

# Criminal Law Reform as a Response to Terrorist Threats

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**Key words:** criminal law reform, terrorism, individual autonomy, rule of law, democracy.

## Abstract

*This paper seeks to set out guidelines for criminal law reform processes to account for the challenges that terrorism may pose to the rule of law and democracy. An increase in the number of criminal law reforms and the creation of new criminal offences have been seen across jurisdictions as a direct and immediate response to terrorist attacks. Such measures are often directed at the prevention of future wrongdoing rather than punishment for past offences. Examples include criminalization of preparing crimes and possessing information that might be used in the commission of crimes. Criminal lawyers and philosophers have criticized such developments, but as of yet, there has been little consideration of the underlying theoretical issues that may arise during processes of reform. However, criminal law reform as a direct and immediate response to such events may curtail the rule of law and democracy.*

*Governments are often pressed for time when responding to terrorism, which may have an impact on the rule of law and democracy*

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*in the following ways: Firstly, adopting special measures may seem justified after a terrorist attack to protect supposed victims of such attacks. Reforming and enacting new laws in the heat of the moment may lead to over-criminalization and adopting rules that cannot guide the actions of supposed subjects because such measures are often designed to prevent crimes. In other words, responding with law does not mean responding in accordance with the rule of law. Secondly, there may be inadequate time for debate in the legislature and in society regarding proposed measures. This may truncate democracy. I address these concerns and seek to set out guidelines for how processes of criminal law reform may treat people as capable of self-moderation. I embed my guidelines in a moral framework that respects autonomy and in which the rule of law and democracy are essential features.*

## 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. Lawmakers may be furious about a terrorist attack, or they may feel fear or agony, and they may pass laws based on those feelings. For example, new criminal 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. However, the impact of criminal law reforms on society has received less attention in the literature. As I will argue in this paper, the process of law reforms in response to terrorist threats may truncate the rule of law and democracy.

This paper aims to contribute to the identification of general principles that should underlie the process of criminal law reform.<sup>1</sup> My argument is presented in the following steps: First, I describe an ideal rule of law democracy in order to illustrate how fighting terrorism may take place in such a society. Second, I detail criminal law reform as a response to terrorist threats and contrast this approach 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, I examine why criminal law reform as a response to terrorist threats can raise particular concerns with respect to the rule of law and democracy. Fourth, I recommend ways to reform criminal law without affecting the rule of law and democracy. I argue that the process of criminal law reform ought to include a stage of reflection in which society decides whether reform is needed or not. A broad range of responses should be considered, including strategies aimed at the social,

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<sup>1</sup> Measures more destructive than the criminal law include war and targeted killing. Such alternatives to the criminal law show the advantages of responding with a rule of law framework.

economic, and cultural roots of terrorism, as well as damage control and, ultimately, criminal law. Criminal law reform should be a last resort and the process of enacting new laws ought to respect individual autonomy.

## 2.1 Criminal 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 criminal laws. 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. In turn, 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 he produced a controversial film on the position of women in Islam with Ayaan Hirsi Ali.

Criminal law reforms in response to terrorism vary from state to state, making it difficult to address all legal developments here. For the purpose of this paper, I will focus on the creation of new criminal offences in the wake of the 9/11 attacks, using the case of the Netherlands to illustrate how states have adapted laws and created new criminal laws as a response to terrorist attacks. I will compare criminal law reform with more restrained techniques that have been used in the past to counter terrorism in the Netherlands. Less repressive measures include initiating possibilities for dialogue and improving living conditions.

My aim is to illustrate how criminal law reform practices can be described in terms of an archetypical rule of law democracy by comparing criminal law reform with less repressive means of fighting terrorism. This section describes an ideal rule of law democracy that respects individual autonomy, which is useful for heuristic purposes. Broadly construed, it contents that a society is 1) ruled *by* law and 2)

that it is democratic. I will provide more details on both aspects.<sup>2</sup> In the following sections, I will illustrate how actual responses to terrorism can be described in terms of this archetype.

An ideal rule of law society allows for the creation of new criminal law offences 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. 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 state interference by not acting against the law. Individuals in a rule of law society are not subject to the arbitrary will or judgment of a coercive government, but only to the law. They are free to do whatever the laws do not explicitly 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. The content of such a prospective law should be directed at punishment for past wrongdoing rather than the prevention of future wrongdoing. Additionally, the law should be predictable and clear in order to contribute to the reliability of the law. In other words, a citizen should not be terrified of punishment, but rather know what the law requires. This enables her to live an autonomous life.<sup>3</sup>

I add democracy as a feature of rule of law societies.<sup>4</sup> In an ideal democratic rule of law society, the law limits the government and a

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<sup>2</sup> I do not aim to set out a full understanding of the rule of law or democracy. Rather, I widely apply accepted understandings of these notions to cases of law reform with regard to terrorism.

<sup>3</sup> See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 34.

<sup>4</sup> 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*,

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.<sup>5</sup> This is the notion of “political liberty” as introduced in Ancient Greece and addressed by Rousseau, Kant, and Habermas, among other political philosophers. Ideally, governments in such societies take as their starting points the need to protect individual autonomy. Therefore, law reforms in rule of law democracies are ideally based on democratic debate and involve research into public opinion.

However, after terrorist attacks, which cause fear and harm among people, governments are pressed for time and tend to treat autonomy merely as another good to be put in balance alongside security. As I will explain below, processes of law reform in such situations challenge the rule of law and democracy.

## 2.2 New criminal 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 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 innocent 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

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Cambridge University Press, 2004, p. 137. On the link between rule of law and democracy, see, Thomas Carothers, “The Rule-of-Law Revival,” *Foreign Affairs*, 1998; Thomas Carothers, “Rule of Law Temptations,” *Fletcher Forum of World Affairs*, 2009; Robert Barro, “Democracy and the Rule of Law,” in: B. Bueno de Mesquita and H. Root (eds.), *Governing for Prosperity*, Yale University Press, 2000.

<sup>5</sup> 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.

responded with less severe measures than it has responded to current terrorist events.

I briefly describe this case as an alternative to current practices of combatting terrorism through criminal law reform. This is not to say that creating new criminal offences 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 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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

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<sup>6</sup> I will not give a full account of anti-terrorist measures in the Netherlands, but will instead compare current measures with Dutch responses in the 1970s. My aim is to analyse this historical case in comparison with recent 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 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. 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.

<sup>7</sup> "Terreurbrief" TK 1972–1973, Handelingen II, 1972–1973, appendix 12000, nr. 11; M. Moerings, "Terrorisme: een serieus probleem voor Nederland?" *Tijdschrift voor Criminologie*, 1989, 358–378.

<sup>8</sup> See Rechtbank Assen, 26 March 1976. "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.

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.<sup>9</sup>

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.<sup>10</sup> The government established special units, consisting of sharpshooters from the army, the marines and the police force, aimed at 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.<sup>11</sup> 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.<sup>12</sup> However, the government did not enact special criminal laws to fight terrorism.<sup>13</sup> Most legal scholars and practitioners argued that terrorist actions already constituted crimes under the existing penal code and preferred to respond with measures

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<sup>9</sup> Joke Cuperus, Rineke Klijnsma, *Onderhandelen of bestormen: Het beleid van de Nederlandse overheid inzake terroristische akties* (Polemologisch Instituut Groningen 1980), p. 90.

<sup>10</sup> Handelingen II, 1972–3, 12.000, nr.11.

<sup>11</sup> The intelligence units did not function well and were taken by surprise by Moluccan actions. See Joke Cuperus, Rineke Klijnsma, *Onderhandelen of bestormen: Het beleid van de Nederlandse overheid inzake terroristische akties* (Polemologisch Instituut Groningen 1980), p. 21.

<sup>12</sup> Joke Cuperus, Rineke Klijnsma, *Onderhandelen of bestormen: Het beleid van de Nederlandse overheid inzake terroristische akties* (Polemologisch Instituut Groningen 1980), p 7, 47–49.

<sup>13</sup> In 1973, the Prime Minister sent a letter to parliament concerning terrorism measures, but there is no mention of creating criminal laws. See Handelingen II, 1972–3, 12.000, nr.11; see, also, an overview of the measures in: Handelingen II, 1978–9, 15 300, nr. 36.

that were already available, including criminal laws concerning the unlawful possession of arms and unlawful deprivation of liberty.<sup>14</sup>

Since September 11, 2001, the Netherlands, among other countries, has become increasingly focused on guaranteeing that the criminal justice system is prepared to deal with terrorist threats. Only three weeks after the attacks, the government announced a plan to fight terrorism with new measures and laws that significantly extended governmental powers with respect to phone tapping, border control, and financial transactions.<sup>15</sup> 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, particularly in the field of criminal law.

The Dutch criminal law system, as many other criminal law systems, had not previously considered terrorism to be a criminal offence.<sup>16</sup> Legislators 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 government enacted the Terrorist Offences Act, which defines terrorist crimes, such as recruitment for the Jihad. This Act also increases the penalties for crimes committed with terrorist intent.<sup>17</sup> 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

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<sup>14</sup> G.E. Mulder, "Bestraffing, 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.

<sup>15</sup> Kamerstukken II 2001–2002, 27 925, nr. 10, p. 8–13.

<sup>16</sup> 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.

<sup>17</sup> Wet Terroristische Misdrijven [Anti-Terrorism Law], June 24, 2004, Staatsblad 2004, 290, entered into force on August 10, 2004.

terrorism, which goes hand in hand with less procedural safeguards for individuals suspected of terrorism.<sup>18</sup>

### 3. Why criminal law reform raises concerns

It is often assumed that criminal law reform is necessary to protect rule of law democracies against terrorist threats. However, prioritizing the security of swift responses to terrorism over individual autonomy masks the impact of such measures on society. The criminal law reforms and the enactment of new criminal laws discussed in this article may affect the rule of law and democracy. This section discusses the impact of criminal law reform on both interests.

The rule of law ensures that individuals living under it are not subject to the arbitrary will of others. In this sense, the rule of law is contrasted with the rule of man. In other words: “law is reason, man is passion.”<sup>19</sup> In a rule of law society, 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.<sup>20</sup> 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, or hate. This may have an impact on the ethical mission of the rule of law to shield individuals from human weaknesses.

Anxiety and fear in society may press governments to respond quickly after terrorist events. For example, on October 26, 2001, one month after the 9/11 attacks, the president of the United States signed the Patriot Act. This act introduced new criminal offences and significantly expanded the criminal law response to terrorism. The Netherlands, as I described above, also responded with criminal law reform to terrorist events. Quickly reaching for the criminal law may truncate democracy because there may be inadequate time to debate the

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<sup>18</sup> See, Handelingen II 2003-2004, nr. 33, p. 3338; TK, 2004-2005, 29754.

<sup>19</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 122.

<sup>20</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 122.

proposed anti-terrorism measures in the legislature and in society.<sup>21</sup> This may have an impact on political freedom because without a democratic decision-making process, citizens no longer live under laws of their own making.

In substantive terms, the rule of law is challenged when governments create more means to punish and control citizens. 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. In light of this approach, criminal law reform should be a last resort because providing states with more means to punish citizens limits the legal liberty of those 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, such as the criminal offence of recruitment for the Jihad. The expansion of the law has been linked to so-called “over-criminalization,”<sup>22</sup> which may result in criminalizing individuals when they have not committed a crime. Other examples of new measures used by the state are asset freezes and banning individuals from travelling.<sup>23</sup> 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. Thus, travel bans require that states not admit targeted persons into their territories. As a consequence, the targeted person is only free to move within the borders of their enclosure. Persons subjected to preventive restraints, such as travel bans and asset freezes, are not presumed to be guilty and are not subject to “punishment.” Instead,

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<sup>21</sup> Kent Roach makes this point 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.

<sup>22</sup> On See on over-criminalization see Doug Husak, *Overcriminalization*, Oxford University Press, 2008, pp. 33–45.

<sup>23</sup> 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.

they are subjected to preventive measures because they might become guilty. However, both practices of punishment and prevention 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, such as in the case of recruitment for the jihad. However, in many cases, ordinary offences could be applied to the perpetrators of terrorist attacks, such as 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 criminal law. 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 criminal law reform cannot help in the fight against terrorism. In some cases, it may be necessary to reform the criminal law; however, it is important to recognize that such reforms may decrease the legal liberty of individuals in society.

The purpose of criminal law reform is often to create harsher penalties for terrorist attacks in order to deter 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.<sup>24</sup> 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, such as measures that prohibit individuals from financially supporting terrorism, may be more successful at deterrence. However, individuals who are subject to such

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<sup>24</sup> 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."

measures should be made aware that they are being targeted and should enjoy other safeguards, as required under the rule of law.

Anti-terrorism legislation may also undermine the ability of the law to guide citizens because criminal procedures regarding terrorism are often directed at the prevention of future wrongdoing rather than punishment for past wrongdoing. 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.<sup>25</sup> Rumors about the planning of an attack or an analysis of the Dutch General Intelligence and Security Service may meet this new standard.<sup>26</sup> 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 this “preventive turn” in anti-terrorism legislation is that persons who cannot (yet) be prosecuted for crimes but are likely to commit terrorist acts do not deserve to be free. Therefore, these people must be either detained preventively or policed. This approach allows more discretionary decision-making and more use of standards instead of rules. 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 will be terrified by punishment. Preventive measures should meet particular standards to respect individual autonomy in society, e.g., time limits and individual risk assessments. 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.

Anti-terrorism laws that are enacted retroactively or retrospectively also affect prospectivity and predictability. For example,

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<sup>25</sup> Kamerstukken II 2004-2005, 30 164, nr. 3, p. 9; Kamerstukken II 2004-2005, 30 164, nr. 7, p. 14; Kamerstukken II 2004-2005, 30 164, nr. 12, p. 5.

<sup>26</sup> Kamerstukken II 2004-2005, 30 164, nr. 3, p. 14.

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.<sup>27</sup> 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.<sup>28</sup> The main problem of retroactive legislation is that you cannot plan your life because 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 Waldron has argued, occasional retroactive legislation has an impact on the rule of law as a system. The argument is that laws work as a system with legal procedures. 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 system of laws and procedures. From this point of view, there should be no question of punishment without the systematic 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 system and is, thus, problematic, even if it is applied occasionally.<sup>29</sup>

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<sup>27</sup> 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.

<sup>28</sup> Jeremy Waldron, "Retroactive Law: How Dodgy was Duynhoven?" *Otago Law Review* 10, 2001–2004, 631–654, p. 635.

<sup>29</sup> See Jeremy Waldron, "Retroactive Law: How Dodgy was Duynhoven?", *Otago Law Review* 10, 2001–2004, 631–654, p. 637.

## 4. Proposing guidelines for processes of criminal law reform as a response to terrorism

In situations of peace and tranquility, the principles of the rule of law function as protections for the individual autonomy of citizens. Likewise, such safeguards should control the process of law reform in response to shocking events, including terrorist attacks. The following sections seek to set out guidelines for governments to address pressing questions of security with regard to terrorism without disrespecting individual autonomy.

Law reform in times of peace usually allows for ample time for debate in the legislature and in civil society. The Dutch government usually 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 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. A concomitant risk of terrorist threats is that states become impatient when responding to terrorism and attempt to accelerate this procedure. Principally, governments tend to shorten the time for debate in society and are inclined to forego research into public opinion because of a desire to respond quickly.

However, debate in society and research into public opinion is essential to processes of antiterrorism law reform from normative and instrumental points of view. Normatively, debate is essential as a means of conferring legitimacy on reforms in a democracy and ensuring political liberty. Playing a role in the process of criminal law reform is essential for citizens to enjoy political liberty.<sup>30</sup> The above-mentioned procedure of law reform in Dutch society is aimed at safeguarding the role of citizens as autonomous agents.

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<sup>30</sup> 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).

From an instrumental perspective, democratic debate is essential because the success of antiterrorism measures depends on public 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.<sup>31</sup> 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.

I argue that the government should consider a broad range of responses to terrorism, including soft and harsher methods. Most threats, including many forms of terrorism, can be dealt with under a framework of softer responses. Softer responses include negotiation, persuasion, establishing 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.<sup>32</sup> It should be the task of the Dutch government to foster such initiatives and establish other avenues for dialogue with potential perpetrators. Furthermore, improving the living conditions of marginalized groups may prevent

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<sup>31</sup> Rapports of the Dutch Commission for the Evaluation of Counterterrorism Performance, [https://www.parlementairemonitor.nl/9353000/1/j4nvgs5kkg27kof\\_j9vvij5epmj1ey0/vi6v1ktsk9y2/f=/blg20673.pdf](https://www.parlementairemonitor.nl/9353000/1/j4nvgs5kkg27kof_j9vvij5epmj1ey0/vi6v1ktsk9y2/f=/blg20673.pdf), see, in particular, p. 70.

<sup>32</sup> See [www.parool.nl/amsterdam/amsterdamse-imams-beginnen-jongerenwebsite-tegen-radicalisme~a3787152/](http://www.parool.nl/amsterdam/amsterdamse-imams-beginnen-jongerenwebsite-tegen-radicalisme~a3787152/).

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 terrorism. One of the risks of ruling out softer strategies 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 the Stade de France stadium in France where people were watching a soccer game. This prevented him from detonating a bomb in an 80,000-person venue.<sup>33</sup> Individuals who are subjected to such constraints should be given the opportunity to challenge them if they are subjected to them on a regular basis, or if the impact of the constraints is discriminatory.

Harsher strategies include imposing measures, such as denying suspected individuals access to particular locations that can be used for terrorist attacks. As I have argued elsewhere, these individual constraints may restrain the free and autonomous life of targeted individuals and should, therefore, be subject to appropriate safeguards and time limits.<sup>34</sup>

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. These strategies should be exhausted first because there is a risk of creating laws that unnecessarily infringe upon the legal and political liberties of citizens. Governments should avoid creating laws when society has been affected by a terrorist attack. 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 democracies.

Unfortunately, some terrorist attacks cannot be prevented. Anti-terrorism measures should, therefore, include ways to minimize harm and destruction. This means that post-attack situations should be regulated as well. Laws that have less impact on individual autonomy than criminal laws, such as evacuation strategies, may help to regulate

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<sup>33</sup> See <https://www.wsj.com/articles/attacker-tried-to-enter-paris-stadium-but-was-turned-away-1447520571>.

<sup>34</sup> Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy* 9 (3), 2015, pp. 521–535.

the situation after a terrorist attack. 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.

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 paper describes requirements for creating anti-terrorism strategies that are in line with the principles of the rule of law and democracy. I argue for considering existing measures before reaching for law reform. 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.

Other strategies, such as 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.

The full development of an anti-terrorism policy is beyond the scope of this paper; however, the guidelines set out here may advance such a policy. Therefore, the proposal presented here seeks to impose some sense of order in future criminal law reforms.

## 5. Conclusion

Criminal law reform in response to terrorist threats may affect the rule of law and democracy. As I argued in this article, the effects of these reforms call for safeguards on future responses to terrorism.

This paper focuses on responses to terrorism in the Netherlands and examines responses to Moluccan terrorism in the 1970s and processes of criminal law reform as a response to recent Islamic terrorism threats. Based on this analysis, I illustrated how criminal law reform may challenge the rule of law in substantive, formal, and

procedural terms. The enactment of new criminal 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 shorten the time for democratic debate and research into public opinion. Therefore, I propose a set of guidelines for criminal law reform. I argued that such processes should include time for debate in the legislature and in society and that 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. Such strategies should be exhausted before exploring any harsher methods.