfers when it comes to radicals – i.e., that they remain inapplicable due to the inherent contradictions and fragmentation of systems at the national level.

V. CONCLUSIONS

More recently, as part of the EU-funded TAKEDOWN project[lii], we analysed the transformation of judicial policies and practices from a new perspective (S. Bianchi, 2018) [liii] , resuming, with a certain degree of freedom, the sociological theories of Robert Michels (1911), Vilfredo Pareto[liv] and, more recently, Thomas Ferguson[lv]. At the centre of our analysis is the role and circulation of the elites in governance processes, interpreted in the context of the evolution of state and legislative institutions in the post-Westphalian era, according to models of 'global governance' [lvi] , as originally defined by the United Nations [lvii] and then reworked by the Global Administrative Law Project. [lviii]

The synthesis of that work [lix] is that new asymmetric actors have penetrated the 'game of security', which has widened its spectrum of action, profoundly modifying the decision-making rules, procedures and modalities, with a primary impact on the level of rights and, above all, with substantial modification to the constitutional equilibrium and relations of *check and balance* that guarantee the democratic stability of national systems.

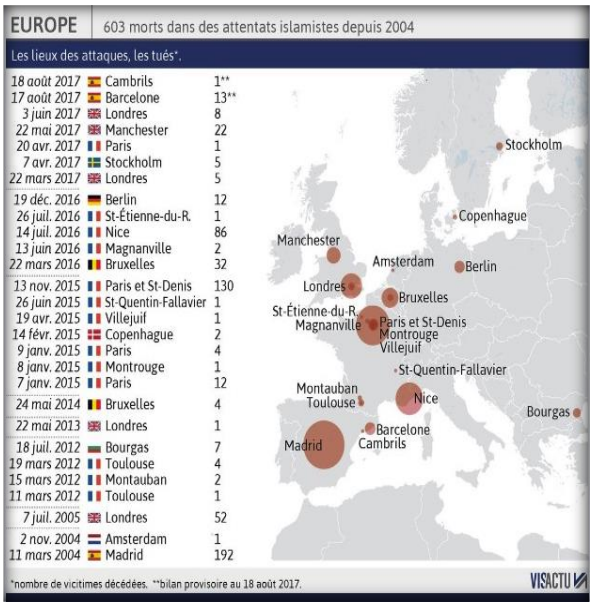
In particular, in the 1970s, Europe also began a process of profound institutional transformation. From a functional and sectoral political aggregation centred on economic and financial cooperation, the EU became a primary actor in matters of security through different and changing processes of judicial cooperation and security. The ways in which this path was realised, between the European Council of Rome on December 1, 1975, when the 'Trevi Group' was established, and the Lisbon Treaty of December 2007, when the EU took on new judicial and security powers, are 'grassroots' ways, as they say, i.e. fragmentary, informal, gradual and based on systems of 'comitology'.

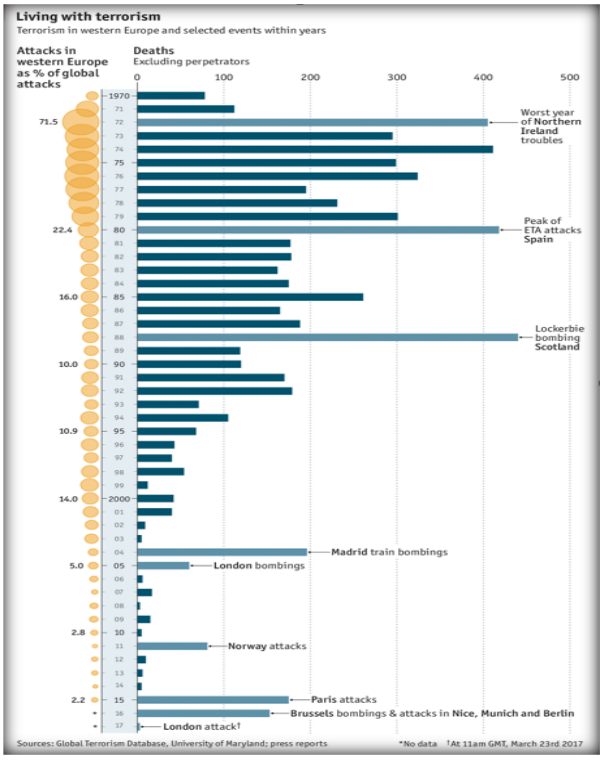
In our historical research (Bianchi S., 2017) we noted how the driving forces of these legislative, political and practical processes will be new bodies called 'Policy-Enabling Techno-Structures'. With their hegemony in these techno-structures and in the resulting comitological decision-making processes, the political elites of the Member States initiate new models of competition, perpetuating the dynamics of the national conflict in new operational theatres on a European and international scale, but with new means and tactics. Only in this sense can we speak today of a new post-Westphalianism[lx], which, in reality, perpetuates (but also dampens) the traditional models of competition.

'Post-Westphalianism' is a scheme of competition between national and supranational powers played through hegemony in international organisations that changes the balance in the member countries, thus in some way violating the heart of Westphalianism, which is represented by the principle of national non-interference (Kissinger H., 2014). From 'bottom-up', the legislative process - which was once the heart of national sovereignty together with defence and security - has become 'top-down'; from national, it becomes supranational. Many laws are no longer made in parliaments and parliamentary commissions, as in the past, when the elected representatives brought the problems and the demands to be addressed from the territory to the centres of political systems. Today, a large percentage of soft and hard 'laws' originate in the supranational committees of experts, entering ordinary or special legislative processes and, from there, descend to member countries with direct (regulation) or 'dual' processes, with varying degrees of modification, in the form of 'directives', 'framework decisions' or the softer 'recommendations' and 'Guidelines'.

There are four main outcomes from these complex post-Westphalian dynamics in terms of security and prevention:

(1) Firstly, security priorities are largely influenced by supranational comitology, with no real connection between national threat analysis and the prioritisation of policies, practices and resources. An example of this perverse mechanism is the overestimation of the phenomenon of radicalisation (and terrorism) in the countries of southern and Eastern Europe, where the phenomenon is statistically not very relevant, compared to organised crime or simple criminality.





(Fig. 17 and 18- Global Terrorism Database, University of Maryland: Data on casualties and attacks 2000-2017)

(2) The second outcome from this post-Westphalian process of new creeping

nationalism is the emergence of new hybrid policing models, halfway between intelligence services and law enforcement agencies (LEAs): the so-called 'intelligence-led police', which, in Europe, will often take the form of prevention police. The slogan of these new policing models is the magical word *'multi-agency'*, which hides a profound de-institutionalisation of procedures, with many risks in terms of rights.

(3) The third product of these processes is the marked de-juridicalisation of prevention processes. European and international security police and agencies (Europol, Interpol, etc.) will assume previously unknown powers, while judges, prosecutors, lawyers and the judicial elite in general will remain marginal. We must have the courage to admit that behind the failure to implement art. 86, par. 4, of the Treaty of Lisbon, which provides for the establishment of a European prosecutor, there is the defeat of the judiciary as a European techno-institutional elite, to the benefit of administrative preventive practices, which today have a free hand in the areas of pre-crime. This area includes many new aspects of contemporary criminology, with the consequent retributive justice, community penalties or the automatism of sentencing.

(4) Finally, the last outcome is so-called public-private cooperation, thanks to which the field of security - once a sector rigidly and jealously guarded by the state apparatus - has been extended to private individuals, from the execution of the sentence (private prisons), surveys (internet governance, for example) to prevention (the Danish Info-Houses and their corresponding models in the Netherlands, UK, USA, etc.).

All these themes play a central role in the context of prevention policies and, more specifically, in the context of 'political' prevention, i.e. 'deradicalisation', whether it deals with problems related to religiously inspired crime phenomena, or touches those issues that today go under the label of 'polarisation'.

The EU, as well as the European Court of Justice and the ECtHR, have assumed undeniable importance in the regulation of these matters.

Therefore, in a post-Brexit age, an independent EU - guarantor of the interests of all Member States, which has its foundation in the rule of law - can no longer postpone the formulation of an organic legislative corpus of individual and patrimonial prevention rules. Given the importance in terms of security and civil rights, we cannot continue to proceed in a fragmented manner, building procedures and policies on the basis of ever-changing cases or - worse still - the pressure of public opinion, the media or conflicts between the powers of the state.

Under Directive 2017/541/EU, the Union and its Member States have significantly expanded the scope of 'terror-related crimes' to all so-called preparatory acts.

Furthermore, article 13 of the Directive has established a new principle of criminal investigation and of the cognitive judgment of the judge:

"*For an offence referred to in Article 4 or Title III to be punishable, it shall not be necessary that a terrorist offence be actually committed, nor shall it be necessary, insofar as the offences referred to in Articles 5 to 10 and 12 are concerned, to establish a link to another specific offence laid down in this Directive*."

The extension of these penal measures in such a flexible form probably allows the introduction of 'factual elements' typical of criminal processes in prevention procedures, similarly to what happened in Italy with the 'Royal Law' on the application of prevention measures towards 'politically dangerous subjects'[lxi]

This element could make all the work, effort and investment in ideological prevention, on which the EU and its agencies concentrate today, as well as a myriad of other projects, superfluous. By bringing the phenomenon of prevention back into an equal relationship with criminal law - with clear procedures derived from the ECtHR's jurisprudence and the 'Stockholm's Roadmap', as well as other European directives such as EIO - European security systems can still balance security and justice, prevention and law.

An organic framework for prevention norms in the form of a directive can start from this by reviewing the errors made up to now in the prevention of radicalisation.

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[i] Bauman Z., Lyon D, *Liquid Surveillance. A conversation*, Cambridge (UK), Polity Press, 2013. Garland D. describes this process in his *The Culture of Control. Crime and Social Order in Contemporary Society*, Chicago, University Press, 2001: "*As recently as 1979, those involved in the business of crime control shared a common set of assumptions about the framework that shaped criminal justice and penal practices. There was a relatively settled, self-conscious, institutional field and the debates and disagreements that occurred operated within well-established boundaries. (…) Today, for better or for worse, we lack any such agreement, any settled culture, or any clear sense of the big picture. Policy development appears highly volatile, with an unprecedent amount of legislative activity, much dissension in the rank of practitioner groups, and a good deal of conflict between experts and politicians* (D.Garland, 2001, pg.4)

[ii] *"It would be going too far to say that criminal justice suffered a 'collapse' or a 'breakdown' in the period after the mid-1970s, but there is no doubt that the institutional arrangements of penal-welfarism and, more generally, of modern criminal justice, were undermined and unsettled in these years." (*D.Garland,2001, pg. 104)

[iii] "*SCP is based upon the idea that crime is a rational decision (SCP theorists will then advance the concept of 'rationality of irrationality' or 'bounded rationality'), designed to weigh the risks and benefits for the offender, and how in the absence of effective controls, offenders will focus on suitable targets. Routine activity theory relies on the occurrence of three key characteristics: a motivated offender, a suitable victim, and a lack of control. Crime Pattern Theory, as developed by Pat and Paul Brantingham, is a complex way of explaining why crimes are committed in certain areas."* (S.Bianchi, 2018, pg. 14)

[iv] *"The events of the late 1980s may have consigned Marx and Engels to the scrapheap of failed ideologies, but their description of capitalist modernity in the Communist Manifesto remains as true today as it ever was.* (D.Garland, 2001, pg. 79)

[v] "*Private prisons, victim impact statements, community notification laws, sentencing guidelines, electronic monitoring, punishment in the community, 'quality of life' policing, restorative justice- these and dozens of other developments lead us into unfamiliar territory where the ideological lines are far from clear and where the old assumptions are an unreliable guide."* (Garland, 2001, pg.4)

[vi] "*Criminological theory is of little help in dealing with crime in the real world because it finds causes in distant factors, such as childrearing practices, genetic makeup, and psychological or social processes. These are mostly beyond the reach of everyday practice, and their combination is extremely complicated for those who want to understand crime, and do something about it." (*Clarke R.V. & Eck J., *Become a Problem Solving Crime Analyst in 55 Steps,* Italian version Università di Trento, 2008, (original version London, Jill Dando Institute of Crime Science, University College, 2003, Fiche 9*)*

[vii] "*Primary crime prevention identifies conditions of the physical and social environment that provide opportunities for precipitate criminal acts. Here the objective of intervention is to alter those conditions so that crimes cannot occur. Secondary crime prevention engages in early identification of potential offenders and seeks to intervene in their lives in such a way that they never commit criminal violations. Tertiary crime prevention deals with actual offenders and involves intervention in their lives in such a fashion that they will not commit further offences."* (Brantingham and Faust, 1976, p.290)

[viii] Moghaddam, M.F., *The Staircase of Terrorism*, February–March 2005 American Psychologist, Vol. 60, No. 2.

[ix] The New York Police Department (NYPD), *Radicalization in the West: The Homegrown Threat* (NYPD, 2007: 21), was the first of these predictive linear models. We used this method in our Bianchi S., Jihadist Radicalisation in European Prisons: Experimental Project for the Identification of Jihadist radicalisation in European Prisons, European Commission - Directorate General Justice Freedom and Security- CRYME JLS/2007/ISEC/551- 2010; M.Sageman proposed a non-linear predictive model in 2007 (*Radicalization of Global Islamist Terrorists,* United States Senate Committee on Homeland Security and Governmental Affairs), which was then adjusted in 2008 *('A Strategy for Fighting International Islamist Terrorists'*, in The Annals of the American Academy of Political and Social Science, 618 (1), pp.223–231). Taarnby developed a model in 8 steps, analysing recruitment pre and post 11/9 (Taarnby, M. (2003) *Profiling Islamic Suicide Terrorists, a research report for the Danish Ministry of Justice.* Danish Ministry of Justice, and (2005) *Recruitment of Islamist Terrorists in Europe: Trends and Perspectives.* Danish Ministry of Justice). In its study on al-Muhagirun Q.Wiktorowicz (*2004) 'Joining the Cause: Al-Muhajiroun and Radical Islam', The Roots of Radical Islam, Department of International Studies, Rhodes College)* identifies four sequential processes. McCauley C. and Moskalenko S. (*2008, 'Mechanisms of Political Radicalization: Pathways Toward Terrorism', Terrorism and Political Violence, 20 (3), pp.415–433)* have identified 12 'mechanisms' of political radicalisation which operate across three levels: that of the individual, the group, and the mass level. A pathway of suicide bombers, articulated in 4 steps, is offered by P.Gills (2007, *'A Multi-Dimensional Approach to Suicide Bombing'*, International Journal of Conflict and Violence, 1 (2), pp.142–159, and 2008, *'Suicide Bomber Pathways Among Islamic Militants'*, Policing, 4 (2), pp.412–422).

[x] GDAP 0384043 dated 14-11-2015; GDAP 0385582 dated 16-11-2015 and GDAP 0248805 dated 20-7-2016.

[xi] Pressman, D. E., & Flockton, J. (2014). *Violent extremist risk assessment development of the VERA-2 and applications in the high security correctional setting*. In A. Silke (Ed.), *Prisons, terrorism and extremism. Critical issues in management, radicalisation, and reform* (pp. 122-143).London: Routledge

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[xiii] Pressman E.D., *Risk Assessment Decisions for Violent Political Extremism. 2009-02.* Ottawa, Her Majesty the Queen in Right of Canada, 2009

[xiv] Ministero di Giustizia-DAP, *Relazione del Ministro sull'Amministrazione della Giustizia. Anno 2017. Inaugurazione dell'anno giudiziario 2018*, pg. *23*

[xv] Manual on Violent Radicalisation – European Commission – JHA, 2008; GDAP 0384043 dd. 14-11-2015; GDAP 0385582 dd. 16-11-2015; GDAP 0248805 dd. 20-7-2016 as integrated with GDAP 0248805 dd. 20-7-2016.

[xvi] Now available in https://www.prisonlegalnews.org/news/publications/radicalization-in-the-west-the-homegrown-threat-nypd-2007pdf/

[xvii] The legal settlement is available in https://www.aclu.org/sites/default/files/field_document/1211._stipulation_of_settlement_and_order_1.7.16_0.pdf

[xviii] *NYPD to Update Guidelines Governing Investigations; Will Resolve Litigation Brought By Civil Rights Groups*, January, 7, 2016, now available in http://nypdnews.com/2016/01/nypd-to-update-guidelines-governing-investigations-will-resolve-litigation-brought-by-civil-rights-groups/

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[xx] FERRAJOLI L.*., Diritto e ragione. Teoria del garantismo penale,* Bari, Laterza, 1997, p. 820

[xxi] UNODC, *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons*, Criminal Justice Handbook Series, New York, 2016, pg. 71. The decision to use models of disengagement instead of deradicalization is consequence of the view of the Human Rights Committee of July 2003, UN Doc. CCPR/C/78/D/878/1999, para. 7.2, based upon the analysis of the sentence *Yong-Joo Kang v. Republic of Korea*.

[xxii] Scarcella A., Page R., Furtado V., *Terrorism, Radicalisation, Extremism, Authoritarianism and Fundamentalism: A Systematic Review of the Quality and Psychometric Properties of Assessments*, PLoS ONE 11(2), 2016; CAGE, *Home Office Blacklisted:The secretive Home Office Units silencing voices of dissent*, London, Cage Advocacy, 2017; CAGE, The Science of Pre-Crime: The secret 'radicalisation' study underpinning prevent, 2016, in https://cage.ngo/publication/the-science-of-pre-crime/

[xxiii] Cartlett J., Birdwell J., King M., *The Edge of Violence: a Radical Approach to Extremism*, London, Demos, 2010

[xxiv] D.P.R. 30 giugno 200, n. 230

[xxv] Ministero della Giustizia-GDAP-0445731-2011, Circolare 3594/6044

[xxvi] European Security Strategy-A secure Europe in a better World, Brussels, 12.12.2003, https://europa.eu/globalstrategy/en/european-security-strategy-secure-europe-better-world; The European Union Counter-Terrorism Strategy, Justice and Home Affairs Council meeting, Brussels 1 December 2005, www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/87257.pdf; Communication from the Commission to the European Parliament and the Council - The EU Internal Security Strategy in Action: Five steps towards a more secure Europe (COM(2010) 673 final of 22.11.2010); Renewed European Union Internal Security Strategy Implementation Paper, Brussels, 14 July 2015, 10854/15; European Council, June 2016, Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the EU Foreign and Security Policy.

[xxvii] https://www.gov.uk/government/publications/prevent-duty-guidance

[xxviii] The first document is GDAP0093040 dd. 13-3-2015, following the initial EU strategy in the same year.

[xxix] "*Essa dipende infatti oltre che da valutazioni soggettive ed oggettive, anche dalle caratteristiche logistiche e di sicurezza dell'istituto, dal personale in dotazione e dalla disponibilità dei mezzi, oltre che dalle informazioni riservate in possesso dei responsabili dell'istituto*". GDAP-0445732-2011, Circolare 3594/6044, pg.17

[xxx] https://www.durham.police.uk/About-Us/Documents/Peels_Principles_Of_Law_Enforcement.pdf

[xxxi] Bigo D, Carrera S. Hernanz N., Jeandesboz J., Parkin J., Ragazzi F., and Scherrer A., Policy Dept. C: Citizen's Rights and Constitutional Affaits (2013), *National Programmes for Mass Surveillance of Personal Data in EU MSs and their compatibility with EU Law, Brussels*, EP Directorate General for Internal Policies, pg.15

[xxxiii] DL 20 febbraio 2017, n. 14, recante "Disposizioni urgenti in materia di sicurezza delle città" (in GU n. 42 del 20 febbraio 2017)

[xxxiv] NOMS HQ, National Probation Service, Managing Terrorist and Extremist Offenders in the Community, AI 13/2014- PI 10/2014

[xxxv] The Role of Religion in Exit Programmes and Religious Counselling in Prison and Probation Settings, Ex Post Paper, RAN Centre of Excellence, 10-11 October 2017, Madrid, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation_awareness_network/about-ran/ran-p-and-p/docs/ran_pp_role_of_religion_in_exit_programmes_10-11_10_2017_en.pdf.

[xxxvi] FERRAJOLI L., *Diritto e ragione. Teoria del garantismo penale*, Bari, 1997, p. 557

[xxxvii] Cass., Sez. V, 13 novembre 2012, O.G., n. 14044, in Foro It., 2013, 10, II, col. 530

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[xli] FRA, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU. Vol. I: Member States' legal framework*, Vienna, 2017

[xlii] *Now in https://theintercept.com/series/the-fbis-secret-rules/*

[xliii] http://graphics.nytimes.com/packages/pdf/nyregion/20070215_nycruling.pdf

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[xlv] *https://www.aclu.org/legal-document/raza-v-city-new-york-order-approving-stipulation-settlement*

[xlvi] *https://www.aclu.org/cases/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program*

[xlvii] Summerfield D., *Mandating Doctors to Attend Counter-Terrorism Workshops in Medically Unethical*, BJ Psych. Bullettin, 2016:1-2; Reed S., *The Prevent Programme: An Ethical Dilemma for Teachers as well as Psychiatrists*, BJ Psych. Bullettin, 2016:1-2

[xlviii] BOSCO PUGLISI G., *Il Procedimento di Prevenzione*, Quaderni del CSM, Frascati 18-20 dicembre 1997 – 12-14 febbraio 1998, pp. 53-72

[xlix] More specifically Directive (UE) 2016/343 dated 9 March 2016, often recalled by rights activists.

[l] Alexandre c. Portogallo, n. 33197/09, § 51, 20 novembre 2012, e Pocius c. Lituania, n. 35601/04, § 43, 6 luglio 2010)

[li] Par. 144. Please see also Mennitto c. Italia [GC], n. 33804/96, § 23, CEDU 2000 X; Micallef c. Malta [GC], n. 17056/06, § 74, CEDU 2009; e Boulois c. Lussemburgo [GC], n. 37575/04, § 90, CEDU 2012)

lii https://www.takedownproject.eu

[liii] "*While Garland analyse the developments from the perspective of the dichotomy welfare/control, we prefer to consider the unbalanced evolution of institutional bodies in the light of the relations between executive powers/judicial powers/civil society or private sector. In our opinion, the real change from the seventieth is represented by the disproportionate role which politician assigned to executive agencies, like intelligence and LEAs, at the expenses of judges and prosecutors; (1) the extension of the security 'field' (as defined by Garland) to sectors, traditionally not considered as part of the security competences; (2) the intrusion of private actors into the security scene. These relevant changes occurred within legal and institutional frameworks which maintained a certain degree of stability, therefore generating contradictions, procedural conflicts, inhomogeneous practices and policies and, last but not least, conflicts among citizens. To summarize, security became a battle field for politicians and media, with all the related consequences on the public opinion. What Garland defines as the new culture of control is not only a phenomenon resulting from the removal of security from the welfarist theories, but rather their merging with the advanced models of Situational Crime Prevention (SCP) in the form of prevention of terrorism.*" (S.Bianchi, 2018, pg. 14)

[liv] Pareto, V., *Trattato di Sociologia Generale,* Firenze, Barbera, 1916.

[lv] *Ferguson T., Golden Rule : The Investment Theory of Party Competition and the Logic of Money-Driven Political Systems, Chicago, University of Chicago Press, 1995*

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[lix] Bianchi S., 2017, *Understand the dimensions of organized crime and terrorist networks for developing effective and efficient security solutions for first-line practitioners and professionals*, in TAKEDOWN EU-Horizon 2020 Research and Innovation Programme under Grant Agreement No 700688, D.2.4 Documentation of the OC/TN response approaches and policies

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