Policy in a Time of Fear: Blinded by Safety and Security

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After the attacks on New York, Madrid and London, various types of legislation have been implemented to combat and prevent terrorism. Although such measures are necessary to protect society, it is also essential that criminal legislation especially is limited by the boundaries set by the values in a democratic society. When those lines are crossed, legal protection can't be guaranteed. The proposal to criminalize the glorification of terrorist acts is criticized in accordance with the freedom of expression (ECHR Art. 10).

Keywords: Criminal Law, Instrumentalism, Terrorism, Legislation, Freedom of Expression

1. Introduction

Criminal law as an instrument is restricted by boundaries set by the values of a democratic society and inextricably entwined with legal security – at least that is how it ought to be according to the Western (classical) idea[1]. However, with the increase of criminal activity, such as organised crime, international crime and terrorism, those boundaries are no longer always clearly defined.

Over the years, criminal law has changed its course. With the public's growing fear of unknown risks and crime and the lack of trust in criminal law and the government it seemed time for vigorous measures. Those measures appeared necessary from the governments point of view, in order to serve the public interest. This meant that over the years, criminal law became more and more preventive, to exclude any form of risk and to prevent any sense of unsafety and insecurity felt by the public.[2] In the classical view on criminal law it is considered a last resort, a so-called '*ultimum remedium'* [3], only used when all other less intrusive measures are no longer sufficient and when guarantees are intended to protect the individual against governmental power and societal vigilantism.[4] With the development of risk society, the guarantees that should protect the individual are increasingly threatened. The main political focus became the

[1] Kelk, C., *Studieboek materieel strafrecht*. Deventer: Kluwer, 2005.
[2] Buruma, Y., *De dreigingsspiraal. Onbedoelde neveneffecten van misdaadbestrijding*. Den Haag: Boom Juridische uitgevers 2005.
[3] Kelk, C., *Studieboek materieel strafrecht*. Deventer: Kluwer, 2005.
[4] Emmen, A.M.C. & Stolk, R. Het recht in het tijdperk van *big data.* De toekomst bezien vanuit het redelijk vermoeden van schuld en de privacy. In: *D.C. van Beelen, C.I.J. Klostermann, G. Noordeloos, P.L.F. Ribbers (Red.), Privacy en gegevensbescherming (congresbundel Mordenate College),* Apeldoorn-Antwerpen: Maklu 2015, p. 73-89

protection of collective safety, even though criminal science stresses that the laws on terrorism infringe the individual legal protection.[5]

Criminal law is considered to be an instrument of policy and a miracle cure to solve all society's problems, a development Foqué and 't Hart *describe as criminal instrumentalism.* In their view criminal instrumentalism can be defined with '*when criminal law is only seen as a specific means of coercion in order to reach a certain public goal: a goal that, external to criminal law, is politically determined and is developed in a more extensive policy'*.[6]

This article will address the ideas of democratic society and its boundaries, as well as the instrumental use of criminal law. After that a short overview of developments in criminal justice over the past decades within Dutch society will follow and insight will be given on how criminal justice became harder and increasingly an example of criminal instrumentalism. Onwards, to illustrate the danger of instrumentalism for legal protection of the individual, a recent proposal that aims to criminalize the glorification of terrorism will be discussed. Finally description will be given on how criminal law relates to the boundaries set by democratic society, particularly Art. 10 ECHR, and whether this proposal can be considered an example of criminal instrumentalism.

2. Values of a Democratic Society and the Development of Criminal Justice in the Netherlands in a Nutshell

2.1. The social contract of Beccaria

The principles of Western Europe's democratic society derive from the views of Beccaria and Montesquieu. Beccaria held the idea to create a social contract in order to guaranty public safety. This social contract should be a ground structure for an ordered, stable and secure society. The social contract is an imaginary situation, which does not follow from a previous social situation, but is the starting point from which society can be formed and a legal system can be developed to sustain and protect the community. Although Beccaria believes that the situation prior to the contract is unsafe as men are constantly at war with one another, he is however convinced that when people do decide to enter into a social contract, that this is on a voluntary basis and with the knowledge that equal participation in the community is to be established in order to succeed. To create this society, it would be necessary to give up 'small parts of freedom' in favour of the public good, in order to enjoy the remaining freedom. The total sum of the passed on small parts of freedom forms the so called 'sovereignty of the nation', with the sovereign as legal guardian and manager of this public good.[7] If the decisions of the sovereign subsequently do not benefit the public good or if they would endanger the freedom of the 'contractors', according to Beccaria, the sovereign would be overthrown because his

[5] Woude, M.A.H. , Wetgeving in een veiligheidscultuur. Totstandkoming van antiterrorismewetgeving in Nederland bezien vanuit de maatschappelijke en (rechts)politieke context, Den Haag: Boom Juridische uitgevers 2010.
[6] Foqué, R. en Hart, A.C. 't, Instrumentaliteit en rechtsbescherming. Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.
[7] Beccaria, C., Over misdaden en straffe, vertaling J.M. Michiels. Kluwers Nederlandse uitgave van 'Dei delitti en delle pene'. Deventer: Kluwer 1982. p. 43

actions would be damaging to goal and purpose of the contract.[8] The social contract creates a legal foundation, a model that considers the people within society who are committed to the social contract and subsequently are bearers of rights and obligations, to be legal entities.

2.2. Checks and Balances

Montesquieu in his work De l'Esprit des Lois introduced the doctrine of the separation of the legislative, executive and legal powers (better known as the *trias politica*), meaning that the power of one should always be checked by counterforce of the other. According to Montesquieu this is a fundamental condition which should create freedom. According to Montesquieu laws should set rules for what man can and cannot be forced to.[9] Although a strict separation had to be altered for it to work in a modern society, the fundamental idea that the governmental powers should be divided to prevent arbitrariness and suppression was in fact maintained by institutions that balance each other out (checks and balances), and also by decentralisation.

2.3. Criminal Instrumentality

In line with the ideas of Montequieu,'t Hart claimed that law in a democratic society has a specific function where it should fulfil the conditions to make a democracy function not only procedurally, but also substantively. Where democracy should ensure an equal input for everyone in the public system, law provides chances to realize one's potential and to emancipate. A judicial system of 'checks and balances' should be formed to guarantee an equilibrium between the freedom of the individual on the one hand and on the other a restriction of that same freedom, in order to constrain and punish any violations of law.[10]

The government, with its almost absolute power to punish the individual also needs to be legally restricted in order to protect the individual as a legal subject against the abuse of power (Rule of Law). Within the classic-liberal constitutional state, the government and thereby the criminal justice system, are limited by the boundaries formed by the values of the democratic constitutional state. The principle of legality can therefore be seen as the guiding principle of the rule of law and therefore has two functions. The principle is both normative, in relation to the governmental power which restricts that power, as well as normative towards the individual who can take notice of what is considered to be social unacceptable behaviour and what legal consequences this behaviour will have. This gives criminal law a certain instrumental value.[11] As criminal law is a major infringement on a person's freedom, the character of criminal law as protector of the peoples' rights has always been an key factor in criminal law in order to

[8] Blad, J.R., Hoofdstuk 1,'Strafrechtelijke rechtshandhaving, In J.R. Blad & J. van der Hulst (Eds.) *Strafrechtelijke rechtshandhaving: aspecten en actoren belicht voor het academisch onderwijs.* Den Haag: Boom Juridische uitgevers. p. 21-43 (2007)

[9] Montesquieu, C. de, *De l'Esprit de Lois* 1748. Ned. vert. *Over de geest der wetten* (selectie), vertaling en annotatie J. Holierhoek, Inleiding E. Snel. Meppel: Boom 1998.

[10] A.C. 't Hart, *Hier gelden wetten! Over strafrecht, Openbaar Ministerie en multiculturalisme*, Leiden: Gouda, Quint, 2001

[11] J.R. Blad, *Herstelrecht en civilisering van de strafrechtspleging*, in Marie-Claire Foblets, Mireille Hildebrandt & Jacques Steenbergen (Red.), *Liber amicorum René Foqué* (pp. 169-188). Gent/Den Haag: Larcier/Bju, 2012.

protect the person considered to be a suspect of committing a criminal act. This side of legal protection of criminal law is safeguarded *i.e.* by the principle of individual culpability, the already mentioned principle of legality, proportionality, subsidiarity and criminal law as *ultimum remedium*, where it should only be used as a last resort.[12]

Criminal law however can only function as an instrument when it equally protects the rights and freedoms of every individual within the concept of rule of law against both vertical infringements by the government, as well as horizontal infringements by other persons. In other words, the aim of rules and regulations is to define the reciprocal rights and duties of citizens or those applicable in the relationship between citizens and government. This criminal instrumentality as well as the legal protection of individual legal subjects should be cited, as Foqué and 't Hart put it, as two sides of the same coin, therein legal protection should be inherent to criminal law as an instrument.[13]

2.4. Criminal Instrumentalism

Until the eighties of the previous century, criminal law in the Netherlands was considered an instrument to punish perpetrators and also, to some extent, to prevent future criminal behaviour. Because of the 'pillar' system, wherein the public was divided and organised in confessional/ideologically-based groups (pillars), the crime rate was low and frequently misbehaviour was settled within the group without governmental interference. However, when the pillar system came to an end because of secularism, the upcoming trade in drugs in the seventies and consequently the rise of organised crime, the ideas on how to effectively fight crime changed. The increase of the social and political discussion on fighting organised crime, the sense of insecurity of the public and the threat of terrorism pressured criminal law and its role which it is supposed to play in solving the experienced problems. The Bill Society and Crime of 1985 as presented by the Dutch government[14] , forms the turning point in criminal justice with regard to criminal law as an instrument and the ways in which law enforcement should operate. From that time on, the leading political thought was to use criminal law as an instrument to create a more systematic and targeted system in order to prevent crime. This resulted in a tougher and more commercialised law system, created to be effective in controlling society and combating crime. Criminal law is mainly aimed at general prevention but subsequently also at tough punishment if general prevention should fail.[15] This led to a certain use, or rather *abuse* of criminal law, which Foqué and 't Hart have called *criminal instrumentalism.* Criminal law then is considered to be: *'Merely a specific coercive instrument*

[12] Woude M.A.H. van der & Sliedregt, E. van (2007), De risicosamenleving: overheid vs. strafrechtswetenschap? Aanwijzingen voor het debat rondom veiligheid en risico's , *Proces, Tijdschrift voor strafrechtspleging* 6: 216-226

[13] Foqué, R. en Hart, A.C. 't, *Instrumentaliteit en rechtsbescherming.* Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.

[14] Kamerstukken II 1984/85, 18 995, nr. 13-14.

[15] Hart, A.C. 't, *Mensenwerk? Over rechtsbegrip en mensbeeld in het strafrecht van de democratische rechtsstaat*. Amsterdam/New York/Oxford/Tokyo, 1995.

to reach a certain social aim: an aim that, external to criminal law, is politically dictated and will be developed in a comprehensive policy'[16]

Criminal law as an instrument is within the vision on criminal instrumentalism no longer inextricably linked to the legal guarantee of the protection of individual citizens, which simultaneously limits society and the government; consequently, criminal law does not recognize this connection and deems legal guarantees to be a separate subsidiary objective.

The thing that defines criminal instrumentalism, according to Blad, is that one looks upon the limitations that are inextricably connected to legal certainty as inefficient obstacles that stand in the way of maximum effect. In the eyes of the political leaders these obstacles need to be removed as much as possible.[17]

What remains is a criminal paradox. Law that merely focuses on public safety and security, will ultimately lead to a total lack of privacy. Moreover, because of the extended use of criminal law, the individual will nearly be withheld from all its rights and freedoms for the good of the public. The question that can be posed is whether these governmental Orwellian Big Brother actions can really make individuals feel safe and secure. Is it fair to sacrifice individuals' freedom for public safety?

2.5. Policy in a Security State from 1995 onwards

After the Note of 1985 the government, supposedly driven by the by the public experienced perceptions of unsafety, in order to reach a more effective policy on criminal justice, conducts a security policy which is becoming more and more a form of instrumentalism in nature.[18]

Criminal justice becomes a system that is based on the publics' feelings, uneasiness and insecurity. The fearful citizen demands the best possible protection against all sorts of collective risks, such as organised crime, international crime and terrorism. Because of technical developments new dangers have sprung and the critical consumer and citizen expects a proactive approach to limit and/or exclude every form of risk. Criminal law, which isn't suitable from the classic reactive model point of view, is expected to force security. This resulted in what is called 'risk orientated criminal justice' and 'risk orientated criminal law'[19]. The criminal act of an individual perpetrator is no longer the main focus, but risk profiling becomes one of the governments key instruments to control safety risks. Prevention of crime, even before criminal activities have begun, so to speak.

Politicians, with a view to re-elections, felt the need to stop the peoples' feelings of concern and unsafety. Faith in the government needed to be restored as well as faith in criminal law as

[16] Foqué, R. en Hart, A.C. 't, *Instrumentaliteit en rechtsbescherming.* Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.

[17] Blad, J.R. , 'Strafrechtelijke rechtshandhaving', in: J.R. Blad e.a. (red.) *Strafrechtelijke rechtshandhaving. Aspecten en actoren voor het academisch onderwijs belicht,* Den Haag: Boom Juridische Uitgevers, 2007.

[18] Woude M.A.H. van der & Sliedregt, E. van (2007), De risicosamenleving: overheid vs. strafrechtswetenschap? Aanwijzingen voor het debat rondom veiligheid en risico's , *Proces, Tijdschrift voor strafrechtspleging* 6: 216-226

[19] Koppen, P.J. (2008) , De beschaving van risicostrafrecht: Tussen goede opsporing en prima gevaarspredictie, *Proces, Tijdschrift voor strafrechtspleging* 2:36-46.

an instrument. The lack of public faith and feelings of safety paved the way for populism. Fear of losing the vote of the public caused politicians to adjust the political agenda to the needs of society. The collective sense of unsafety and insecurity calls for direct measures. Although criminal law from the classic point of view should be an '*ultimum remedium*', the general consensus of the people is that crime can only be fought by 'significant criminalization and hardening of the criminal justice system.'[20]

2.6. Terrorism

After the attacks in New York in 2001, Madrid in 2004 and London in 2005, fear of victimisation took control of our lives, minds and voices of reason. The rise of terrorism on religious grounds resulted in fear becoming the leading factor in policy-making, even more so than before, in order to restore safety and stability. It resulted in a global war on terrorism and from a safety perspective, under the influence of the European Union,[21] as in most European States, it led to adopting more radical legislation on terrorism. These events and the fear and insecurity already felt by civilians have raised much attention for collective safety in the social and political debate. In order to 'secure' public safety, it was thought necessary to create a firm policy on safety. This policy, which supposedly aimed to restore the balance between the protection of society as a whole and its potential victims opposed to the individual rights and protection of potential perpetrators, was heavily criticized by scholars as well as by the council for the judiciary, for disrupting the balance between criminal law as instrument of policy and criminal law as a means to protect rights.[22] In the modern concept of terrorism, the enemy is unknown and most of the time quite invisible, making negotiations impossible. Also, since 'new' terrorism is based on religious grounds, reaching an agreement would be unthinkable. It also aims to make as many civilian victims as possible. The attacks focus on creating chaos, arouse fear and by doing so creating mass public fear.[23]

Terrorism calls for firm actions and criminal law offers possibilities as it is used to track down persons who might consider committing a terrorist act. Because of this change in purpose and use, criminal justice had a complete turnaround: it went from tracking down and prosecuting offenders and tracking down risks by collecting and processing as many information as possible. This resulted yet again in crossing the boundaries of criminal instrumentality and making policy that ignored legal protection of the individual citizen. This politicisation of safety and security caused a decline in legitimacy of the government and the police.[24]

[20] Kelk, C., Enkele strafrechtelijke ontwikkelingen en de volkswil. Vijf jaar na Pim Fortuyn. *Justitiële verkenningen* nr. 2, 2007.

[21] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism

[22] Woude M.A.H. van der & Sliedregt, E. van (2007), De risicosamenleving: overheid vs. strafrechtswetenschap? Aanwijzingen voor het debat rondom veiligheid en risico's , *Proces, Tijdschrift voor strafrechtspleging* 6: 216-226.

[23] Woude, M.A.H., van der. Voorzorgstrafrecht: zorgen voor inzichtelijke keuzes. Een eerste aanzet tot een ex post- en ex ante-evaluatiemodel voor de wetgever. In Hildebrandt, M. & Pieterman, R. (Eds.*) Zorg om voorzorg* (p. 77-106). Den Haag: Boom Juridische Uitgevers, 2007.

[24] J. Terpstra, *Het veiligheidscomplex. Ontwikkelingen, strategieen en verantwoordelijkheden in de veiligheidszorg*. Den Haag: Boom Juridische Uitgevers, 2010.

3. The Legislative Proposal to Criminalize the Glorification of Terrorism

3.1. Introduction

After the beheading of American journalist James Foley by ISIS, in the summer of 2014, some of the responders on social media sympathised with this terroristic group and glorified this act, openly supporting ISIS. The leader of the Dutch Christian party (CDA), Buma, expressed his concern for the lack of power majors will have in case they need to act against those who sympathise with ISIS and who condone terroristic violence.[25] More recently, Buma stated in January this year that after the attacks in Paris last November he believes that there is ground for legislation to criminalize the glorification of terrorism.[26]

The concern of Buma led to a legislative proposal, submitted by Mona Keijzer of the CDA and send to the Council of the Judiciary for approval on 17 December 2015. According to the explanatory memorandum the proposal aims to introduce a new article; 137ga into the criminal code which criminalizes the glorification of the armed struggle and terroristic acts when the person knows or reasonably should suspect that this glorification seriously disrupts or may disrupt public order. The proposal stems from the concern about extensive coarsening of the public debate in the Netherlands and is motivated by the need to protect society against statements that have exceeded the permissible limits by far.[27]

The question that needs to be answered in this chapter is whether the criminalization of the glorification of terrorist acts is a justified instrument that conforms to the boundaries set by the values of a democratic society.

3.2. The Historical Background of the Proposal

This wasn't the first time this proposal was submitted. In 2005, right after the first series of terrorist attacks, the former minister of justice: Donner, also consulted the Council on a similar proposal.[28] At the time the minister aimed to criminalize glorifying, trivialising or denying terrorism and large international crimes (*i.e.* genocide, war crimes and crimes against humanity), 'of which one knows or reasonably should suspect that it will or can disturb public order.'[29]

[25] http://www.volkskrant.nl/politiek/-verbod-verheerlijken-terrorisme-juridisch-niet-houdbaar~a4266808/ (3 May 2016).

[26] https://www.cda.nl/actueel/toon/buma-roept-opnieuw-op-tot-strafbaar-stellen-van-verheerlijking-terroristisch-geweld/ (3 May 2016).

[27] Advies Raad voor de rechtspraak https://www.rechtspraak.nl/SiteCollectionDocuments/20160309-Advies-initiatiefwetsvoorstel-strafbaarstelling-verheerlijking%20terrorisme.pdf.pdf (3 May 2016).

[28] Concept legal proposal to alter the criminal code concerning to criminalize the glorify, play down, trivialize and denial of very serious crimes and disqualification from the practice of certain professions. Advice of the council was published on www.rechtspraak.nl with number 2005/26.

[29] *Ibid*

The proposal was ill-received and there was a lot of critique on its vagueness and the large infringement on the freedom of expression.[30] Afterwards, the government stated that the delict sedition (Art. 131 Criminal Act) was already sufficient to meet international obligations.[31] Furthermore, it was not very likely that the judiciary would accept the criminalization of 'apologie'. Also, according to the government's statement, it would be too difficult to make the criminalization sufficiently precise and meet the criteria of the ECHR, and to comply with the requirements of the principle of legality and still holds it's value.[32]

Because of the latest attacks in France and Belgium, the ongoing debates on the growing threat of terrorism, Buma's beliefes that the public debate has coarsened and that this has exceeded the permissible limits extensively, Buma believes now is the time to criminalize the glorification of terrorism. He claims that there is a relation between positive statements on the acts of terrorism in social media and the violent attacks as a result.[33] In December of 2015 the initiative-proposal was submitted by Buma's colleague Keijzer and send for approval to the Council for the Judiciary.[34]

3.3. Argumentation regarding the Proposal

In accordance with the critique on the proposal of 2005, Buma attempted to specify the new proposal by narrowing it down to only criminalizing the 'glorification of the armed battle and terrorist acts when the person knows or reasonably should suspect that this glorify seriously disturbs or may disturb public order.'[35] But further changes to the former proposal were not noticeable to the Council of the Judiciary or others. Since the current proposal or the explanatory memorandum has not been made public, I consider it to be permissible to use the content of the 2005 proposal in order to discuss the current one.

The proposal states that the freedom of expression (ECHR Art. 10) is an important freedom of humanity in a democratic society. The public debate in the Netherlands is consequently of great importance and it is of great value that everyone in society can equally participate in that debate and feels free to express themselves, regardless of origin, sex, sexuality, religion. Freedom of expression and religion therefore hold a prominent position within the public debate. However, public expressions can also have a counterproductive effect. When statements or expressions are hurtful, relations between groups in society can become worse and it can encourage radicalisation, which can ultimately lead to terrorism.

In the proposal it is stated that it is acceptable to criminalize the glorification of terrorist acts when it is of great importance for public safety and/or protection of public order, when the used

[30] Advies Raad voor de rechtspraak, www.burojansen.nl/terrorisme/apologie/advieverheerlijkingrv.pdf (3 May 2016).

[31] RvE Verdrag ter Voorkoming van Terrorisme, CETS nr. 196; EU-Kaderbesluit 2008/919/JBZ van de Raad van 28 november 2008 tot wijziging van Kaderbesluit 2002/475/JBZ inzake terrorismebestrijding, L330/21.

[32] M. van Noorloos, Verheerlijking van terrorisme, NJB 2014/907.

[33] https://www.cda.nl/actueel/toon/buma-roept-opnieuw-op-tot-strafbaar-stellen-van-verheerlijking-terroristisch-geweld-1/

[34] https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Tal-van-onduidelijkheden-in-wetsvoorstel-dat-verheerlijken-terrorisme-strafbaar-maakt.aspx

[35] Advies Raad voor de Rechtspraak https://www.rechtspraak.nl/SiteCollectionDocuments/20160309-Advies-initiatiefwetsvoorstel-strafbaarstelling-verheerlijking%20terrorisme.pdf.pdf (3 May 2016).

statements and expressions seriously disrupt or may disrupt public order. According to the former minister and now Buma, it is justified to criminalize such statements under those circumstances, because these cases satisfy the constraints that are permitted by the ECHR. The promotion of equal participation in the public debate of different groups in our society therefore would justify the limitations of fundamental rights by criminalizing this glorification.[36]

Buma further states, that even though there wasn't enough support to criminalize the glorification of terrorist acts in the past, now there is enough ground to do so. Although the criminalization is criticised for being in conflict with the freedom of expression, Buma claims that the glorification is also criminalized in France and the UK where the freedom of expression is also highly appreciated. The difference being these countries in the recent past both fell victim to terrorist attacks by Islamic fundamentalist. According to Buma there is a great difference between expressing thoughts and expressing joy over terroristic violence, which inclines towards terrorism. [37] The arguments expressed by Buma actually suggest certain causality between the glorification and the terrorist acts that might follow. In other words: in the opinion of Buma, the potential terroristic perpetrators feel encouraged and strengthened by the glorification to commit the terrorist acts. The criminalization would in this thought be necessary in order to prevent terrorist acts. [38]

3.4. Criticism on the Proposal

The Council on the Judiciary criticised the proposal, by stating that the new proposal is very similar to the previous one of 2005. Although, according to the Council, there are many ambiguities in the proposal, the main objection is that it is not clear how the proposal relates to the freedom of expression. There is no clarity on which expressions would be considered glorification and so should be criminalized. The proposal lacks an explanation from which follows that boundaries have been crossed or that there is a general sense of necessity for criminalizing the glorification.[39] Without any evaluation criteria, there's a danger that 'the criminal judge has to decide on historical, religious and political controversies'.[40] It is most likely that many convictions in the light of this criminalization would be in contravention of article 10 ECHR.

The other difficulty with the proposal is that the requirement of intent on disturbing public order is missing. The memorandum indicates that it was intended to punish those who make public statements that aim to cause public disturbance. If the requirement of intent is not added to the

[36] Concept legal proposal to alter the criminal code in order to criminalize the glorification, playing down, trivialization and denial of very serious crimes and disqualification from the practice of certain professions.

[37] https://www.cda.nl/actueel/toon/buma-roept-opnieuw-op-tot-strafbaar-stellen-van-verheerlijking-terroristisch-geweld/ (3 May 2016).

[38] M. van Noorloos, Verheerlijking van terrorisme, NJB 2014/907

[39] Advies Raad voor de Rechtspraak https://www.rechtspraak.nl/SiteCollectionDocuments/20160309-Advies-initiatiefwetsvoorstel-strafbaarstelling-verheerlijking%20terrorisme.pdf.pdf (3 May 2016).

[40] Advies Raad voor de Rechtspraak http://docplayer.nl/15619324-1-inleiding-aan-de-minister-van-justitie-t-a-v-de-heer-mr-j-j-wiarda-postbus-20301-2500-eh-den-haag.html (3 May 2016).

proposal, every journalistic or scientific publication could be pursued.[41] It is obvious according to the Council that the scope of these legal provisions is at odds with the freedom of expression.

3.5. Jurisprudence of the European Court on Article 10 of the ECHR: Conditions of the Freedom of Expression

In order to conclude whether the criminalization of the glorification of terroristic acts is in breach with the freedom of expression from article 10 ECHR, it is necessary to compare to what is decided on the conditions for a breach of the freedom of expression by the European Court.

According to the Court, the freedoms hold a special position within ECHR. They are necessary to help secure other rights and freedoms in a democratic society and facilitate in spreading opinions, thoughts and information, without which pluralism, tolerance, broadmindedness and social cohesion are hardly possible. The freedoms try to accomplice that social matters with all sorts of opinions, are solved by interaction and dialogue and not by violence. They are vigilant for the position that the majority holds and that it does not abuse its dominant position against the minority.[42]

The European Court it is determined that the freedom of expression can be limited when three conditions are fulfilled. The interference of the government needs to be:

- provided by law, meaning that interference needs to come from a norm of internal law , that is accessible, sufficiently precise formulated, and provides with sufficient ground to prevent arbitrariness (principle of legality);
- based on one of the in article 10 paragraph 2 ECHR mentioned grounds (legitimacy); and
- "necessary in a democratic society, where needs to be considered whether the interference complained of corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued[43] and whether the reasons given by the national authorities to justify it are relevant and sufficient" (Necessity)[44]

The latter requirement comes with a certain but not unlimited 'margin of appreciation'. Under certain circumstances the intensity of the test of necessity (also the extent of the 'margin of appreciation') can be wider or smaller. To determine its width, the next conditions are of importance.[45]

First, the nature of the expression. The ECHR seldom limits participation in the public debate ('public speech' or 'debates on questions of public interest') that takes place on democratic grounds. However, these expressions can be inadmissible, when there's a call for use of

[41] http://www.volkskrant.nl/politiek/-verbod-verheerlijken-terrorisme-juridisch-niet-houdbaar~a4266808/ (3 May 2016) en Advies Raad voor de Rechtspraak http://docplayer.nl/15619324-1-inleiding-aan-de-minister-van-justitie-t-a-v-de-heer-mr-j-j-wiarda-postbus-20301-2500-eh-den-haag.html (3 May 2016).

[42] ECLI:NL:PHR:2013:2379

[43] Handyside v. the United Kingdom judgment of 7 December 1976, § 49.

[44] ECLI:NL:PHR:2013:2379

[45] ECLI:NL:PHR:2013:2379

violence against a certain part of the population or when rejection of the democratic principles is otherwise promoted.[46] In some cases a complained is declared inadmissible, because certain expressions and behavior would be incompatible with the text and the spirit of the ECHR and protection of that expression or behavior would lead to destruction of those rights and freedoms incorporated in the Convention.[47] In other words, expression that is incompatible with the values of the Convention is not protected by article 10. The by the Court mentioned examples are 'negation of the Holocaust, the justification of pro-Nazi policy, associating all Muslims with a serious act of terrorism, calling Jews "the source of all evils in Russia" (Lehideux and Isorni v. France, 23 September 1998, §§ 47 and 53, Reports 1998-VII; Garaudy v. France (dec.), no. 65831/01, ECHR 2003-IX; Norwood v. the United Kingdom (dec.), no. 23131/03, ECHR 2004-XI; Witzsch v. Germany (dec.), no. 7485/03, 13 December 2005, and Pavel Ivanov v. Russia (dec.), no. 35222/04, 20 February 2007). "(...) like any other remark directed against the Convention's underlying values ..., the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10 (there is a) category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17." '[48]

The statements of the Court mentioned above in *Lehideux and Isorni* show that acts that do not comply with democracy and human rights are without a doubt the aim of prohibition by Art. 17 of the Convention.

The second category of circumstances that defines the intensity of the necessity test, is the intention with and the consequences of certain expressions and behaviour. The intent of the impact of the remark or behaviour is what justifies the breach of the rights of the ECHR. That a certain expression or behaviour arouses aversion of the public, does not justify that breach. The interference of the government is considered more necessary when the expression aims for violence or damage to certain persons. On the one hand, the consequences that interfering has on the freedom of expression will be regarded. On the other, the relation between the (seriousness of the) expression and the taken measures will be viewed. When the scope of a measure is limited, the interference will be found legit sooner.[49]

Now there's clarity on the possibility that limitations to the freedom of expression are allowed when there is a 'pressing social need', it is necessary to see when the Court believes there is a matter of 'pressing social need' when it comes to the glorification of terrorist acts.

In *Sürek,* the Court decided that it was a matter of 'pressing social need' when the applicant was fined for spreading 'separatist propaganda', calling for 'bloody vengeance'[50] In a similar case, Leroy v France (no. 36109/03, 2 October 2008), the Court ruled that the dignity of victims was offended by the praise of an act of violence, namely the attacks of September 11 2001, by publishing a drawing that not only criticised US imperialism, but also glorified the

[46] *Ibid*

[47] ECHR 14 march 2013, App. nr. 26261/05 and 26377/06 (Kasymakhunov and Saybatalov/Russia) par. 113.

[48] Council of Europe/European Court of Human Rights, *Internet: case-law of the European Court of Human Rights*, 2015. p. 55.

[49] ECLI:NL:PHR:2013:2379

[50] Council of Europe/European Court of Human Rights, *Internet: case-law of the European Court of Human Rights*, 2015.

deconstruction of it by violence. The caption expressed moral solidarity with the terrorists. The Court decided that the conviction of the applicant pursued several legitimate goals, especially because of the sensitive nature of the war on terrorism. These legitimate goals were: 'maintaining of public safety, prevention of disorder and crime.[51]

In the case of *Féret v. Belgium* the Court decided that there had been no violation of Art. 10, since the applicant's comments were a message in electoral context and were clearly racial, aimed for foreigners, to arouse feelings of distrust, rejection and even hatred against them. The Court decided that conviction was justified to prevent disorder and protecting the rights of others, namely immigrants.[52]

In *Le Pen v. France* it was the Courts opinion that the application was inadmissible and that the interference with the applicant's enjoyment of the right to freedom of expression had been necessary in a democratic society, since the reasons given by the domestic courts for conviction were considered relevant and sufficient. Applicant's statements were placed in the context of general debate, which normally requires a non-interfering government in order for a person to enjoy his right to freedom of expression. In this case, however, the applicant tried to create a gap between by placing the French on one side and the Muslim community on the other, shedding a disturbing light on the latter.[53]

4. Conclusion

At the end of this article we need to deliberate how the proposal on criminalizing the glorification of armed battle and terrorist acts relates to the instrumentality of criminal law and whether it is sufficiently defined by the boundaries set by democratic society, in particular by the freedom of expression of Art. 10 of the European Convention, or whether this proposal can be judged as a form of instrumentalism.

In chapter two it was emphasised that criminal law can only function as an instrument when it equally protects the rights and freedoms of every individual within the rule of law against both vertical infringements by the government, as well as horizontal infringements between citizens. In other words it needs to protect both society as well as the individual suspect. Criminal law should be bound by the principles set by democratic society and it should always be considered the *ultimum remedium*, or last resort. Crossing that line causes criminal law to become an instrument that is merely used to 'reach a certain social aim: an aim that, external to criminal law, is politically dictated and will be developed in a comprehensive policy'[54] The limitations are politically viewed as being nuisances that stand in the way of the desired goal.

In this particular proposal, the instrument could be limited by Art. 10 ECHR. To evaluate whether there is a breach of Art. 10, a comparison needs to be made to the case-law of the

[51] *Ibid.*

[52] European Court of Human Rights, *Factsheet Hate speech*. 2016.

[53] *Ibid.*

[54] Foqué, R. en Hart, A.C. 't, *Instrumentaliteit en rechtsbescherming.* Arnhem/Antwerpen: Gouda Quint/Kluwer, 1990.

European Court of Human Rights. The Court stated in multiple cases that the freedom of expression can in fact be limited, if the three conditions (legality, legitimacy, necessity) are met.

In the case of the proposal, there are already questions (by the Council of the Judiciary) whether the proposal on criminalization is sufficiently described and defined. The current proposal does not describe clearly what expressions would be criminalized and also the necessary element of 'intent' towards disturbing the public order is not included. This leads to uncertainty which endangers the principle of legality. This condition, however, can be fixed quite easily by altering the text of the proposal.

A more interesting question is to see consider it is legitimate to limit the freedom of expression, in other words, whether the proposal meets the conditions of paragraph 2 of Art. 10ECHR and, if so, whether the interference is necessary in a democratic society and if there is a pressing social need that corresponds with that interference. The interference needs to be in proportion in relation with the legitimate goal pursued and the reasons for interference need to be relevant and sufficient. This last condition comes with a limited 'margin of appreciation.'

Further, the scope of the 'necessity' (in a democratic society) needs to be determined. In order to do so, the following conditions are of the utmost importance.

First, when expressions in a public society call for the use of violence against a certain part of the population or when rejection of democratic principles are otherwise promoted, the expressions can be inadmissible. In some cases a complaint is declared inadmissible, because of the incompatibility of the expressions or behaviour with text and spirit of the ECHR. Protection of that particular expression or behaviour would lead to destruction of the rights and freedoms incorporated in the Convention and would therefore not be protected by Art. 10 ECHR.

Secondly, of importance for the intensity of the test of necessity is the intention with and the consequences of certain expressions and behaviour. Interference is considered more necessary when the expression or behaviour aims for violence or aims to damage certain persons. Of importance is what consequences the interference has on the freedom of expression and what the relation is between the expression and the interfering measures. When the scope of the measures taken is limited, the interference will sooner be considered legit.

The final step is to determine when the Court believes there is a matter of 'pressing social need.' Based on the Court's rulings, I believe that there is a matter of pressing social need when a person's remarks can be regarded as a call to violence or as hate speech based on religious intolerance. Merely deliberating on ideas that may be offensive to society, without however calling for violence or seemingly calling for violence is not considered hate speech. In most cases the Court believes the public debate must be continued in order for people to grow and to exchange thoughts.

The question now is, whether the proposal meets the requirements posed by Art. 10 ECHR and those set by the European Court of Human Rights.

In my opinion, the proposal is not necessary, since there already are several articles in the Criminal Code which criminalize similar issues. Furthermore, the proposal does not meet the

requirements of legality. But most of all I believe that criminalizing the glorification of terrorist acts deals with a fine line between sincere glorification and the freedom of the right to expression. States hold a certain margin of appreciation when it comes to the necessity to limit the freedom of expression, however, to in opinion there is no pressing social need to restrict the opinions of people who support terrorist actions on the internet.

Although it is repulsive to me that those acts are glorified by some people, it would be wrong, not to mention useless to create an ineffective instrument and to criminalize every opinion or thought that deals with terrorism. It would be like creating a thought-police, judging people on thoughts, what makes it impossible for the judges to rule on evidence. Moreover, in a democratic society it would be wrong to shutdown the public debate only because it's not ones opinion. A pressing social need will only be accepted by the Court, when the goal of the expression is to inflict violence and to harm others directly. In my view Twitter messages and 'likes' on Facebook cannot be considered such.

Buma's proposal therefore is a disproportionate interference with the freedom of expression and it would therefore provide with an instrument that merely is being used to reach a certain social aim: an aim that, external to criminal law, is politically dictated and will be developed in a comprehensive policy.