



Ethical Bottlenecks

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Introduction

Although the Netherlands do not have a tradition of terrorism dominating everyday life, the attacks on 9/11 changed the public debate in the Netherlands (Advies Commissie Vreemdelingenzaken: 2003). Great importance has been given to the national and international threat of terrorism, especially after the murder on Theo van Gogh. As a result, counterterrorism measures were introduced to national legislation. In seeking to overcome terrorism, democratic states face enormous challenges. One of the most difficult challenges in devising a legitimate counterterrorism strategy is how to gain security through ethically responsible means. Historically, states yielded some of their liberties in order to guarantee security. A problem arises, however, when one oversteps that which is necessary in order to achieve that which one considers right: social order and harmony or the rule of law?

In countering terrorism the Netherlands takes a so-called broad approach, addressing not only the acts of violence, but also the chain of events that precludes them. The idea is to take action at the earliest possible stage in the causal chain of terrorism, rather than taking repressive measures when a terrorist is already active. This approach is labelled the 'human agent approach' (see also TTSRL deliverable 11). The emphasis of Dutch policy has been put on measures that entail direct contact with people, be they terrorists, recruiters or possible terrorists.

In this paper the legal and ethical implications of the Dutch counterterrorism approach will be analyzed. An analytical framework will be used to determine what constitutes a legitimate standard for legislation. Four indicators are identified which will constitute the bases of the framework. They include determinacy, pedigree (symbolic validation), coherence and adherence (to a normative hierarchy). They will determine whether there is a structural feature in Dutch legal practice that can explain the nature of the difficulties that we will identify in this paper as controversial. The indicators for assessment are derived from Thomas Franck (Franck, 1988). This framework, first of all, addresses the legal base of the measure. Secondly, the level of determinacy will be discussed. It will outline any difficulties with the wording of the legal

provisions. To avoid discretionary use of a legal provision by the state, it is crucial that the terms are not too ambiguous.

An important consideration is that legislation should be formulated while keeping in mind that citizens should enjoy a certain level of protection against the state. As the law however cannot accommodate in all circumstances it is the court that interprets and explains the law in its intention and meaning. The law should therefore be sufficiently clear and provisioning. Thirdly, the pedigree will be examined: addressing the extent to which the provision is in line with what one could expect on the basis of earlier legislation. Fourthly, the level of coherency will be analyzed. Is the legal

1	Legality
2	Determinacy
3	Pedigree
4	Coherence
5	Adherence

measure coherent with other principles stated by the Dutch government? Finally, the measures will be examined on adherence. How do the provisions relate to rules that should be governing them? Adherence is about whether or not a rule or law is in accordance with the rules or laws that lay down the standards that all laws below it in the hierarchy of laws should meet. To illustrate, references will be made to the proportionality, necessity and foreseeability of the measure. These principles need to be ensured and supervised by the judiciary in order to legitimize counterterrorism measures. As can be seen, principles of a constitutional state impose positive obligations on society to take steps to protect the lives and physical integrity of everyone within their jurisdiction. Moreover, those steps must be effective in providing such protection. The core areas where these normative aspects of counterterrorism policy are most likely to complicate decision making, so-called bottlenecks, will be identified and analyzed.

In order to step up the fight against terrorism in the Netherlands and increase the likelihood of prosecution, a number of measures have been included in national legislation or are at the moment of writing, still under consideration. In June 2004 the Dutch government applied a framework to ensure the implementation of counterterrorism law within the Criminal Law. As a consequence of regulations from the EU and UN after the events of 9/11, the Dutch Ministry of Justice drafted a document addressed to the Dutch parliament explaining the necessity of adjusting Dutch criminal law in order to counter international terrorism effectively.

According to the Minister of Justice a supportive legal system is necessary to achieve this. The document sums up the essential amendments to be made with the main argument of preventing terrorist attacks on Dutch soil and to criminalize and discourage the membership of a terrorist organisation. This supportive legal system is to be realized by the *Wet Terroristische Misdrijven* (WTM, Terrorist Offenses Act) (House of Representatives 2003: 2-3, 7-8). Other important amendments to the Dutch Criminal and Administrative Code are the *Wet Bestuurlijke Maatregelen Nationale Veiligheid* (The Bill on Administrative Measures for National Security) and the *Wet verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven* (Bill on expanding possibilities to trace and prosecute terrorist offenses). The selection of issues that will be discussed in this paper have the most impact on the lives of individuals. They are the following: preliminary investigation regarding data retention, procedure of intentional disturbance by the police, *Wet Bestuurlijke Maatregelen Nationale Veiligheid*, financing of terrorism, measures regarding criminal law and blacklisting.

Wet Terroristische Misdrijven

The EU Council Framework Decision on Combating terrorism states clearly that the act of terrorism should be embedded in every member states' legal system. Before this decision, the Dutch Criminal Law did not include terrorism as a specific criminal offense (as outlined in TTSRL deliverable 4). Due to the fact that The Netherlands is a full member of the European Union, the country has to comply with the demands made by EU regulations. This Framework Decision however, as a directive of the EU, leaves it open to the member state on how to implement terrorism and terrorist offenses into their criminal law. It merely sets the minimum and leaves the member state free to create more extensive legislation.

The Dutch government has chosen the following approach. First of all, a new article is added to the Criminal Law, art. 83 WvSr which outlines what constitutes a terrorist offense. The additional article, art. 83a WvSr, outlines the criteria for the requirement of *terrorist objective*, this objective makes a specific offense a terrorist offense. It is important to understand that the *terrorist*

objective relates to the final goal of the offense and not to the motive of the offender (Koopstra/Ende 2007: 28-28).

The motive, in relation to objective, regards the intention of the possible perpetrator. *Motive* considers the early stages of planning a terrorist offense where *objective* refers to the final stages of a terrorist offense, as mentioned the actual goal. The motive of the offender is made punishable under a combination of the already existing articles 80, 83 and 96 WvSr. According to these articles conspiracy to commit a terrorist attack, as an utterance of *terrorist motive*, is considered as an offense against the safety of the state and is therefore punishable (Article 46 and 55 juncto 80, 83 96 (2)(1); 385a and 282a; 4125b and 282 WvSr). Dutch law considers an act as a terrorist conspiracy when two or more legal persons make an agreement to plan a terrorist offense. To consider this conspiracy as a punishable offense is in line with the purpose of the Dutch legislator to prevent terrorist offenses before they happen. Withdrawal on voluntary basis before the offense is carried out, which with regard to normal intent and preparation of criminal offenses leads to impunity, does not apply here. Once the agreement has been made, the legal persons involved are punishable (Koopstra/Ende 2007: 29-31).

In addition to the planning of a terrorist offense, to be a member of a terrorist group is outlined and penalized in article 140a WvSr. This article is closely related to article 140 WvSr, membership of a criminal organisation. However, article 140a WvSr is penalized with higher punishment and leaders or founders are a separate disciplined item.

Finally, the last important modification to the criminal law namely, offenses with a terrorist objective are criminalized with higher and heavier punishment possibilities. Article 114a of the Criminal law clearly states, for example, that the offenses named in articles 108 – 110 WvSr (offenses against Royal Dignity) committed with terrorist objective are penalized with a half double of the standard maximum. Throughout the whole criminal code, including the Law on Nuclear Energy and Law on Weapons and Ammunition, laws are added with the intent to raise punishment when offenses are committed with a terrorist objective (Koopstra/Ende 2007: 16-17).

Several discussion points have come up in the media as well as in the academic world of law as a result of this newly introduced legislation. An important issue that is presented by criminal lawyers Britta Bohler and Victor

Koppe (Olgun: 2006) is the fact that the adjustments to the Criminal Code make it possible to penalize 'future acts'. The mere intention to commit a terrorist act is enough to sentence an imprisonment. The punishment of conspiracy of a terrorist act and the punishment of being a member of a terrorist organization make it possible to judge thoughts and expression of violent radicalism when shared between two or more persons. The law does not state explicitly when expressions of violent radicalism are considered a conspiracy. This could endanger the rights of articles 7, 8 and 9 of the Dutch constitution and articles 10 and 11 ECHR, respectively the freedom of speech, freedom of association and freedom of assembly and protest.

In addition, there has been discussion in the academic world and general media discourse on the definition of terrorism. Several NGOs have commented that the definition as implemented in Dutch national legislation has been, or could be interpreted, as overly broad and not quite explicit (HOM 2005). More specific, the notion of *terrorist objective* is vague and furthermore unspecified. The goals and objectives of a possible terrorist could also be interpreted to fall within the boundaries of sporadic outbursts of violence during civil demonstrations (Amnesty International 2008). Quite a lot of uncertainty exists on the reach of the terroristic objective. It's not quite clear how large the part of the population must be to meet the requirements of art. 83a Sr. Neither is fully obvious who under which circumstances can be regarded as government and which standards must be met to establish the aim to compel. Moreover, the exact meaning of the *political, constitutional, economic or social structures of a country or an international organization* and what determines whether these structures are fundamental (or not) remains uncertain as well. It's exactly such a broad and vague description that poses a risk of the reach of the WTM becoming too broad. Furthermore, TTSRL research has also pointed out (see Right Wing Case study) that the introduction of this sort of definition would call for an equal classification of right wing violence as terrorism also. This notion could arguably be equally applicable to the activities of animal rights activism as contemporary examples in the Netherlands, where several business projects stopped as a result of the actions shown (Amnesty International 2008). Yet the Dutch government currently holds that actions of these sorts of groups, as well as left wing activists, are simply signs of political activism (2008: 1). This could appear to make the

notion discriminative and counterproductive to clear, consistent and equal application of the rule of law to all citizens equally.

As can be seen, the newly introduced legislation to step up to the fight against terrorism deserves attention. It can be asserted that the legitimate character of the WTM leaves room for discussion on several points. Though no problems exist with regard to the coherency and legality, as acts from parliament imply to be legal, an problematic issue concerns the wording. This issue is contained within the indicator of determinacy, which is low in this respect. The reach of the terrorist objective becomes quite extensive. Although vagueness could permit flexible response to improvements in public security, a lack of clarity could undermine legitimate ruling and eventually infringe on the assertion that civil liberties will be protected. Furthermore, the legitimate character is undermined by the low level of adherence. As noted above, the measure might infringe on Dutch and European law. Mainly because the application of foreseeability is uncertain. It can be argued that thoughts might become criminalized in Dutch criminal law leaving an ambiguous position for the whole of the community.

1.	The legal basis of the measure can be found in Dutch Criminal Law and stems from the EU Council decision on Combating terrorism. Dutch criminal law, expanded by the WTM, nowadays includes criteria to determine to what extent an offense constitutes a terrorist offense, Article 83 (a) WvSr.
2.	A few remarks must be made concerning the level of determinacy as the wording of the measure is problematic. And important imperfection of the measure concerns the definition of terrorism as implemented in the related legislation. Studying the measure learns that the reach of the WTM is unclear as for instance the notion of terrorist objective remains unspecified. The level of determinacy is therefore low.
3.	Dutch Criminal Law did not include terrorist offenses before the implementation of the WTM. As the basis of earlier legalization is absent no adequate assessment can be given on the level of pedigree.
4.	The expansion of Dutch Criminal Law to include terrorist offenses is new and the legal measure appears to be in line with other guiding principles on national security policy. As the measure entails for instance the

	criminalization of conspiracy, it falls within the ambit of the strategy to prevent terrorist crimes and therefore creates a coherent pattern in counterterrorism policy.
5.	The level of adherence is low. A vital feature in this respect concerns the amount of foreseeability. As the state has not been able to frame explicitly when expressions of violent radicalization are considered conspiracy it becomes possible to criminalize thought. This could endanger the rights of articles 7, 8 and 9 of the Dutch constitution and articles 10 and 11 ECHR, respectively the freedom of speech, freedom of association and freedom of assembly and protest.

Measures regarding Criminal Process Law

Hereunder we will outline the amendments made in Criminal Process law regarding the prosecution and the process of prosecution of terrorists, including the reasoning for these changes. In general, the origin of these modifications are the same as the amendments that were discussed earlier: the EU Framework Decision of June 2002.

According to Article 67 *Wetboek strafvordering* (WvSv) a suspect of an offense can be kept in temporary custody in order to keep the suspect from hindering the investigation process for no longer than fourteen days. Prolongation of custody is only possible when in these fourteen days, new proof has been found by the investigative body to further incriminate the suspect. Temporary custody is only possible when 'serious evidence to the offense' exists. Since February 2007 this article contains a fourth paragraph which states that 'serious evidence to the offense' is unnecessary when concerning a suspect of terrorism. Merely an 'indication to a terrorist offense' is sufficient to impose custody. The wording is somewhat troublesome however as the term 'indication to a terrorist offense' is left unspecified, as specification could lead to problems identifying the sort of indication (Koopstra & Ende 2007: 84-86).¹

The main reason to lower the barrier on temporary custody concerning terrorism is to provide the criminal investigator with more time to provide

¹ Hereafter, indication is referred to as the absence of a reasonable suspicion inhibiting solid facts and evidence.

evidence against the person supposedly involved in terrorist activity at a very early stage. This timely preventive measure is facilitated by the fact that serious evidence is not needed to start an investigation on a person with regard to terrorist activity (Koopstra & Ende 2007: 86).

When enough evidence is provided in the criminal investigation imprisonment of a suspect is possible on the basis of article 66 lid 3 WvSv for a maximum of 3 months awaiting trial. Since February 2007, this article contains a part which is focused only on terrorist offenses and enclosed the extension of this period to a maximum of two years. Including the fact that during these two years, process documents can be refrained from the suspect and the defence. The underlying argument made by the legislator is similar to the one regarding custody. Namely that the investigation on terrorism is complicated and lengthy as it nowadays often concerns the use of (foreign) intelligence and that public disposal of process documents can endanger the prosecution process of possible other suspects (Koopstra & Ende 2007: 86-87).

In 2006 the Dutch legislator implemented the law on 'secured witnesses' (*Wet Aafgeschermdde Getuigen*) into Dutch Criminal Process Law (Staatsblad 2006 461). This law amended several articles, the most important change was made to article 226(g and further) WvSv. This article ensures legally that witnesses in a criminal trial regarding national security (like terrorism) can be heard without the habitual information on the witness being made available for all involved in the trial (prosecutor, suspect, defence and judge). The modification of this article further certifies that officials of Dutch (military) intelligence services can be heard as witnesses. Anterior to this amendment, intelligence officers were not to play any part in the prosecution process. In essence, these designated functions were meant to prevent the blending of functions and the accompanying competences. Blending of competences would obscure the prosecution process and the judicial control - as a part of a constitutional state - over it. With the amendment it becomes possible for the ministry of justice to use (incriminating) information in the prosecution, obtained through secret intelligence operations and from anonymous sources. Laying bare the ambiguity between an open and judicially controlled prosecution and the importance of vital information obtained by intelligence services on terrorist activity. A note must be made that information obtained through intelligence activity must be 'hard' evidence. Which will be decided upon by an impartial judge (Dutch Lower Chambers 2004).

The reason for implementing this law given by the Dutch government is to make information obtained by intelligence accessible for prosecution in criminal cases regarding national security. An important argument stated by the Ministry of Justice is that international crime and terrorism are investigated through national and international intelligence services. Thus the evidence obtained by intelligence is deemed to be of vital importance to the trial and should therefore be made available in a secured system (Dutch Lower Chambers 29 743, 2004: 2-4). In complementation of the amendment to article 226 WvSv, article 187d lid 4 WvSv makes it possible to keep information on hearing methods plus the facts of the hearing confidential (Ibid: 7).

The above described modifications to Criminal Process Law have led to public debate. Politicians, legal academics/experts, human rights organizations and even judges (who normally stay absent from any political discussion due to their impartiality) have expressed their view on the addressed issues.

With regard to custody of a suspect of terrorism without 'serious evidence to the offense' (art. 67 WvSv), it should be noted that imprisonment (and temporary custody for that matter) is the most grave means of coercion a government possesses. It should therefore normally be based upon serious evidence. The European Convention of Human Rights (ECHR) contains stringent protection against imprisonment in Article 5 ECHR. The current Article 67 WvSr according to Van Kempen is not entirely in violation of this article, when it can be undisputedly proven that the deprivation of freedom is of grave importance to the investigation (van Kempen: 2).²

However, in combination with more extensive investigative authorities he argues that it is not attentive to lower the barrier for imprisonment as this would damage the right of citizens in general to be protected against governmental power. In other words, the government has not proved the necessity of the new Article 67 lid 3 WvSv. Senator Professor Rosenthal has expressed almost exactly the opposite: that measures like lower barriers on imprisonment are justified as the government needs to guarantee freedom and safety for its citizens (NRC Handelsblad 2005). He argues that without the full guarantee on the right to freedom, none of the other rights otherwise so prized and possessed can be guaranteed.

Human rights organisation HOM has expressed the concern that the concept of 'indication to a terrorist crime', is vague and not specified enough to guarantee legal security as this damages the predictability of the law (which is a principal of a constitutional state). The concept, according to HOM, enables discretionary use of the law and arbitrariness. (HOM 2005: 13-14).

Professor Prakken³ expresses mainly a concern about the combination of the several amendments to Criminal Process Law. She states that the extension of the practise of imprisonment (art. 67 lid 3 WvSrv) in addition to more authority and techniques for the Dutch prosecutors (art. 132a WvSv) along with the ability to withhold information on witnesses (226g-m WvSv) and the right to withhold process documents from the defensive party plus the vagueness of several legal concepts could infringe on the foundation of the constitutional state and the protection of its citizens. (NRC Handelsblad 2005).

Article 66(3) WvSr, which enables the refraining of process documents to the defensive party for a maximum of two years, has lead to the comment of several parties that this obscures the task of the judge to inspect the investigative process. This can lead to unlawful prosecution and could violate the principle of fair trial (art. 6 ECHR) (van Kempen: 4, HOM 2005: 14). Van Kempen further argues that the necessity of this law is not argued sufficiently by the government, especially as the term of a maximum of two years is unfounded (van Kempen: 3).

On the extended possibilities of the prosecution in terrorist criminal cases as laid down in articles 132a WvSv and in 226 WvSv, Judge G. Corstens of the Dutch Supreme Court has expressed the concern that the requirements to start criminal investigation and prosecution are too low. Especially as suspicious behaviour and 'indication' have become the basis to start criminal investigation. (van Kempen: 7-8, 10, HOM 2005: 12, NRC 2005).

Furthermore, the possibility to hear protected and anonymous witnesses and intelligence officials (art. 226 WvSv) has raised the issue of legitimacy. Principally, as the information obtained through these kind of methods cannot be checked and verified by the judge, thereby diminishing the legality of the trial. This could be estimated as a violation of article 6 ECHR, the right to a fair trial.

² Prof mr. P.H.P.H.M.C. van Kempen holds a chair on Human Rights at the Radboud University of Nijmegen

However, the Dutch government refutes this assessment on the ground that the hearing is done by an independent legal body to prevent arbitrariness. Another argument stated by the Ministry of Justice regards the judge, who evaluates if the presented information is sufficient to proceed to conviction and maintain legitimacy (Dutch Lower Chambers 2005: 8).

HOM argues that information obtained by intelligence is often obtained through exchange or cooperation with foreign intelligence services. And although the Netherlands have a prohibition of torture (on ground of article 11 of the Constitution) and a clean slate in its practice on this topic, other countries might not. It can therefore not be guaranteed that information used in Dutch trials gathered through the hearing of intelligence officials is not obtained by torture (Fokkens: 2004).

It can be concluded that the amendments made to the criminal process law lead to discussion, even before they were enacted. As the legality is not disputed here, the discussion centres on several of Frank's indicators on legitimacy. As it turns out, the level of determinacy is low due to unspecified terms, such as 'an indication of terrorist offense'. Solid facts and the reasonable suspicion are absent and might bring about unclear investigative behaviour by governmental officials. In addition, concern is articulated on the way the discussed legislation coheres with principles of human rights and the international legal order. Though the Netherlands tends to respect these rules they however appear to be subordinated by the counterterrorism strategy and the need for public security as they infringe upon several fundamental constitutional rights. For instance, legislation makes it possible to obscure sources of evidence and the means in which the evidence is obtained (NRvR letter to Dutch Senate 2006), diminishing the right to fair and transparent trial. Furthermore, the principle of necessity is not proven and therefore absent. This might be troublesome and undermine the legitimate character of the newly introduced legislation. The impact this measure might have on the symbolic worth of the legal system should be kept in mind as the right to freedom and the right to be protected against the government is essential for the perceived feelings of safety of a community as a whole. Though the legislation appears to be to quite legitimate and not actually breach human rights law, but infringing

³ Professor mr E. Prakken is a member of the faculty of law, and specialised in Criminal Process

upon, it is superficially effective and some troublesome effects, as can be concluded, are still present.

1.	The legal basis of the measure can be found in Dutch Criminal Law and stems from the EU Council Decision on Combating terrorism of June 2002.
2.	The wording of the measures regarding Criminal Process Law is not specified enough. As became apparent, mere 'indications to a terrorist offense' are required. What is meant by a terrorist offense remains absent. This could lead to problems identifying the sort of indication that is required. The level of determinacy is therefore low.
3.	Dutch Criminal Process Law did not include terrorist offenses before the implementation of the WTM. Some modifications, however, relate to regulations which have already been part of Criminal Process Law. Earlier legislation made it - for obvious reasons - possible to detain perceived suspects of crime. The expanded possibilities to detain a person can to a certain extent be seen as a continuation of earlier legislation, though they were less far reaching as they are now for terrorist offenses. With regard to the accessibility of intelligence reports in court it should be noted that before these reports were not allowed in court (Public Prosecutor Service). This is not in line with what one could expect on the basis of previous legislation; diminishing the level pedigree.
4.	Amendments made to Criminal Process Law are coherent with guiding principles on national counter terrorism policy. The level of coherence does not constitute a problem.
5.	With regard to custody of perceived suspects it should be noted that stringent preconditions must be met, as stated by Article 5 ECHR. As mentioned, wording is problematic leaving open possible infringements upon these preconditions, and on the legal security and, perhaps evenly important, the predictability of the law. In addition, as legislation makes it possible to obscure sources of evidence and the means in which the evidence is obtained this might diminish the right to fair and transparent trial; article 6 ECHR. Meaning that foreseeability is infringed upon. Furthermore, as the government has not been able to prove the necessity of

the aforementioned modifications, the measures also touch upon the principle of necessity. By and large, the level of adherence is low.

Preliminary investigation regarding data retention

Since 9/11 an enormous increase in the demand for reliable information for effective counterterrorism can be witnessed in many national policies. Implicitly, this has been made clear in the *Wet Terroristische Misdrijven* which amends the Dutch Criminal Code in order to create an expansion of the possibilities to investigate and claim personal data. This expansion is seen as a crucial facet in combating terrorism. The retention of data could increase the knowledge on the whereabouts of potential terrorists. At the earliest possible stage action could be taken without resorting to repressive measures. This data retention is subsequently materialized in different regulations, such as the Counterterrorism Information Box (*CT Infobox*). The CT Infobox collates, compares and evaluates information on individuals who are involved in terrorism. It is a joint project of the AIVD (General Intelligence and a Security Service), the MIVD (Military Intelligence and Security Service), the National Police Services Agency, the IND (Immigration and Naturalization Service), the investigation service of the Tax and Customs Administration (FIOD/ECD) and the Public Prosecution Service.

The analysis of the legality and the legitimacy of this measure is summarized in the following table:

1.	Preliminary investigation entails the comparison and processing of collected personal data. The Dutch Penal Code, expanded by the <i>Wet Terroristische Misdrijven</i> , distinguishes between several special investigative jurisdictions. The legal basis for this criterion can be identified in Dutch criminal law, and stems from EU directive 2002/58/EC . The investigation into personal data concerning the retention of telecommunication data can be found in the <i>Wetboek van Strafvordering (WvSv)</i> : art. 126hh and art. 126ii (WvSv). This
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	measure can be issued by the public prosecutor.
2.	The criterion to implement the measure is to a certain extent ambiguous. The measure is vaguely formulated on a crucial point: "Those who, according to the measure, become susceptible for investigative purposes are being looked into based on an 'indication' instead of a 'reasonable suspicion'." Where the latter is primarily based on relative solid facts and circumstances, the former is not. To a certain extent ambiguity exists on the implementation of mere indications as a criterion to investigate. It should be noted that this regulation creates a very wide range of implementation possibilities as an indication does not require an actual link between the investigated persons and the crime (Advies orde van advocaten). It then becomes possible to investigate persons who are not directly linked, and possibly are innocent, to be investigated.
3.	The Netherlands has had laws in the past that allowed the investigation of personal data. The new measures to prevent terrorist attacks, which entered into force on 2 August 2005, do therefore not break a tradition and can be seen in the light of former legal policy. These new measures should be seen in the light the continual strive for the protection of national security and its citizens. The post 9/11 shows a renewed interest in public safety and it fits therefore in former security policy.
4.	The extension of jurisdiction to investigate and/or to retain data seems to be coherent with other Dutch counter terrorism measures. The emphasis in Dutch counter terrorism strategy is to prevent rather than to repress. In this respect, the comparison and processing of collected personal data do cohere with the 'human agent approach'. However, the extent to which these measures are consistent with one another also depends to what extent other constitutional principles are met. This will become perceptible in the discussion on the bottlenecks.
5.	The level of adherence regarding this measure is low. This measure touches upon the right to respect ones private life as laid down in Article 8 of the European Convention on Human Rights (ECHR). Restrictions to this right must be in accordance with the law and are bound by constitutional

principles of foresee-ability, necessity and proportionality. It remains unclear whether the regulation actually meets the test. The extent to which the regulation infringes on article 8 of the ECHR depends to a large extent on the level of determinacy of the regulation. As mentioned, this level is low and the measure inhibits an ambivalent criterion to act. It's exactly such a broad and vague description that poses a risk of the reach of the regulation becoming too broad. It should be noted however that the infringement remains within the boundaries of article 8. No evidence can be put forward that proves a legally grounded violation of article 8 of the ECHR, yet.

The fact that adherence is low means that some frictions exist between national and international accepted laws. Although citizens demand from their government absolute protection these new laws appear to be infringing upon the privacy of individual citizens (Boutellier: 2003). Here privacy can be seen as that part of one's life that is invisible to the state, and that the state gathers no more information than is absolutely necessary. In this section a discussion will take place concerning the use of the regulation, and it will become susceptible whether ethical bottlenecks do exist.

With the enactment of the *Wet Terroristische Misdrijven* there need only be 'indications' that a terrorist attack is being prepared, whereas before there was need for 'reasonable' suspicion. The 'indications' criterion, on the basis of which the government can claim personal data, has been vaguely formulated. This can become problematic when concrete suspicion is absent. A very wide range of possible implications of the measure stands free. The fact that an 'indication' is sufficient creates a very wide range for the use of this restrictive power and could be incompatible with the requirement of foreseeability (HOM: 2005, p.9). As this measure touches upon the private life of an individual or a group it could also affect the life's of innocent individuals. Security gained from the retention of data might be *illusory*, as it is likely that traffic data that is associated to one individual may actually be linked to activity taken by another, or by a process that is unrelated to the activities of that user (State Watch 2005). Individuals can therefore be linked to potential suspects without genuinely being related to terroristic activities. As a consequence, many innocent citizens can get incorporated into the investigation, causing additional damage to

the community. These investigations may lure societal tensions as reputations are being destroyed, by violating the presumption of innocence, when it becomes public that certain branches or groups are being monitored. Aside from the expansion of the categories of data that may be collected, the Act provides for the possibility to search places and objects in order to collect data. Previously, the authority to search was withheld for the purpose of confiscation.

Another considerable disadvantage of the measure has to do with filing complaints to the admission in the data collection process (CBP: 2004). Those being monitored can only file a complaint post facto. This is however not very useful, as their personal data has already been retained at that stage. Moreover, the police is not obligated to inform those being monitored by a notification order (notificatieplicht). Notifying a suspect can in some circumstances be suspended in the interest of the investigation. It then becomes difficult for those involved to clear their names. Citizens are not informed on the whereabouts of their own personal data and can therefore not proceed legally since they have no knowledge of the practice.

In addition, all of the information that surfaces in the context of a terrorist investigation, which in the Netherlands is reserved for the General Intelligence and Security Service (AIVD), will be stored as mentioned in the Police Register laws. As the jurisdiction of the police to investigate has been enlarged, the police can use the stored information, so called goal-diverted behavior, to acts which do not relate to terrorism. Meaning that the information may be used to investigate other (ordinary) criminal activities (Richtlijn bewaarplicht 2002/58/EC). Moreover, as it is the case in precaution politics terrorist acts, and their inherent threat, seem to be catastrophic. And given the volume of data to be retained and required to prevent, particularly Internet data, it is unlikely that an appropriate analysis of the data will be at all possible (Alvaro, 2005: 7).

By and large, the measure to retain data for preliminary investigative purposes is prone to be discussed at length. A general impression of the measure as mentioned above reveals some difficulties regarding its legitimate character. It can be asserted that the level of determinacy and adherence is low. The findings reveal that the measure contains to a certain extent ambiguous legal descriptions, reducing the level of foreseeability. Difficulties might arise when the discretionary power of the government is used to investigate private information and result in disproportionate means for national security goals. Although the

measure appears to be legitimate, as it for instance does not actually violate article 8 of the ECHR, it remains to be seen whether boundaries on the regulation can be set. Setting boundaries to the extent the implementation of it will become effective enough will be problematic as the analysis of data becomes hard without paying attention to the principle of proportionality.

Wet Bestuurlijke Maatregelen Nationale Veiligheid

A key feature in preventative stage of the Dutch counterterrorism policies and legislation is to limit the movement of a person. The *Wet Bestuurlijke Maatregelen Nationale Veiligheid* is one of those legal measures that provides such a method, so called control orders. Article 2 enables the Minister of Interior to limit the freedom of movement. These measures include:

- A prohibition to be present in or in the vicinity of one or more specific objects or in (a) specified area(s) of the Netherlands;
- A prohibition to be near one or more persons;
- An obligation to report to the local or regional police at a certain moment as specified by the Home Secretary.

According to article 3(1), the measure imposed under this legislative act will have duration of three months at most and will be renewable for a maximum period of two years. A possibility for the targeted person to get the measures lifted, if he proves that there has been a change in the circumstances, is incorporated into these control orders.

1.	On the basis of the ' <i>Bestuurlijke Maatregelen Nationale Veiligheid</i> ', adopted on 20 March 2007, the Home Secretary is empowered by Article 2(1) of this draft to limit the movement of a certain individual in order to prevent terrorist activities. The regulation has its legal base in administrative law. This has been done deliberately because it concerns situations which can not be prosecuted by criminal law, but in which suspects can be linked to terrorist activities and pose a threat to national security. Former legislation did not fully provide the capacity to act in advance. As administrative law inhibits public order and security it makes acting in advance possible even when there is not yet a crime that can be prosecuted, hence, the expansion
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	and complementation of jurisdiction of criminal law (Dutch Lower Chambers 2005*).
2.	The criterion on which the government can act is related to the behaviour by which a person can be connected to terrorist activities or the preparation of it. There should be a reasonable suspicion, seen in the nature and context of the activities, before it can be implemented. It should be noted that these measures take place on behalf of a certain pattern of the suspected, not just a single fact of the suspected individual. This should make an objective verifiability possible. However, vaguely described implementation criteria, as for instance the interest of national security, make it difficult to clearly define what sort of activities constitute a terrorist activity. The level of determinacy is therefore low.
3.	In the past, Dutch authorities have limited the freedom of South Moluccans to enter The Hague or to demonstrate against President Suharto of Indonesia. The South-Malaccan community, in their struggle for independence, constituted a threat to Dutch society and were therefore limited in their movement for a certain moment in time (1969-1970). These new legal measures relate to the same guiding principles as former attempts to limit the freedom of individuals.
4.	Measures to limit the freedom of individuals in the public domain are not entirely new to Dutch counterterrorist policy. In the interest of national security freedom of individuals could be limited at an earlier stage in the chain of events. These new measures can in a way be seen as a continuation of earlier counter terror policy. However, these kinds of measures and especially the alleged suspicions against which these measures are adopted, traditionally fall with criminal law and do not fall within the scope of administrative law. Though the expansion of jurisdiction in administrative law, as mentioned above, is new, its guiding principles remain the same and therefore create a coherent pattern.
5.	Stringent preconditions must be met before this measure can be implemented. As can be read in the documents of the (TK 30 566), these preconditions are supposed to fall in line with the margins of human rights obligations. Some reservations, however, are at place as these measures

	can lead to the arbitrary treatment of citizens. The control order <i>might</i> infringe upon several rights inter alia the right to privacy, freedom of expression and association and the right to a fair trial (art. 6, 8, 10, 11 ECHR). Meaning that adherence is low.
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These control orders to prevent terrorist attacks have been a topic of debate since they first appeared on stage. There are two important features that deserve attention: the jurisdiction of administrative versus criminal law and (the right to fair trial) question of arbitrary treatment and the right to a fair trial

An interesting topic of discussion concerns the potential of arbitrary treatment of citizens by investigative agencies. As mentioned, the implementation of control orders concerns situations in which there is not yet a crime to be punished. Stringent preconditions should therefore be met, as mentioned by *De raad voor de rechtspraak* (TK 30 566). This council formulated a few concerns regarding the implementation of the measure. Their main concern regarded the vague norms of the control orders, giving it, the extended jurisdiction, an almost disproportionate reach. These concerns stem from the low level of determinacy. The criminal classification of terrorist activity and those leading up these activities are vaguely formulated. To be more illustrative of the formulation: the measure speaks of 'in terms of facts, circumstances that relate to terrorist activities...' This formulation is not specified enough. Although reference is made to a certain pattern in behavior of the individual that should precede the implication of the measure, it remains indistinctly described. It does not become sufficiently clear what is meant by a 'terrorist activity' (Dutch Advisory on the Judiciary (NVvR) 2005). Though a certain level of playing field should be given to decision makers to interpret suspicious situations, as a strict interpretation cannot be maintained due to the large variety of different 'activities', caution is at place.

Moreover, there is critique on this measure from the field (AIVD, OM, Police). For instance, if a person is not allowed to be in the vicinity of a specific figure, how will he know where he cannot go that day? Does he receive a message every morning with this person's schedule? That seems to be very strange and potentially a bigger risk because the measure should be effective in its results, without becoming disproportionate as a means to its goal.

In addition, another concern relates to the amount of information available to the ruling of court judges. The execution of the measure is primarily based on intelligence reports of the AIVD. The defending party in court is not allowed to look into these reports (Ministry of Interior). This appears to be a breach with Article 6 (3)(b) of the ECHR. The right to a fair trial is a norm of human rights law designed to protect individuals from the unlawful and arbitrary curtailment. It is also guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” ...when one of their rights is at stake. It should be noted however that it does not necessarily have to be in a criminal context. Although this article does not constitute an absolute right certain principles should be maintained, ECHR case law shows that secrecy of documents is judged by court on its validity. Judges should be able to determine whether the evidence can be accepted and used regarding the level of secrecy. It can therefore be concluded that a controlling mechanism does exist to determine the secrecy of government documents (Campbell and Fell v UK).⁴ In the Netherlands, however, the public prosecutor cannot be forced to present its evidence when it concerns, for instance, Article 32 *Wetboek van Strafvordering*.

To conclude, the implementation of this measure can become problematic for several reasons. Control orders in some way conflict with the assertion in the strategy that civil liberties and human rights will be protected. Though the strengthening of the legal system against threats of the nations is needed, the gaining of apparent security may come at the price of a decrease in freedom. We may assume the political process to be transparent and fair but actually appear to be infringing on human rights conventions. As a consequence, the legitimate character of the measure might be undermined. One of the most problematic issues discussed concerns the amount of foreseeability and proportionality. As the level of determinacy and adherence is low; chances of arbitrary treatment are present and the right to a fair trial might be infringed upon.

Procedure of intentional disturbance by the police

⁴ EHRM (Campbell and Fell v VK) 28 June 1984

As mentioned, in order to counter terrorism at the earliest possible stage, Dutch counterterrorism measures are aimed at prevention rather than on repressive means. In this struggle the police has been given a rather large amount of freedom to disturb an individual during ordinary daily activities. Potential terrorists are monitored and the intentional disturbance consists of making house calls, inviting the person to the police station, approaching acquaintances (family, friends) of the person involved, visiting public areas where that person is present, spreading cards in the neighborhood saying that reporting to the police can be done anonymously, and more. In short, all kinds of explicitly public actions the police can engage in without hindering the individual but to still make explicitly clear to the person that he is being watched and followed. This practice is used in order to prevent suspects from taking part in terrorism or related activities thereof. An important feature that should not be overlooked easily concerns the fact that this measure is several times used against persons who were not yet convicted. It cannot be resembled with an ordinary criminal investigation (TK 2005-2006, 29754, nr. 6). Meaning that the judiciary is not involved in advance and that the worth of it can only be assessed post facto. This leaves the implementation of the measure up to the discretionary power of government officials.

1.	The procedure to disturb a potential terrorist in its private life is not similar to criminal investigation and is constitutionally grounded on the public order task of the police, article 2 o-f the Dutch Police Act 1993 juncto article 83 WvSr, and it is not based on penal law. The decision to intervene must be made by the mayor of the specific community, who has jurisdiction to act in these circumstances according to article 12 Police law (politiewet) 1993 and 172 Community Law (gemeentewet).
2.	The level of determinacy is low. Due to the fact that the circumstances in which to intervene are vaguely formulated. These articles solely determine the task and divides the powers between the Mayor and the police force. It remains unclear under what strict conditions this measure can be imposed and what exactly the person involved has to engage in, in order to impose the measure. In this respect, the law is not sufficiently clear and the reach of the measure remains unspecified. Case law is an important regulator in this field. Judges have to a certain extent been able to limit the reach more

	accurately (COT 2007 p. 113-114).
3.	In the past, Dutch government has had specific legal policy to monitor a specific individual. The starting point on which the government decided to monitor a specific individual is based on the police law of 1993. The police has been using 'surveillance 'as a way to monitor football hooligans and career criminals (Raad van hoofdcommissarissen 2003). The new, and more extensive, measure can therefore be seen as a continuation of former policy.
4.	Disturbing a person shows similarities with observation. Dutch law provides for the investigating power of observation but only after an investigation magistrate grants authorization to do so. This is an important procedural guarantee which appears to be absent for the disturbing measures. Although this measure is coherent with the strategy to prevent, it is not in line with the assertion that citizens will never be subjected to arbitrary treatment. With the qualification of the Mayor of the city having to approve the measure personally, based on information of the CT-infobox and on recommendation of the public prosecutor, the chance of arbitrary use of this measure is balanced. Though it should be noted that the level of transparency is low as mechanisms to control actions are not always sufficiently present.
5.	The level of adherence regarding this measure is low. The most important right that is being infringed on is Article 8 of the European Convention on Human Rights and Article 10 of Dutch Constitution Law (<i>Grondwet</i>). Article 8(2) of the ECHR states that infringement of this right is only allowed when it is in accordance with the conditions set in law, serves a legitimate goal and is necessary for the interest of a democratic society: national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. As can be seen, a certain amount of proportionality should be present. Case law shows that the proportionality standard is not always met (Court of Amsterdam 2006, 389 r.o. 15).

One of the most controversial topics of debate concerns the legal base, and with it the jurisdiction of the Mayor, to implement the measure to disturb. The Mayor is responsible for public order by Article 172 of the *Gemeentewet*. This article is used to legally justify the measure of disturbance. Besides the fact that the level of determinacy is low, as explained above, court ruling shows that Article 172 has been overstretched and that no (prior?) legal support can be found in community policy.⁵ In addition, as this measure concerns the public domain it does not concern the private domain of for example houses. Infringement in private buildings, for instance, is not a part of the measures' jurisdiction. An important feature that goes with breaches of privacy is the level of consistency. A systematic interference in private lives can be regarded as a serious breach of privacy with the consequence that the *politiewet* can no longer be applied. Moreover, to bring structural and intentional fear in personal lives of citizens is punishable by article 258 Sr. It remains to be seen where the line can be drawn. High court ruling follows article 126g *Wetboek Strafvordering* stating that consistency contains "a certain timeframe intensity and frequency".⁶

Since the enactment of this new legislation two cases⁷ have been brought before court. In the *Muslima* case, the judge(s) ruled that the measure of disturbance had to be ended because the basis of the circumstances to intervene were grounded on religious practice of the suspects and, consequently, the measures taken did not prove to be sufficiently necessary and proportionate to its goal. The court rulings showed that government decision making was focused on subjective interpretation of the behaviour or suspect concerning things like faith, clothes and mosques instead of concrete criminal facts or suspicion of criminal behaviour.⁸ It appeared that the measure was not implemented correctly. In the other case, concerning an alleged member of the Hofstadgroep⁹, the Court of Amsterdam ruled however that the measures were legitimized as the interest of national security was clearly at stake. Although Dutch policy has a history in monitoring and surveying individuals, the measure to disturb suspected individuals has not been crystallized to its full extent, yet. The level of legality

⁵ LJN: AU7314, Rechtbank Amsterdam, 328230 / KG 05-2159 AB

⁶ HR 1 juni 2004, NJ 2004, 354, LJN AO7066.

⁷ Court of Am 1 December 2005, AB 2006, 284 comments Brouwer; Court of Amsterdam 9 March 2006, AB 2006, 389 met comments Brouwer.

⁸ LJN: AU7314, Rechtbank Amsterdam, 328230 / KG 05-2159 AB

⁹ The Hofstadgroep is a home grown terror network in the Netherlands of radical Islamist.

remains ambivalent. As mentioned, an important point of discussion concerns the legal base of the measure. The reach of administrative law and the Mayors jurisdiction in this respect is not sufficiently clear. This brings about an uncertain legitimate character of the measure. Measures which interfere in personal life's with such intensity should inhibit clear and careful legal referencing. The level of determinacy is therefore low. In addition, as case law shows this measure might infringe on article 8 ECHR when the preconditions for implementing are not met. It should be noted that it is the implementation of the measure and not the measure itself that is not in accordance with the hierarchy of laws.

Measures regarding the financing of terrorism

Bill Integrity Financing Terrorism

Since 9/11 the Netherlands are trying to create barriers against the financing of terrorists and terrorist organisations. This has been explicitly outlined in the Bill Integrity Financial Sector and counterterrorism, drafted on the 16th of November 2001 by the Dutch Government (Dutch ministry of Finance, 2001). This document states that effective counterterrorism policy can only be effective when adequate legislation exists, especially on the financing of terrorism. The elimination of the financial sources of terrorist organisations is seen as a key factor in the battle against international terrorism, as it supposedly diminishes terrorist activity and thereby the threat of an actual terrorist attack on Dutch soil. Furthermore, tracking and countering financial currents to terrorists is deemed to lead to crucial information to benefit the complete counterterrorism action plan (including the pursuing of potential terrorists). (Dutch Minister of Finance 2001: 2-3).

One of the most extensive measures proposed by the above mentioned Bill is expansion of the Law Reporting Unusual Transactions (Wet Melding Ongebruikelijke Transacties) to tax collectors office, trust funds, pension funds and indemnity insurance companies. The Bill also outlines new and more intensive cooperation with the Financial Action Task Force (FATF) (a European Union wide organisation). In addition, the Bill proposes to modernise the legislation on which a minister of the Dutch government can freeze assets of (potential) terrorists and terrorist benefactors and on which a Dutch minister can

execute other counterterrorism measures (Sanctiewet 1977). (Dutch Ministry of Finance 2001: 59-64). As the latter measure overlays the intent of other, related measures, we will discuss its legitimacy hereunder.

On basis of article 2 of the Sanctiewet of 1977 (Law on Sanction, freely translated), a Dutch minister can create a legally binding regulation for all Dutch citizens (Algemene Maatregel van Bestuur/AmvB) in order to suffice to an international treaty or to a decree or recommendation by an international organisation (Sanctiewet art. 2: 1977). Thus in combination with the UN-resolution 1373 and its translation into European legislation, as well as the lists of UN resolution 1267 and following and its translation into European legislation the Dutch minister of Finance can create an ordinance to freeze the financial assets of an individual allegedly involved with terrorism, so-called blacklisting.

Blacklisting can be seen as lying in the legal space of exception. The legal space of exception can be identified as the grey area, between on the one hand punishing acts in advance, based on mere indications and the punishing based on a reasonable doubt and solid facts post facto on the other hand, created by the blacklisting procedure. In this legal space of exception persons are turned into suspects for their possible future actions, for actually supporting terrorists. Studying the regulation learns that the intention of an individual or a group becomes criminalised, and not the act itself (De Goede: p13). Here we can see that Penal Law has been changed due to perceived terrorist threats since 9/11. Criminalising intention actually contradicts Dutch Penal law. Herein articles 47 & 48 clearly outlines the criteria for a criminal offender, in which intent is not included. This has been for crimes with a terrorist objective only. Punishment of suspects however, which have not yet been proven guilty of any crime, by blacklisting and its consequences, raises the question of legitimacy with regard to human rights which will be discussed in the following section in relation to the freezing of assets.

As mentioned, the Dutch Minister can create an ordinance to put suspected individuals on a blacklist. If deemed necessary the regulation provides the possibility to freeze the assets of those involved. This regulation inhibits some controversial issues. According to a recent rapport from the Dutch National Court of Audit - which mainly criticises international procedures - these sanction lists are not sufficiently transparent to freeze assets on basis of these lists. Especially as information on possible suspects is often divided among several

organizations between which exchange of this information is often ad hoc (Algemene Rekenkamer 2008: 44-46). And as mentioned, the freezing of assets is deemed to violate the legal and humanitarian concept of *presumptio innocente*. Moreover, once listed on a blacklist, it becomes very difficult to prove yourselves innocent. Hence when the legal possibility to prove your innocence and get yourselves de-listed is made difficult, thereby undoing the sanctions, this could be deemed infringing on the principle of proportionality and undermining legitimacy. It then becomes extremely difficult to live within modern society with no access to liquidities whatsoever for obvious reasons, as basal issues like purchasing food or paying rent become impossible. In addition, when it becomes public someone has been taken up for retention it might cause additional damage as a person's name or reputation may be damaged.

1	On basis of article two of the Sanctiewet of 1977 (Law on Sanction, freely translated), a Dutch minister could create a legally binding regulation for all Dutch citizens (so-called <i>Algemene Maatregel van Bestuur/AmvB</i>) in order to suffice to an international treaty or to a decree or recommendation by an institute of international law (Sanctiewet art. 2: 1977). Thus in combination with the UN-resolution 1373 and recommendations by the FATC the Dutch minister of Finance can create an ordinance to freeze a suspect of terrorism finance assets.
2	The wording of the regulation is not specified enough. The main problem is concentrated on the vagueness. The potential vagueness with regards to this measure concentrates on the meaning of what actually constitutes a terrorist activity and when exactly someone is funding this activity. The reach of the regulation is, as consequence, quite extensive. The level of determinacy is therefore low.
3	The measure is in line with former legal policy. The regulations fits into the strand to fight against terrorism, as the Dutch guiding principles to combat terrorism in society are underlined by the tradition to prevent rather than to repress. In the past, the Dutch government has been able to freeze assets of individuals. In combination with UN-resolution 1373, the Minister of Finance

	could freeze assets based on the Sanctiewet 1977.
4	Since 9/11 the Netherlands are trying to create barriers against the financing of terrorists and terrorists organisations. This has been explicitly outlined in the Bill Integrity Financial Sector and counterterrorism, drafted on the 16th of November 2001 by the Dutch Government (Dutch ministry of Finance, 2001). This document states that an effective counterterrorism policy can only be effective when adequate legislation exists, especially on the financing of terrorism. The elimination of the financial resources of terrorist organisations is seen as a key factor in the battle against international terrorism, as it complicates terrorist activity and thereby decreases the threat of an actual terrorist attack on Dutch soil. Furthermore, tracking financial currents to terrorists is deemed to lead to crucial information to benefit the complete counterterrorism action plan (including the pursuing of potential terrorists) (Dutch Minister of Finance 2001: 2-3). Meaning that the level of coherence is high.
5	As can be seen adherence is low. An important shortfall of the regulation concerns the inability to make clear when someone can be put on a blacklist, and when someone's assets may be frozen. This relates to the principle of foreseeability which appears to be absent. In addition, as noted above, the presumed innocence is infringed upon. Moreover, though de-listing procedures do exist, it is hard for suspects to prove themselves innocent and get themselves de-listed. This conflicts with proportionality and foreseeability. Furthermore, intent is made punishable, which is in contradiction with Dutch Penal Law articles 47 & 48. These articles outline the criteria for a criminal offense not including 'intent'. This is once more, in conflict with the principle of foreseeability.

Conclusion

In the wake of 9/11 and especially since the murder of Van Gogh, Dutch counterterrorism policy is growing increasingly assertive. Dutch government officials recognized that proactive measures were imperative to combat terrorism

adequately and from its very inception. Judicial, legislative, law enforcement and intelligence reforms have been introduced in order to better tackle the threat of terrorism. As can be seen, measures are no longer reactive by nature as they used to be in the past. A growing responsiveness in the fields of pre-emption and anticipation of terrorism can be discovered when analyzing the newly introduced counterterrorist legislation.

These reforms have been met with some intense and vehement discussion as well as criticism from various actors, including the Dutch intelligence community itself. Much of this debate focuses on the limitation of civil liberties through counterterrorist legislation, as appears to be common in most liberal democracies. The application of the indicators of Frank put forward for assessing legal policy shows that problematic issues regarding legitimate rule of law and the proposed counterterrorist legislation exist in The Netherlands. An important feature for ensuring a legitimate rule of law is the predictability of the legal system. The ability of law to portray the penalized behavior clearly and transparently, in the sense that one can understand the purpose of the text by reading it, appears to lead to a number of problematic issues when looking at counterterrorist legislation. This issue is contained within the indicator of determinacy. In most of the measures discussed, the level of determinacy was quite low. The recurring use of phrases like 'indication', 'reasonable suspicion', and 'a danger to national security' provides discretionary power (without another form of control) to the authority. Although vagueness could permit a flexible response to improvements in public security, a lack of clarity could undermine legitimate ruling and eventually conflict with the assertion that civil liberties will be protected. The issue is exacerbated by the overly broad definition of terrorism as contained within the law. This makes the lowering of the bars that set the standard for which a person can be followed, interrupted, detained or questioned even vaguer and more illegitimate from a legal perspective.

The fact that the principle of 'national security' is mentioned and used in a vague or non-descriptive manner appears to be inherent to the concept. It is important to note that this notion of 'national security' is and should be considered a legitimate reason for governments to call for certain far-reaching and not necessarily legitimate measures in times of peace. Yet, 'national security' when used as a reason for governmental action should always be open to control. This should be done, even in a restricted setting, by other government

authorities, such as the judiciary, in order to adequately observe the principles of checks and balances to maintain ethical responsible means to the perceived goals.

If anything, what should be considered more ethically questionable is not so much the introduction and use of the term 'national security' in the context of counterterrorism, but the limiting of the rights of the defendant to such an extent as happened in the Netherlands. Whereas it would be quite strange if the notion of 'national security' would never be mentioned in the context of counterterrorism, to be able to hold a defendant for almost two years on the basis of evidence the defendant nor his defense can ever see or examine, seems to violate all principles of right to a fair trial. Furthermore, even during the trial the defendant cannot examine the evidence – and again, nor can his defense – with the exception of questioning the anonymous witnesses that can be provided by the intelligence services. This is also a violation of the right to a fair trial. Additionally, as has already been mentioned, several of the measures such as the *verstoren* (intentionally disturbing), blacklisting, deportation and many other measures with far-reaching implications for the individual in question, suffer from faulty or inadequate procedures to seek personal compensation or question the practice in general. As with the data retention practice, it should also be noted that these measures can only be questioned after they have already been executed and even then – in the case of data retention – the individual concerned can never check whether the government has really followed up on the ruling. Nor can anyone else on behalf of the individual, as would be normal in cases when governmental action is judged on its illegitimate, illegal or simply incorrect character. A national ombudsman that would be responsible for checking up on national counterterrorism practice, as hinted at in several EU directives, has not been implemented yet.

Lastly, what should be noted despite all the questions raised above and severe criticism as voiced by parliamentarians, human rights experts as well as legal practitioners and academic experts, the Dutch government really does take the broad approach. In addition to all the measures mentioned above, the Dutch government also makes a concerted effort to address societal tensions between different ethnic and/or religious communities. Reaching out explicitly and facilitating the integration and emancipation of the Muslim community through special initiatives like the creation of representative councils, special conferences,

parties, etc. Also, as the government voices its absolute commitment to the principles of human rights and all the other international legal obligations that follow from membership of various organizations. As such, Dutch counterterrorism policies and legislation still by and large appear to be quite legitimate as well as superficially effective, even though when analyzed from a legal and more detailed perspective they may raise controversial issues regarding societal order and the rule of law.

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