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LAW REFORM AS A RESPONSE TO TERRORIST THREATS

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LAW REFORM AS A RESPONSE TO TERRORIST THREATS

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Key words: law reform, anti-terrorism, individual autonomy, rule of law, democracy.

Abstract

This article sets out guidelines for law reform processes to account for the challenges that terrorism may pose to the rule of law and democracy. As a response to terrorism, an increase in reforms of laws and administrative measures has been seen across jurisdictions. The substantive offences themselves have been criticized, but as of yet, the theoretical issues that may arise during processes of reform have not been considered. However, law reform as a direct and immediate response to such events may curtail the rule of law and democracy: there may be inadequate time for debate in the legislature regarding proposed measures or the debate may be centered on arguments based on fear and hate towards perpetrators. This article argues that this may curtail individual autonomy of citizens and truncate democracy. It sets out guidelines for how processes of law reform may treat people as capable of self-moderation.

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1. Introduction

One of the dangers of terrorism for democratic rule of law is that it may lead to processes of law reform that, in fact, undermine the rule of law and democracy. Law reform in this sense is the process of examining existing laws, and supporting and implementing changes in a legal system.² Lawmakers may be furious about a terrorist attack, or they may be driven by public fear or agony, and they may pass laws based on those feelings. For example, as detailed in this article, new offences and procedures were created in the Netherlands as a response to the 9/11 attacks in the United States in 2001 and the murder of Dutch film director Theo van Gogh in 2004.

The impact of anti-terrorism measures on civil liberty has been widely discussed. Such studies often point out that such measures disregard the right to individual liberty and the autonomy of targeted individuals.³ However, the

² Such supposed improvements of a legal system can be done by, e.g., changing existing laws, or creating and codifying new laws.

³ See, among other sources, Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy* 9 (3), 2015, pp. 521–535; Owen Fiss, "The War Against Terrorism and the Rule of Law", *Oxford Journal of Legal Studies* 26(2), 2006, pp. 235–256; Manuel Cancio Meliá, "Terrorism and Criminal Law: The Dream of Prevention, the Nightmare of the Rule of Law", *New Criminal Law Review: An International and Interdisciplinary Journal*, 14 (1) 2011, pp. 108-122; many human rights lawyers argued that anti-terrorism measures may infringe on individual rights guaranteed in the European legal order, see, e.g. Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* (Oxford: Oxford University Press, 2009); Iain Cameron, "European Union Anti-Terrorist Blacklisting," *Human Rights Law Review* 3(2) (2004): pp. 225–256; Ronald Dworkin has argued that the risks of anti-terrorism measures to civil liberties impose particular harms on Muslims. Ronald Dworkin, "The Threat to Patriotism", *New York Review of Books*, February 28, 2002, available at: <http://www.nybooks.com/articles/2002/02/28/the-threat-to-patriotism/>.

impact of processes of law reforms on society has received less attention in the literature.⁴ As argued in this article, the process of law reforms in response to terrorist threats may curtail individual autonomy of citizens and truncate the rule of law and democracy. The creation and adaptation of administrative and criminal measures will be addressed, because processes of reform of both types of measures may similarly affect individual autonomy of citizens.

This article aims to contribute to the identification of general principles that should underlie the process of law reform as a response to terrorist threats and may be useful for the evaluation of law reform in response to other shocking events as well, including threats posed by pedophiles and people traffickers.⁵ Most examples in this article come from The Netherlands. The descriptions of these cases serve as illustrations for a wider argument on how processes of law reform may treat people as autonomous agents. The argument is presented in the following steps: First, the article describes an ideal rule of law democracy in order to illustrate how fighting terrorism may take place in such a society. Second, it details recent examples of law reform as a response to terrorist

Controversially, Bruce Ackerman, among other scholars, has argued for implementing a temporary state of emergency, in which governments are able to convict individuals—even innocent persons—to reassure the public that the situation is under control after a terrorist attack. See “The Emergency Constitution”, 113 *Yale Law Journal* 1029, 1037 (2004). For an opposing view see e.g. Kent Roach, Gary Trotter, “Miscarriages of Justice in the War Against Terrorism”, *Penn State Law Review* 109 (4) 2005, pp. 967–1041 (Roach argues that past anti-terrorism laws have not made societies safer, but they have contributed to miscarriages of justice.)

⁴ Kent Roach addressed the dangers of the criminal law solution to terrorism in Canada, see “The Criminal Law and Terrorism”, in: Victor V. Ramraj, Michael Hor, Kent Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005.

⁵ Alternatives to law reform, including war and targeted killing, show the advantages of responding with measures within a rule of law framework.

threats and contrasts these approaches with an historical example of a less repressive means for fighting terrorism: the response of the Dutch government against Moluccan terrorism in the 1970s. Third, it examines why law reform as a response to terrorist threats can raise particular concerns with respect to the rule of law and democracy. The argument is illustrated with several cases of hasty legislative responses to terrorist attacks and of laws that were debated in poor circumstances. The article describes these cases in order to illustrate that such responses to terrorism can raise particular concerns with respect to the rule of law and democracy. The last section of this article recommends guidelines for law reform.

2.1 Law reform in a rule of law society

Terrorism usually targets innocent civilians, causing fear and harm. In turn, governments feel pressure to act quickly, often by creating new laws and sanctions. For example, Security Council Resolution 1373, adopted a few days after the September 11, 2001 attacks in the United States, required states to criminalize support for or participation in terrorism. The Netherlands, among other countries, created new anti-terrorism measures and extended the powers of the state to prevent terrorism. The murder of Theo van Gogh in 2004 further urged the Dutch government to reform the law. Mohammed Bouyeri, a Dutch-Moroccan Muslim, murdered Van Gogh after Van Gogh produced a controversial film on the position of women in Islam with critic of Islam Ayaan Hirsi Ali.

Law reforms in response to terrorism vary from state to state, making it difficult to address all legal developments here. The focus of this article is on the creation and reform of new criminal offences and administrative sanctions in the wake of the 9/11 attacks, using the case of the Netherlands to illustrate how states have adapted laws and created new measures as a response to terrorist attacks. This article compares criminal law reform and enactment of new administrative sanctions with more restrained techniques that have been used

in the past to counter terrorism in the Netherlands. Less repressive measures, which may lie outside the framework of law reform, include initiating possibilities for dialogue and improving living conditions.

My aim is to illustrate how law reform practices can be described in terms of an archetypical rule of law by comparing law reform with less repressive means of fighting terrorism. There is a vast literature on the rule of law, which will not be addressed here.⁶ Instead, this article seeks to give a short description of an ideal rule of law society that respects individual autonomy. This description is useful for heuristic purposes. Broadly construed, this ideal society is 1) ruled *by* law and 2) democratic. This section provides more details on both aspects. It illustrates how actual responses to terrorism can be described in terms of this archetype.

An ideal rule of law society allows for the creation of offences and sanctions as long as they are suitably constrained by the demands of respect for individual autonomy. This approach is based on a view of human beings as having the ability to make plans and live accordingly. With the recognition that the government can infringe upon the lives of individuals, this approach requires constraints on governmental power.

In short, government officials are required to act in accordance with preexisting law, which enables individuals to predict when they will be subjected to coercion by the government and allows them to avoid prosecution by not acting against the law. Individuals in a rule of law society are not subject to

⁶ The aim of this article is not to set out a full understanding of the rule of law or democracy. Rather, it applies accepted understandings of these notions to cases of law reform with regard to terrorism. See, for an overview of the literature on the rule of law, Jeremy Waldron, "The Rule of Law", *Stanford Encyclopedia of Philosophy*, (First published: June 22, 2016), available online at: <https://plato.stanford.edu/entries/rule-of-law/>. See, on prevention of terrorism and the rule of law, also Andrew Ashworth and Lucia Zedner, *Preventive Justice*, Oxford University Press: 2014, primarily, Chapter 8.

the arbitrary will or judgment of a coercive government, but only to the law. They are free to do whatever the laws do not forbid them to do. This right to “legal liberty” prohibits governments from punishing citizens in the absence of a preexisting law. Therefore, law reform in such a society is ideally prospective. Prospective laws require individuals to obey rules that have been enacted in the past. If someone commits a crime, the process of punishment should be subject to prospectively enacted principles, procedures, and safeguards that come into effect the moment the crime is committed until the sentence is fulfilled. In other words, enacting *ex post facto* laws should not be allowed. Most jurisdictions comply with this requirement and have banned *ex post facto* laws in their constitutions or criminal codes.⁷

Moreover, the content of law should be directed at punishment for past wrongdoing rather than the prevention of future wrongdoing. This is not to deny the preventive aspects of the criminal law. The prevention of harm is one of the state’s central tasks, but its mechanisms for preventing harm should be restrained by appropriate safeguards that respect individuals’ rights. The aim of setting out such safeguards should be to enable individuals to avoid punishment, and should provide for sentencing only individuals who intend or knowingly risk the prohibited consequences of certain types of conduct.⁸

⁷ See e.g. Article 1 of the Dutch Criminal Code (stating that no act is punishable without a pre-existing law, and that in the case an act was punishable but the law was changed after the criminal act the most favorable (to the suspect) of the two laws will apply; In the United States, the Congress and States are prohibited from passing *ex post facto* laws by clause 3 of Article I, Section 9 and clause 1, Article 1, section 10 of the United States Constitution.

⁸ See for such safeguards and principles, e.g., Andrew Ashworth and Lucia Zedner, *Preventive Justice*, Oxford University Press: 2014, p. 95-118.

Additionally, the law should be predictable and clear in order to contribute to the reliability of the law. A citizen should not be terrified of punishment, but rather know what the law requires. This enables her to live an autonomous life.⁹

I view democracy as a feature of rule of law societies.¹⁰ In an ideal rule of law society, the law limits the government and a democratic decision procedure determines the content of the law. The aim of this procedure is that citizens live under the laws of their own making.¹¹ This is the notion of “political liberty” as introduced in Ancient Greece and addressed by Rousseau, Kant, and Habermas, among other political philosophers. Ideally, law in such societies secures individual autonomy and intends to give individuals a voice. Therefore, law reforms in societies that act in accordance with the rule of law are ideally based on democratic debate and involve research into public opinion.

The conditions of such a democratic debate should be subject to certain ground rules for citizens to be able to understand themselves as the authors of the laws and to exercise their “public autonomy” through elected representatives. Preferably, democratic debate provides participants with equal opportunities to communicate in an undistorted way. The purpose of this open forum is to give citizens a voice through elected representatives, and, ultimately, the aim is to secure their autonomy.

However, after terrorist attacks, which cause fear and harm among people, government officials are pressed for time and they are often driven by public

⁹ See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 34.

¹⁰ As Tamanaha argues, this understanding of the rule of law may be “inherently tied to liberal societies.” Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 137.

¹¹ See also, Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 100–101 where he argues that democracy and formal legality offer no assurances that morally good laws will be adopted.

emotions. As section 3 explains, in the aftermath of an attack, government officials are inclined towards discussing anti-terrorism measures in poor conditions of debate, to create hasty measures and tend to treat individual autonomy merely as another good to be put in balance alongside security. Autonomy in this sense is a fundamental norm, which is only respected by criminal punishment when people have had a fair chance to avoid punishment. It should not be confused with individual liberty, which can and should be restrained by the government for security reasons. Security is an important good that the government is tasked with providing by protecting individuals from each other, and from outsiders. To provide security, the government has to develop structures and institutions capable of responding to and minimizing threats to human security.¹² It has to restrain people in their liberty in various ways, but autonomy should not be traded off for security. Generally, in rule of law societies government officials aim to protect individual autonomy by upholding general standards of the rule of law and democracy. However, as explained below, processes of law reform in response to terrorist attacks may challenge these standards.

2.2 New laws and less repressive ways to fight terrorism

In the 1970s, the Netherlands faced terrorism by Moluccans who were descendants of the Royal Netherlands East Indies Army transported to the Netherlands after the end of the occupation of the Dutch East Indies. The

¹² Liora Lazarus, "Mapping the Right to Security", in: Ben Goold and Liora Lazarus (eds.), *Security and Human Rights*, Hart Publishing, Oxford: 2007, p. 329 (Lazarus distinguishes between the legal right to security and the political aspiration of the state to provide security).

government of the Netherlands had promised them an independent republic in return for assisting the Netherlands but it did not keep its promise. This group killed politicians and took Dutch civilians hostage in their struggle for an independent Republic of the South Moluccas. The terrorist attacks in the 1970s were extremely serious—people felt threatened, and the number of people targeted was very high (higher than the number of people targeted by Islamic terrorists in the Netherlands today). Yet, the Dutch government responded with less severe measures than it has responded to current terrorist events.¹³

I briefly describe this historical case as an alternative to current practices of combatting terrorism through law reform. This is not to say that combatting terrorism with the creation of offences and sanctions is necessarily flawed. Current terrorist threats may be more difficult to control than threats posed by, for example, the Moluccans in the past, and responding to current threats may indeed require the creation of new measures, including criminal offences. However, understanding this historical response to terrorism enables us to analyze a broader response to future threats and may help to develop an approach that is in line with the values of the rule of law and democracy.¹⁴

¹³ For more information on Moluccan terrorism in the Netherlands see Ronald Janse, “Fighting terrorism in the Netherlands: a historical perspective,” *Utrecht Law Review* 1(1), 2005, 55–67; Martijn Rasser, “The Dutch Response to Moluccan Terrorism, 1970–1978”, *Studies in Conflict & Terrorism*, 28 (6), pp. 481-492.

¹⁴ This article does not give a full account of anti-terrorist measures in the Netherlands, but instead compares current measures with Dutch responses in the 1970s. The aim is to analyse this historical case in comparison with approaches to terrorism in the light of an ideal rule of law democracy. For an overview of terrorist attacks and anti-terrorism measures in the Netherlands see Alex P. Schmid, “Countering Terrorism in the Netherlands,” *Terrorism & Political Violence*, 4(4), 1992, pp. 77-109. In Dutch: E.R. Muller, “De geschiedenis van terrorisme in Nederland,” in: E.R. Muller, U. Rosenthal, R. de Wijk (eds.), *Terrorisme: Studies over terrorisme en terrorismebestrijding*, Kluwer, 2008, 217–242.

The Dutch government's primary aim in the 1970s was to start a dialogue with the perpetrators of terrorism, rather than enact new (criminal) laws and prosecute them.¹⁵ In one of the cases in which Moluccan terrorists were prosecuted and tried before a Dutch criminal court, the court urged the Dutch government to start a dialogue with the Moluccan community because it believed that this could help to solve some of the underlying problems that were causing the terrorist acts, rather than relying on punishment alone.¹⁶ Therefore, the Dutch government attempted to address the social and cultural problems of the Moluccan community in the Netherlands through dialogue. In 1976, for example, a panel was established consisting of Moluccans. This panel made recommendations for addressing the social and cultural problems of the Moluccans in Dutch society. In turn, the Dutch Government attempted to improve this group's living conditions, primarily by providing housing. These attempts and other efforts were not always successful, but illustrate an alternative to responding (solely) with law reform.

The Dutch government switched to a more repressive response to terrorism after a Palestinian group called Black September attacked the 1972 Olympic games in Munich.¹⁷ The government established special units, consisting of sharpshooters from the army, the marines and the police force, aimed at

¹⁵ Proceedings Second Chamber of The Netherlands 1972–1973, appendix 12000, nr. 11; See, Ralph Barker, *Not here, but in another place: A True Story of Captors and Hostages*, St. Martin's, 1980, p. 132; in Dutch: M. Moerings, "Terrorisme: een serieus probleem voor Nederland?" *Tijdschrift voor Criminologie*, 1989, 358–378.

¹⁶ See Rechtbank Assen, 26 March 1976. The court held that punishment does not solve the underlying conflict. ["het opleggen van straf niet kan dienen ter oplossing van het conflict dat aan het begaan van de gepleegde strafbare feiten ten grondslag ligt"] See, also, Ronald Janse, "Fighting terrorism in the Netherlands: a historical perspective," *Utrecht Law Review* 1(1), 2005, 55–67, p. 62.

¹⁷ Proceedings Second Chamber of The Netherlands 1972–1973, appendix 12000, nr. 11.

responding quickly in the case of a terrorist attack. In 1977, these units played a role in the violent ending of a hijacked train and an occupation of a school by Moluccans, among other incidents. Furthermore, the Dutch government established units to gather information in order to prevent terrorist activities.¹⁸ The government also gave instructions to conduct actions against Moluccans that did not conform to existing laws. For example, it illegally ordered the police to conduct search operations in Moluccan houses and to close off part of The Hague for Moluccans during a state visit from Indonesian President Suharto.¹⁹ However, the government did not enact special criminal laws or administrative measures to fight terrorism.²⁰ A letter from the Prime Minister stated that “the actual fight against acts of terror is a form of combating crime and as such the task of the police.”²¹ Most Dutch legal scholars and practitioners argued at that time that terrorist actions already constituted crimes under the existing penal code and preferred to respond with measures that were already available,

¹⁸ The intelligence units did not function well and were taken by surprise by Moluccan actions. See, in Dutch, Joke Cuperus, Rineke Klijnsma, *Onderhandelen of bestormen: Het beleid van de Nederlandse overheid inzake terroristische akties* (Polemologisch Instituut Groningen 1980), p. 21.

¹⁹ Ronald Janse, “Fighting terrorism in the Netherlands: a historical perspective,” *Utrecht Law Review* 1(1), 2005, 55–67, p. 65.

²⁰ In 1973, the Prime Minister sent a letter to parliament concerning terrorism measures, but there is no mention of creating criminal laws. See Proceedings Second Chamber of The Netherlands 1972–1973, appendix 12000, nr. 11; see, also, for an overview of the measures: Proceedings Second Chamber of The Netherlands 1978–1979, appendix 15300, nr. 36.

²¹ Quoted in Martijn Rasser, “The Dutch Response to Moluccan Terrorism, 1970–1978”, *Studies in Conflict & Terrorism*, 28 (6), pp. 481-492, p. 487 (Date of the letter: 22 February 1973).

including criminal laws concerning the unlawful possession of arms and unlawful deprivation of liberty.²²

Since September 11, 2001, country after country became increasingly focused on guaranteeing that their justice systems are prepared to deal with terrorist threats. Shocked by the attacks in the United States, the Netherlands, among many other countries, adopted antiterrorism policies that followed the Security Council Resolution 1373 framework.²³ Only three weeks after the attacks, the Dutch government announced a plan to fight terrorism with new measures and laws that significantly extended governmental powers with new criminal offences, and measures with respect to phone tapping, border control, and financial transactions.²⁴ The murder of film director Van Gogh by an Islamic fundamentalist in November 2004 also strengthened the Dutch government's response to terrorism with new measures and laws.

²² G.E. Mulder, "Bestrafing, bestrijding, berechting; Enkele gedachten over de bestrijding van het terrorisme door middel van het strafrecht," in: L.G.H. Gunther Moor, *Terreur; Criminologische en juridische aspecten van terrorisme*, Ars Aequi Libri, 1977, 85–110; P.W. van der Kruis, "Kanttekeningen bij een requisitoir", *Delikt en Delinkwent*, 1976, 459–462. See for an opposing view, e.g. J.J. Abspoel, "Requisitoir in de zaak van het Openbaar Ministerie tegen J.R. en zes anderen," *Delikt en Delinkwent* 6, 1976, 303–337.

²³ See, Kim Lane Scheppele, "The International Standardization of National Security Law", *Journal of National Security Law and Policy*, 4, 2010, pp. 437-453 (Scheppele holds that the implementation of UN initiatives by different countries since 2000 has resulted in an increasing standardization of domestic law, which is, as she argues, an extraordinary example in international law.)

²⁴ Proceedings Second Chamber of The Netherlands 2001–2002, 27 925, nr. 10, p. 8–13.

The Dutch criminal law system, as many other criminal law systems, had not previously considered terrorism to be a criminal offence.²⁵ Previously, Dutch criminal lawyers took other criminal offences as a basis for addressing terrorist acts and built on provisions that defined criminal offences, such as—in the case of the Moluccans—murder, unlawful possession of arms, and unlawful deprivation of liberty.

However, in August 2004, the Dutch government enacted a terrorist offences act, which defines terrorist crimes, e.g. recruitment for what has been called the jihad. This Act also increases the penalties for crimes committed with terrorist intent.²⁶ At the end of 2004, a legislative proposal was submitted to extend governmental powers regarding the investigation and prosecution of terrorist offences. This led to a focus on preventing terrorism, which goes hand in hand with less procedural safeguards for individuals suspected of terrorism.²⁷

Moreover, the Dutch government enacted special administrative measures to fight terrorism, including prohibitions on entering particular public areas. This has enabled authorities to subject individuals to sanctions without having to wait for that person to actually commit a crime.

3. Why law reform raises concerns

It is often assumed that law reform and, primarily, criminal law reform, is necessary to protect rule of law societies against terrorist threats. However,

²⁵ See e.g. on terrorism legislation in Finland, Kimmo Nuotio, “Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law”, *Journal of International Criminal Justice* 4, 2006, 998–1016.

²⁶ Terrorist Offences Act [Wet Terroristische Misdrijven], June 24, 2004, Dutch Official Journal [Staatsblad] 2004, 290, entered into force on August 10, 2004.

²⁷ See, Proceedings Second Chamber of The Netherlands 2003-2004, nr. 33, p. 3338; Proceedings Second Chamber of The Netherlands 2004-2005, p. 29754.

prioritizing the security of new measures over individual autonomy may mask the impact of such measures on society.²⁸ The reforms of laws and sanctions and the enactment of new measures discussed in this article may affect the rule of law and democracy. This section discusses the impact of law reform on both interests.

One of the aims of the rule of law is to ensure that individuals living under it are not subject to the arbitrary will of others. In this sense, the rule of law is supposed to be contrasted with the rule of man. The “law is reason, man is passion.”²⁹ This is not to say that passion plays no role in the creation of law. Law also aims to bring on board the important political constituencies and this feature of law is full of passion, greed and self-interest. But the trick is not to let those features become too dominant. A negative constraint on the law in a rule of law society is that individuals are supposed to be “shielded from the familiar human weaknesses of bias, passion, prejudice, error, ignorance, cupidity, or whim [...]” of fellow citizens, monarchs, and judges.³⁰ However, anti-terrorism legislation shows that law can be made passionate in the heat of the moment as people pass laws based on feelings of fear, anger, and hate. This may have an impact on the ethical mission of the rule of law to shield individuals from human weaknesses.

²⁸ Security, as understood here, is a good that the government is tasked with providing by protecting individuals from each other. To reach this aim, the government should develop structures and institutions capable of responding to and minimizing threats. See on how the demands of security might be reconciled with the desire to protect individual rights after 9/11, Ben Goold and Liora Lazarus (eds.), *Security and Human Rights*, Hart Publishing, Oxford: 2007.

²⁹ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 122.

³⁰ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 122.

Anxiety and fear in society may press governments to respond quickly after terrorist events. Governments may rush legislation through to respond to those feelings, to relieve a kind of social pressure, to fill perceived loopholes, and to give the impression of action. However, quickly reaching for the criminal law may truncate democracy because there may be inadequate time to debate the proposed anti-terrorism measures in the legislature and in society in an appropriate way.³¹ A striking historical example of legislation that was considered very briefly in the legislature is the British Prevention of Terrorism Act 1974. This was a temporary Act but it set a course for anti-terrorism measures. In this case, the debate in the legislature was driven by public anger caused by the Birmingham pub bombings that resulted in 21 deaths and 180 injured people. There was only seventeen hours of legislative debate before this Act was passed. It distinguished terrorists from other criminals and prohibited membership of (para)military organizations, enabled authorities to issue orders allowing individuals to be held without trial or judicial review, and to arrest detain and interrogate them for seven days without an appearance before a judge. In this case, the government was able to rush legislation through because there was not much opposition in the legislature at that time. In the 70s and 80s the emergency powers legislation was renewed year on year without Parliament ever seeking to address the flaws.³² However, this Act affected the lives of many British citizens and has been widely criticized because of its draconian powers.³³

³¹ Kent Roach argues that legislatures often allow for very limited time to debate anti-terrorism strategies in “The Criminal Law and Terrorism”, in: Victor V. Ramraj, Michael Hor, Kent Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005, p. 131.

³² The author thanks Lindsay Farmer for this example.

³³ E.g., Lynn Wartchow, “Civil and Human Rights Violations in Northern Ireland: Effects and Shortcomings of the Good Friday Agreement in Guaranteeing Protections,” *Northwestern Journal of International Human Rights* 3(1), 2005, pp. 1-18; Kent Roach,

Letting the law respond so quickly to terrorist events may result in the expansion of governmental powers. This article does not detail the content of terrorism laws, but will instead address the process of its enactment. First of all, scholars have argued that debate in the legislature as direct response to shocking events may lead to populism, mediocracy, and hypes.³⁴ An example comes from a debate in the Netherlands House of Representatives that took place shortly after the attack on Charlie Hebdo. In the Netherlands, the House of Representatives may initiate emergency debates on topical issues, including terrorist attacks. The news media covers such debates widely and, as a result, politicians tend to portray their standpoints for the general public. Politician Geert Wilders of the Party for Freedom (PVV) portrayed his controversial views on Islam in the debate after the attack on Charlie Hebdo as follows:

“All of them, all of them, all of them, [...] they all base their ideas on Islam. They all call "allahu akbar" when they cut off a head. They all base their ideas on the prophet when they fire a bullet at a journalist head. They all refer to the Koran and avenge, from their perspective, the prophet when they do such things. All of them! In New York, in Mumbai, with Theo van Gogh in Amsterdam, and last week in Paris. Everywhere. Do not tell me “this has nothing to do with the Islam.” It is the Islam!”³⁵

Gary Trotter, “Miscarriages of Justice in the War Against Terrorism”, *Penn State Law Review* 109 (4) 2005, pp. 967–1041, p. 9-13.

³⁴ In the Dutch context, this has been argued by Henk te Velde, Staten-Generaal en Parlement, in: C. van Baalen, R. Aerts, H. te Velde, J. Oddens, D. Smit (eds.), *In dit Huis: Twee Eeuwen Tweede Kamer*, Amsterdam: Boom, 2015, p. 191.

³⁵ Emergency debate on the Charlie Hebdo shooting of January 7, 2015, House of Representatives of The Netherlands, January 14, 2015, translated from Dutch, available <https://www.parlementairemonitor.nl/9353000/1/j9vvi5epmj1ey0/vjql7km8qdxw> at: <https://www.parlementairemonitor.nl/9353000/1/j9vvi5epmj1ey0/vjql7km8qdxw> [“Allemaal, allemaal, allemaal, mijnheer Pechtold, baseren ze zich op de islam.

In this debate, politicians did not deliberate independently from administrative power and mainly profiled themselves for the general public. Such debates do not mirror an ideal speech situation, because arguments are not weighed on their merits and participants and affected individuals may not have equal opportunities to communicate in an undistorted way.³⁶ Even if the laws produced were good, there are independent reasons for slower lawmaking in terms of democratic participation. Hasty legislative debates may have an impact on political liberty and may affect the autonomy of citizens because poor democratic decision-making processes may imply that citizens no longer live under laws of their own making.

Secondly, in many cases, the conditions of legislative debates in the aftermath of terrorist attacks are poor. After the September 11 attacks and following the Security Council Resolution 1373 framework, The Netherlands adopted new antiterrorism policies. The debate in the Dutch legislator was dominated by fear and anger towards potential terrorists and participants in the debate described individuals with similar features as the perpetrators as posing a threat to society. For example, it used the term “jihad” to refer to individuals contributing to Islamic terrorism, while jihad, as understood by Islamic law

Allemaal roepen ze "allahoe akbar" als ze een hoofd afsnijden. Allemaal baseren ze zich op de profeet als ze een journalist een kogel door het hoofd jagen. Allemaal gebruiken ze de Koran en wreken ze in hun ogen de profeet wanneer ze zoiets doen. Allemaal! In New York, in Mumbai, bij Theo van Gogh in Amsterdam en vorige week in Parijs. Overal. Komt u mij niet aan met "het heeft niets met de islam te maken". Het is de islam!"]

³⁶ The standards of full inclusion, non-coercion, and equality, are hard to satisfy for participants in legislative debates. However, outcomes of such debates should be regarded as reasonable only if the process does not include obvious exclusions from the debate, arguments based on power, suppression of arguments, manipulation, self-deception, etc.

scholars, is the struggle for justice or righteousness.³⁷ As a result of this debate, the legislator introduced anti-terrorism measures aimed at preventing individuals from contributing to Islamic terrorist organizations and Islamic armed forces. For example, it introduced the criminal offence of recruitment for Islamic terrorism or what government officials in legislative debates and journalists in the media called “recruitment for jihad”.³⁸ This offence was criticized because it criminalizes attempts to inspire others to take part in terrorism. It is explained vaguely and some legal experts have argued that it may cover hotheaded teenagers.³⁹ Applying such vague offences may lead to miscarriages of justice, which may truncate the rule of law. Also, the offence of recruitment for jihad particularly focuses on Islamic forces. The focus on Islamic armed forces and the use of the term jihad may stigmatize Muslims, which eventually may lead to radicalization and terrorism.

The murder of Theo van Gogh by Dutch-Moroccan Muslim Mohammed Bouyeri in 2004 further spread fear for terrorism in The Netherlands. The legislative debate following this incident is another example of ‘spirited law

³⁷ See, e.g., Proceedings Second Chamber of The Netherlands 2003/04, 28 463, nr. 29.

³⁸ Ultimately, the term jihad is not used in the criminal code, but it was used in the media and in the debate in the legislator and its reports. In the criminal code, the offence of recruitment for the jihad is based on the previously existing offence of “recruitment for foreign armed forces”. See, Dutch Criminal Code, Article 205 [“1. Hij die, zonder toestemming van de Koning, iemand voor vreemde krijgsdienst of gewapende strijd werft, wordt gestraft met gevangenisstraf van ten hoogste vier jaren of geldboete van de vijfde categorie. 2. Indien de schuldige een van de strafbare feiten, omschreven in het eerste lid, in zijn beroep begaat, kan hij van de uitoefening van dat beroep worden ontzet. 3. Indien de gewapende strijd waarvoor wordt geworven, het plegen van een terroristisch misdrijf inhoudt, wordt de gevangenisstraf, gesteld op het in het eerste lid omschreven feit, met een derde verhoogd.”]

³⁹ See, e.g., Proceedings Second Chamber of The Netherlands 2003/04, 28 463, nr. 29, p. 4 (C.J. van der Wilt), p. 8 (Y. Buruma) p. 13 (B. Böhler).

reform.’ The Dutch media referred to Bouyeri as a perpetrator with dual Dutch-Moroccan nationality.⁴⁰ In the aftermath of the murder, Dutch politicians called for depriving Bouyeri of his Dutch nationality.⁴¹ On November 10, eight days after the murder, the Dutch government announced a plan to initiate a measure that enables them to deprive individuals suspected of contributing to the armed forces of an Islamic terrorist organization of their Dutch nationality (if they hold dual citizenship).⁴² The next day, an emergency debate about anti-terrorism measures took place in the House of Representatives. The shock of the murder of Van Gogh influenced the tone of the participants in this debate.⁴³ The murder was portrayed as a terrorist attack, different from any other previous act of violence, and a threat to the rule of law: participants in the debate spoke about the “destruction of Dutch democracy” and argued that the “measure of violence

⁴⁰ The press conference referred to Bouyeri as having dual Dutch-Moroccan nationality and various news sources followed. See also foreign news sources, e.g. BBC News, “Van Gogh suspect refuses defence”, Monday, 11 July, 2005, available at: <http://news.bbc.co.uk/2/hi/europe/4670535.stm>

⁴¹ Dutch news sources: ‘Meedogenloze aanpak is nodig’, *Volkskrant*, 6 november 2004, available at: <https://www.volkskrant.nl/binnenland/-meedogenloze-aanpak-is-nodig~a691843/>; “Coalitie wil aanpak van extremisten”, NRC, 5 november 2004, available at: <https://digitaleeditie.nrc.nl/losseverkoop/NH/2004/10/20041105/public/>

⁴² Proceedings Second Chamber of The Netherlands 2004-2005, Letter of the Minister of Justice and the Minister of the Interior and Kingdom Relations, November 10, 2004, 29854, nr. 3.

⁴³ Case studies have pointed to the influence of shocking events on the tone of politicians in legislative debates. After a shocking event, participants use stylistic features and other strategies in order to fortify their evaluation of that particular event. See for research on the tone in emergency debates in the Dutch House of Representatives: Peter Jan Schellens, *De Toon van het Debat: Rede uitgesproken bij het afscheid als hoogleraar Taalbeheersing van het Nederlands aan de Faculteit der Letteren van de Radboud Universiteit Nijmegen*, 11 januari 2013, available at: <http://repository.ubn.ru.nl/bitstream/handle/2066/102349/102349.pdf>

the Netherlands confronts can hardly be overestimated.”⁴⁴ Furthermore, politicians described the murder of Theo van Gogh as a novel kind of threat: “We have never experienced such political and religious inspired violence in Dutch history.”⁴⁵

Shortly after the debate on the murder of Van Gogh, a measure that enabled the government to deprive individuals of their Dutch nationality came into effect. Since then, individuals may be deprived of their nationality without a legal procedure and based on intelligence. In such cases, the government infringes on the rights of targeted individuals because it deliberately sidesteps legal procedures. Moreover, this measure may stigmatize Muslims because it is targeted at what the public summary of the legislative proposal described as “jihadis fighting for a terrorist organization in a foreign country.”⁴⁶ Formulated as such, it puts Muslims in a bad light by using the term “jihadis” instead of more neutral terms directed towards individuals who commit terrorist or criminal offences in general. In this case, the legislative debate was particularly directed towards the prevention of terrorist acts committed by Muslims and misused terms like “jihadis”. In other words, the legislator described individuals with similar features as the perpetrator in terms typically associated with terrorism and disrespected their ability to make other (non-criminal) plans and live accordingly.

⁴⁴ More in particular, government officials used the following terms: ‘Islamic terrorism’, ‘Muslim terrorists’, and ‘terroristic Islam’. See, Proceedings Second Chamber of The Netherlands 2004-2005, Debate about the murder of Theo van Gogh, November 11, 2004, 22-1278, 1286.

⁴⁵ Proceedings Second Chamber of The Netherlands 2004-2005, Debate about the murder of Theo van Gogh, November 11, 2004, 22-1290.

⁴⁶ [“jihadisten die in het buitenland meevechten met een terroristische organisatie.”] Revision of the Netherlands Kingdom Act on Netherlands nationality, December 4, 2015, Available at: www.eerstekamer.nl/wetsvoorstel/34356_intrekken_nederlanderschap

Hasty laws can be revisited, but it can be hard to take back a law once it has been uttered and anti-terrorism measures may do harm before revision. On February 2017, 299 individuals with dual citizenship had lost their Dutch passports based on intelligence reports and without a conviction.⁴⁷ Why not safeguard society against law reforms debated in poor circumstances with excessive speed or urgency?

One may think all this is exaggerated, because one hasty act does not undermine democracy generally. But our law works as a system with rule of law values as essential features of that system. One of those values is a democratic decision procedure, which secures citizen's autonomy by abiding by certain ground rules as described above. A legislative debate that does not meet these standards of an open forum may disrespect citizen's autonomy. Yet when such anti-terrorism measures are defended, it is often defended as an occasional matter, relating only to the particular case under discussion. However, such reforms may indicate a marginalization of the rule of law, because such ill-considered law reforms may deprive the rule of law of some of its significance. This is problematic because the individual autonomy of citizens in a rule of law society rests on democratic decision-making processes.

In substantive terms, the rule of law may be challenged when governments create more means to punish and control citizens. New forms of state power have been introduced in the wake of recent terrorist attacks. For example, the Netherlands has introduced new criminal law instruments, including the above-mentioned criminal offence of recruitment for the jihad. Such expansions of the law have been linked to so-called "over-criminalization." Over-criminalization may point to situations of too many criminal prohibitions, and that between

⁴⁷ Interview with Dick Schoof, Dutch Coordinator Anti-Terrorism and Security, NPO Radio 1, available at: www.nporadio1.nl/achtergrond/2959-bijna-300-paspoorten-ingenomen-van-jihadgangers.

them they cover too wide a range of conduct.⁴⁸ It is important to see both dimensions of over-criminalization in anti-terrorism laws, because the rule of law may be threatened by the sweepingness of criminal laws and by the increasing number of such laws.

Legislators have increased the net coverage of criminal prohibitions and civil measures by making them preventive.⁴⁹ Examples of such measures are preventive detention under the criminal law, and, also, measures outside the criminal law, e.g. asset freezes and banning individuals from travelling.⁵⁰ Asset freezes aim to cut off money flows to supposed (potential) terrorists as a preventive measure. Full funds freezes can affect the individual liberty of targeted individuals in a comprehensive way because targets are deprived of their liberty to live normal lives by freely engaging in the society in which they live. Travel bans are preventive constraints as well. They ban individuals from entering or working in a specific country or enact a general ban that prevents them from transiting through or entering any country other than their own. As a consequence, the targeted person is only free to move within the borders of their

⁴⁸ See on over-criminalization Doug Husak, *Overcriminalization*, Oxford University Press, 2008, pp. 33-45; Fernando Molina, "A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal With it", *New Criminal Law Review: An International and Interdisciplinary Journal* 14 (1), 2011, pp. 123-138.

⁴⁹ See for critique on civil preventive measures among other sources, Andrew Ashworth, "Security, Terrorism and the Value of Human Rights," in Ben Goold and Liora Lazarus (eds.), *Security and Human Rights*, Hart Publishing, Oxford: 2007, p. 203-226 (Ashworth argues that the use of civil preventive measures against terrorist suspects side-steps the criminal law and denies those subject to them the ordinary protections and rights of the criminal process.)

⁵⁰ I have called comprehensive forms of such deprivations of liberty "exprisonment." See, Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy* 9 (3), 2015, pp. 521–535.

enclosure. These preventive measures prescribe a sanction aimed at forcing an individual.⁵¹ Persons subjected to coercive preventive restraints that do not actually detain the targeted individual, including travel bans and asset freezes, are not presumed to be guilty and are not subject to “punishment.” Instead, they are subjected to preventive measures because they might become guilty. Both coercive preventive measures and civil preventive measures which are coercive may raise the question of when a state may use its governmental powers to justifiably interfere with individual liberty.

It seems necessary to create new measures and laws if the existing apparatus of the state is unable to prevent a particular type of attack. Some anti-terrorism laws enable the state to prosecute individuals that could not be prosecuted under ordinary offences, e.g. in the case of some preventive measures. In cases of preventive travel bans in the EU context and deprivation of citizenship in the Netherlands officials secretly select individuals for attention, often because they are part of a minority, and make use of administrative measures to intimidate individuals that cannot be prosecuted under criminal law.

However, in many cases, ordinary criminal offences could be applied to the perpetrators of terrorist attacks, including murder, unlawful possession of arms, unlawful deprivation of liberty, and ordinary crimes with respect to attempts, accomplice liability, and conspiracy. In such cases, it may have been the enforcement of the law and coordination of intelligence that may have failed to stop terrorism, rather than the failure of existing laws. The necessity of criminal law reform can be examined by studying the application of criminal laws to so-called terrorists in the past. For example, the perpetrators of the 9/11 attacks were prosecuted under existing domestic laws. Of course, this does not mean that law reform cannot help in the fight against terrorism. In some cases, it may

⁵¹ See on coercive preventive measures, Andrew Ashworth and Lucia Zedner, *Preventive Justice*, Oxford University Press: 2014.

be necessary to reform the law; however, it is important to recognize that such reforms should respect the rule of law. The rule of law is supposed to limit governmental powers; it should protect individuals against the potential abuse of state power and provide them with the right to legal liberty. The next section further details guidelines for law reform.

The purpose of criminal law reform is often to create harsher penalties for terrorist attacks in order to deter or incapacitate potential threats. For example, under the Dutch penal code, manslaughter carries a maximum sentence of 15 years in prison, but when committed as an act of terrorism, the maximum sentence is life in prison.⁵² The value of such reforms in terms of deterring terrorism is likely to be minimal because suicide bombers, for example, are prepared to die for their cause. Measures directed towards third parties, e.g. measures that prohibit individuals from financially supporting terrorism, may be more successful at prevention. However, individuals who are subject to such measures should be made aware that they are being targeted and should enjoy other safeguards, as required under the rule of law.⁵³

Anti-terrorism legislation may also undermine the ability of the law to guide citizens because measures regarding terrorism are often directed at the prevention of future wrongdoing rather than punishment for past wrongdoing.⁵⁴

⁵² Compare the following articles: 287 Dutch Penal Code: "Any person who intentionally takes the life of another person shall be guilty of manslaughter and shall be liable to a term of imprisonment not exceeding fifteen years or a fine of the fifth category." 288a Dutch Penal Code: "Manslaughter committed with terrorist intent shall be liable to life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fine of the fifth category."

⁵³ See, e.g., safeguards set out in Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy* 9 (3), 2015, pp. 521–535, pp. 532–534.

⁵⁴ Ashworth and Zedner argue that governmental concern about the prevention of harm is not new, but, nonetheless, demand for close normative study. Andrew

For example, in the Netherlands, criminal procedures were reformed as a response to terrorist events, thus enabling criminal investigations at a very early stage. “Reasonable suspicion” is not required in terrorism cases anymore. Instead, a much lower standard of “indication” of a terrorist offence is enough to launch an investigation.⁵⁵ Rumors about the planning of an attack or an analysis of the Dutch General Intelligence and Security Service may meet this new standard.⁵⁶ Starting investigations based on rumors emphasizes the risk of an attack rather than completed crimes, which makes it more difficult for individuals to be guided by the law.

The argument in favor of preventive anti-terrorism measures is that persons who cannot (yet) be prosecuted for crimes but are likely to commit terrorist acts do not deserve to be free. We do not want to wait until terrorist acts, or any violent crimes, are committed or attempted. Based on this claim, one could argue that these people must be either detained preventively or policed. This approach allows more discretionary decision-making and use of less rigid norms, which gives citizens less control over judges and officials. This may not be necessarily incompatible with the rule of law, but it can amount to a situation in which citizens do not know what the law requires. In such situations, they cannot plan their lives and could be terrified by punishment. Preventive measures should meet particular standards to respect individual autonomy in society, e.g., time limits and individual risk assessments. Also, making special inchoate crimes such that targeted individuals know what not to get close to doing, would, for example, enable them to govern themselves, plan their lives,

Ashworth and Lucia Zedner, *Preventive Justice*, Oxford University Press: 2014, p. 10-11.

⁵⁵ Proceedings Second Chamber of The Netherlands 2004-2005, 30 164, nr. 3, p. 9, nr. 7, p. 14, nr. 12, p. 5.

⁵⁶ Proceedings Second Chamber of The Netherlands, 30 164, nr. 3, p. 14.

avoid running afoul of the law, and avoid living in fear.⁵⁷ For criminal law in particular, prospectivity and predictability in enforcement are important because they enable citizens to predict what kinds of conduct might lead to coercion by the government, and which do not. If criminal law is to regulate conduct, individuals must be able to know what the law stipulates. Prospectivity and predictability of the law allow citizens to avoid interference from the state by not acting against the law. This reasoning may also be applicable to many administrative anti-terrorism measures, because administrative measures may have similar effects on subjected individuals as criminal laws.⁵⁸

Anti-terrorism laws that are enacted retroactively or retrospectively also affect prospectivity and predictability. For example, in 2002, the Australian government proposed legislation that would make it an offence to send mail in order to create an anthrax scare or some other kind of terrorist scare. It proposed making the law retroactive to October 16, 2001 to take account for past hoaxes.⁵⁹ This amounted to a situation in which targeted individuals were punished with 10 years imprisonment for sending a hoax even though it was not criminalized when they sent it. The new law changed the status of sending such a hoax from permissible to impermissible and is, therefore, retroactive.⁶⁰ The main problem of retroactive legislation is that you cannot plan your life because

⁵⁷ For example, material support to designated foreign terrorist organizations, with a *mens rea* of knowledge, may meet this requirement.

⁵⁸ See, my previous work, Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy* 9 (3), 2015, pp. 521–535.

⁵⁹ Penal Code Amendment (Anti-hoax and Other Measures) Bill 2002. Penalty for such a hoax was proposed to be imprisonment for 10 years. See, <http://www.aph.gov.au/Senate/committee/scrutiny/bills02/bO2.doc>. This amendment has been widely discussed. See, e.g., Jeremy Waldron, "Retroactive Law: How Dodgy was Duynhoven?" *Otago Law Review* 10, 2001–2004, 631–654.

⁶⁰ Jeremy Waldron, "Retroactive Law: How Dodgy was Duynhoven?" *Otago Law Review* 10, 2001–2004, 631–654, p. 635.

you do not know what the law requires of you.

An argument in favor of retroactive legislation in cases of terrorism is that it is an occasional matter that relates only to a particular shocking event. It is often difficult to understand why one should object to this practice. However, as Jeremy Waldron has argued, occasional retroactive legislation may have an impact on the rule of law. His argument against such practices is that criminal actions become immediately significant to perpetrators, witnesses, prosecutors, and so on, not just at the moment of punishment. The punishment is a formal consequence of a criminal act. Prospectivity, which contends that laws should not be made retroactively, is essential to that structure of laws and procedures. From this point of view, there should be no question of punishment without the apparatus of criminal law, with its principles, procedures, and safeguards that operate from the commission of an offence to the discharge of the sentence. Retroactive legislation shortcuts this apparatus and, may be problematic, even if it is applied occasionally.⁶¹

4. Proposing guidelines for processes of law reform

In situations of peace and tranquility, the principles of the rule of law function as protections for the individual autonomy of citizens. Law reform in times of peace usually allows for ample time for debate in the legislature and in civil society. The Dutch government attempts to get a sense of what is going on in society by taking advice from special bodies and research committees, consulting the public, and fostering public debate by, e.g., publishing law proposals on the Internet and allowing the public to respond to it. Subsequently, the Council of Ministers (all ministers together) and the Council of State (advisory body to the

⁶¹ See Jeremy Waldron, "Retroactive Law: How Dodgy was Duynhoven?", *Otago Law Review* 10, 2001–2004, 631–654, p. 637.

Dutch Government and States General) evaluate a law proposal before it is submitted to the House of Representatives and the Senate where legislative debate takes place. Likewise, such safeguards should be taken as a starting point for controlling the process of law reform in response to shocking events, including terrorist attacks. This section seeks to set out guidelines for governments to address pressing questions of security with regard to terrorism without disrespecting individual autonomy.

As explained above, a concomitant risk of terrorist threats is that states become impatient when responding to terrorism and attempt to accelerate this procedure. Principally, after a terrorist attack, governments tend to initiate emergency debates in the legislature. In emergency debates, participants tend to focus on fear, anger, insecurity, and prejudices, the media has more control over emergency debates than over regular legislative debates, and politicians are more likely to profile themselves instead of focusing on debate partners and honoring the force of the better and more rational arguments.⁶²

However, debate in the legislator and in society is essential to processes of antiterrorism law reform from instrumental and normative points of view. Governments should not shorten the time for debate, neither in the legislator nor in society, nor forego research into public opinion because of a desire to respond quickly. From an instrumental perspective, democratic debate is essential because the success of antiterrorism measures depends on public

⁶² Case study on emergency debates in the Dutch House of Representatives: Peter Jan Schellens, *De Toon van het Debat: Rede uitgesproken bij het afscheid als hoogleraar Taalbeheersing van het Nederlands aan de Faculteit der Letteren van de Radboud Universiteit Nijmegen*, Januari 11, 2013, available at: <http://repository.ubn.ru.nl/bitstream/handle/2066/102349/102349.pdf>; On mediocracy in the Netherlands, see Henk te Velde, *Staten-Generaal en parlement*, in: C. van Baalen, R. Aerts, H. te Velde, J. Oddens, D. Smit (eds.), *In dit Huis: Twee Eeuwen Tweede Kamer*, Amsterdam: Boom, 2015, p. 191.

support. As the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights of the International Commission of Jurists said, “counter-terrorist policies can only be successful over the longer term with the active support of an informed public.” The panel recommends states undertake comprehensive reviews of counter-terrorism laws, policies, and practices, including their impact on civil society. Following these recommendations, the Dutch National Coordinator for Security and Counter-Terrorism conducts research on perceptions of risk among citizens.⁶³ Allowing time for debate in the legislature and society at large could also provide a better understanding of why a particular terrorist succeeded and give the government time to investigate how to respond to it.

Normatively, debate is vital as a means of conferring legitimacy on reforms in democracy and ensuring political liberty. Playing a role in the process of criminal law reform is essential for citizens to enjoy political liberty and, thus, to live under laws of their own making.⁶⁴ The above-mentioned procedure of law reform in peacetime is aimed at safeguarding the role of citizens as autonomous agents.

Additionally, debate in the legislature should meet particular standards to ensure the autonomy of participants in that debate and affected individuals. This section takes a first step in embarking on the task of developing a set of requirements for legislative debates based on Jurgen Habermas’ concept of an “ideal speech situation,” which is a concept central to Habermas’ theory of

⁶³ Rappports of the Dutch Commission for the Evaluation of Counterterrorism Performance, available at: www.parlementairemonitor.nl/9353000/1/j4nvgs5kkg27kof_j9vvi5epmjley0/vi6v1ktsk9y2/f=/blg20673.pdf, see, in particular, p. 70.

⁶⁴ For a similar argument on law reform in the UK see Jeremy Horder, *Homicide and the Politics of Law Reform*, Oxford University Press: 2012 (Horder argues that research into public opinion is essential to the legitimacy of reform in a democracy. Expert opinion alone will not secure such legitimacy).

communicative action. Habermas' "ideal speech situation" sets forth conditions that, in effect, articulate what it would mean to assess all relevant information and arguments as reasonably as possible, weighing arguments purely on the merits in a pursuit of truth.

The conditions Habermas set out include: participants honor only the force of the better and more rational arguments, exclude arguments based on authority, power, tradition, ideology, fear, anger, insecurity, misunderstanding or prejudices, critically examine their own values, interests and assumptions, understand the argument from the other's perspective, make an effort to provide all relevant information, treat all affected individuals and participants in the debate equally, not to let individuals capable of making a relevant contribution to the debate struggle to let their voices heard or to exclude them from debate, and deliberate independently from money or administrative power.⁶⁵ The aim of applying these conditions to legislative debates on anti-terrorism is, primarily, to enable determination of the extent to which these debates are facilitating a

⁶⁵ This set of criteria is based on Habermas' requirements for an ideal speech situation. This ideal speech situation may be violated in actual speech situations. Its purpose is to function as a heuristic device that provides "*standards* for a self-correcting learning process" (See, Jurgen Habermas, *Zwischen Naturalismus und Religion*, Suhrkamp 2005, p. 91). The here is to apply this set of criteria to legislative debates. See on Habermas' requirements for an ideal speech situation: Jurgen Habermas, "Wahrheitstheorien" in: H. Fahrenbach (ed.), *Wirklichkeit und Reflexion*, Neske, reprint: 1984, ch. 2; Jurgen Habermas, "Reflections on the linguistic foundations of sociology: The Christian Gauss Lectures", Princeton University, February-March 1971, in: Jurgen Habermas, *On the Pragmatics of Social Interaction*, B. Fultner (trans.), MIT Press 2001, pp. 1-103; see, also, Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W. Rehg (trans.), MIT Press 1996 [German, 1992]. See, also M. Cooke, *Language and Reason: A Study of Habermas's Pragmatics*, MIT Press 1994; S. Chambers, *Reasonable Democracy: Jurgen Habermas and the Politics of Discourse*, Cornell University Press 1996.

discourse in which individual autonomy is respected. Habermas' set of requirements may be incomplete and some requirements may be more important than other requirements for legislative debates on anti-terrorism measures, but comparison of legislative debates on anti-terrorism measures with these requirements provides an idea of how to measure the extent to which autonomy is respected in such debates.

Such comparison may show that debates on many anti-terrorism measures fail to approximate some of the requirements of this ideal debate situation, chiefly, such debates fail to exclude arguments based on prejudices. An example comes from the Dutch legislative debate on deprivation of dual nationality, in which government officials expressed anger and fear towards the Islam. Participants in this debate were not hesitant to base their arguments on prejudices about Muslims. One of them argued that it is obvious that the common denominator of terrorism is Islam.⁶⁶ Involving arguments based on prejudices in debates about anti-terrorism measures may be disrespectful of individual autonomy of targeted individuals. This is problematic because such preconceived opinions are not based on actual experience. Moreover, once such an opinion results in treating that person differently, the target is subjected to a treatment rooted in the characteristics of fellow group members to which she is supposed to belong rather than in her individual conduct. For example, a Muslim is treated based on prejudices about Muslims and not based on her own conduct. Defeating such prejudices is very hard and rejects the targeted individual the option to choose to do right and to give her a chance to avoid being stigmatized. Therefore, prejudices may erode individual autonomy.

⁶⁶ Translated from Dutch "Het is toch duidelijk dat de grootste gemene deler van het terrorisme de islam is?", Mr. Markuszower (PVV), in: Reports of plenary meeting with Dutch national security and counterterrorism of January 31, 2017 ["Plenair Markuszower bij Nationale veiligheid en terrorismebestrijding"], available at: www.eerstekamer.nl/plenair/20170131/markuszower

In some cases, individuals are presumed to be very dangerous based on particular characteristics, e.g. their membership of a dangerous organization or the sharing of characteristics with other dangerous individuals. This is the reason for detaining combatants in times of war until the war has come to an end, even if they might not be individually responsible for their actions during hostilities. However, in general, and particularly in a rule of law society in peacetime, we do not have grounds for disregarding individual autonomy based on such characteristics, because we would then presume that the person might not make the right moral choice and deny her responsibility. Autonomy is the ability to control one's behavior, so prejudices can show a lack of respect for autonomy if individuals have a choice to behave in a morally right way. Participants in a debate must seek to respect this autonomy.

How is the failure of respecting autonomy in legislative debates to be overcome? Shaping legislative deliberation in such a way as to overcome these limitations could be done through the formalization of guidelines for legislative debate and careful management of such guidelines by the chair. This article does not develop a full set of guidelines; however, it describes examples that may advance such a project.

In many countries, the chair in the House of Representatives may ask participants to retract their words, deprive them of the possibility to speak, or exclude them from debate if they use offensive language or disrupt order.⁶⁷ The chair employs such measures to protect order in the House of Representatives. Similarly, the chair should be enabled to apply such measures to protect individual autonomy. More concretely, this implies that the chair should be able to demand debating partners to retract language that includes prejudices

⁶⁷ E.g. The Netherlands House of Representatives, Rules of Procedure, November 2014, Article 58-60, available at: www.tweedekamer.nl/sites/default/files/atoms/files/alleen_rvonovember_2014_0.pdf.

towards perpetrators and individuals that are likely to be affected by a proposed anti-terrorism strategy.

Additionally, in order to shield the autonomy of individuals that do not participate in the debate, it may be helpful to enable the chair to exclude prejudices from reports of meetings of the House of Representatives. Previously, in The Netherlands, the chair had the capacity to exclude rude language from reports of debates in the House of Representatives and some have argued for restoring this capacity.⁶⁸ Likewise, the chair should exclude from the debate and/or reports language that contains prejudices. For example, the chair should create an environment in which participants do not use terms like “jihad” to refer to Islamic terrorism and if the chair does not succeed she should have the capacity to exclude such utterances from its reports. Encouraging debating partners to use more neutral terms that do not contain prejudices towards particular (groups of) people may help creating an open forum in which one assesses all relevant information and arguments as reasonably as possible.

On top of improving conditions for legislative debate, governments should be urged to employ a broad approach to terrorism. Among other conditions, processes of law reform ought to include a stage of reflection in which society and the legislature decide what form of response to terrorism is needed. The argument from autonomy cannot reject all forms of state restriction or interference, because there are many examples of commonly accepted state interferences on individual freedom. However, the government should consider a broad range of responses to terrorism, including softer methods. Many threats, including many forms of terrorism, can be dealt with under a framework of softer responses. Softer responses include negotiation, persuasion, establishing

⁶⁸ This rule functioned from 1934 through 2001. Politicians have criticized language use in the House of Representatives, see, e.g. Cynthia van Gorp, *Trouw*, “Kamerleden willen af van grof taalgebruik”, October 9, 2008, <https://www.trouw.nl/home/kamerleden-willen-af-van-grof-taalgebruik~aa3a8343/>.

conditions for dialogue, and solving the social, economic, and cultural issues of particular groups of people. In the Moluccan case, a panel of Moluccans contributed to a discussion on the roots of terrorism. This method may not be applicable to groups like ISIS and al-Qaeda that seem to be unwilling to engage in dialogue and are committed to indiscriminate destruction and violence. Nevertheless, a soft approach may be valuable for individuals who are inclined to join such groups or to third parties who can influence potential terrorists. In Amsterdam, a group of Imams is attempting to persuade Muslim youth not to join radical Islamic groups such as ISIS. They address questions about religion in Mosques and on the Internet.⁶⁹ It should be the task of the Dutch government to foster such initiatives and establish other opportunities for dialogue with potential perpetrators.

Furthermore, improving the living conditions of marginalized groups may prevent individuals from engaging in or contributing to terrorism. This method has been applied in the prevention of terrorism in the Netherlands since the 1970s and may be an effective way of preventing current terrorist threats. Unfortunately, the Dutch government increasingly focuses on harsher methods. One of the risks of ruling out softer strategies that lie outside the framework of law reform is that the causes of terrorism will not be sufficiently addressed. Therefore, we need both softer and harsher strategies to effectively protect society against terrorism.

Regulations directed towards (potential) terrorists also include “stop-and-frisks” and screenings of, e.g., airplane passengers. In 2015, a suicide bomber was blocked from entering a stadium in France where people were watching a soccer game. This prevented him from detonating a bomb in an 80,000-person

⁶⁹ See Heiba Targhi Bakkali, “Amsterdamse imams beginnen jongerenwebsite tegen radicalism”, *Parool*, 10 november 2014, available at: www.parool.nl/amsterdam/amsterdamse-imams-beginnen-jongerenwebsite-tegen-radicalisme~a3787152/.

venue.⁷⁰ However, individuals who are subjected to these constraints should be given the opportunity to challenge them if they are subjected to such measures on a regular basis, or if the impact of the constraints is discriminatory. As claimed in an earlier publication, the affects of non-criminal measures on the lives of subjected individuals may be similar to the affects of the lives of individuals sentenced to imprisonment, if such “softer” measures are imposed without meeting particular requirements.⁷¹

Harsher strategies include imposing measures that deny suspected individuals access to particular locations that can be used for terrorist attacks. These individual constraints may restrain the free and autonomous life of targeted individuals and should, therefore, be subject to appropriate safeguards and time limits.

These are just a few examples of the recourses that are available to address terrorist threats. In many cases, existing measures and laws could be used to fight terrorism. If new laws and measures are necessary to fight terrorism, they should meet the same standards as laws created during tranquil times in rule of law societies.

Furthermore, anti-terrorism measures should include ways to minimize harm and destruction, because some terrorist attacks cannot be prevented. This means that post-attack situations should be regulated as well. Evacuation strategies may help to regulate the situation after a terrorist attack and preparedness for attacks, e.g., by warning citizens, may also contribute to controlling damage. Terrorist threat advisory systems provide citizens with practical information about geographic regions, potentially affected infrastructure, and steps they can take to protect themselves.

⁷⁰ See, <https://www.nytimes.com/live/paris-attacks-live-updates/suicide-bombers-at-stade-de-france-tried-to-enter-stadium/>

⁷¹ See, Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy* 9 (3), 2015, pp. 521–535.

Incorporating strategies to minimize harm using an anti-terrorism approach may sound like preparing to accept the failure of other strategies, but damage control is essential to minimizing fear and destruction. Without evacuation strategies, terrorists will be much more successful. In November 2015, the attack on the Bataclan Theater in Paris killed 89 people. In such hostage takings and other terrorist acts, evacuation strategies may significantly reduce the loss of lives.

Governments may also reach for warlike measures, but this article describes requirements for creating anti-terrorism strategies that are in line with the principles of the rule of law and democracy. War is a more destructive and less discriminatory alternative to responding within this framework. There may be a role for this harsher method of fighting terrorism, but wars involving terrorists should be subject to principles as well. In such cases, the laws of war should apply.⁷²

The full development of an anti-terrorism policy is beyond the scope of this article; however, the guidelines set out here may impose some sense of order in future responses to terrorist threats.

5. Conclusion

Processes of law reform and practices of enacting new measures in response to terrorist threats may affect the rule of law and democracy. As argued in this

⁷² Other strategies, including torture, should not be permitted, neither in times of war nor in times of peace, because the principles of the rule of law and the laws of war outlaw such techniques. See, on torture and the rule of law in the light of the response to terrorism since 9/11, Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House*, Oxford University Press, 2010.

article, the effects of these processes call for safeguards on future responses to terrorism.

This article focuses on responses to terrorism in the Netherlands and examines responses to Moluccan terrorism in the 1970s and processes of reform as a response to recent Islamic terrorism threats. Based on this analysis, this article sought to illustrate how law reform may challenge the rule of law in substantive, formal, and procedural terms. The enactment of new laws and penalties as a response to terrorist attacks creates more opportunities for states to exercise their power, allows for more discretionary decision-making, and produces laws with fewer entitlements and safeguards for targeted individuals.

Furthermore, quickly reforming laws after a terrorist attack may push government officials to shorten time for democratic debate and drive government officials to consider such measures in a debate motivated by emotions about that past attack. Therefore, this article argued that a set of guidelines for law reform ought to be formed and made some first steps in its development. It proposed that processes of law reform should include time for debate in the legislature. This debate should meet particular standards that respect individual autonomy and participants in this debate should consider a range of approaches, including softer strategies that target the underlying problems that cultivate terrorism, as well as strategies to control damage before and after an attack.

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