Nederlandse antiterrorismeregelgeving getoetst aan fundamentele rechten

Een analyse met meer bijzonder aandacht voor het EVRM

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Summary

Dutch antiterrorism legislation reviewed in light of fundamental rights
An analysis with special attention to the ECHR

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7 Summary and conclusions

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Recent years have witnessed the introduction of a large number of anti-terrorism measures in the Netherlands. Following on from the recommendations of the Suyver Committee (The Anti-Terrorism Policy Evaluation Committee), parliamentary debates, discussions in the literature and our own preliminary analysis, six of these have been found to merit particular attention in respect of fundamental rights. These are the Terrorist Criminal Offences Act (Wet op terroristische misdrijven), the Terrorist Training Act (Wet training voor terrorisme), the Detection and Prosecution of Terrorist Crimes Act (Wet opsporing en vervolging terroristische misdrijven), the Protected Witnesses Act (Wet afgeschermde getuigen), the National Security Administrative Measures Bill (voorstel-Wet bestuurlijke maatregelen nationale veiligheid), and the Personal Disruption Measure (Maatregel persoonsgericht verstoren). The research reported here examined whether these measures, their provisions and their application are in accordance with the substance and import of fundamental human rights. In that regard, the following matters are considered for each measure.

a. First, a brief description is given of the measure's content, operation, and objective.
b. This is followed by an explanation of all jurisprudence wherein the Dutch Courts have reviewed the measure in question, its provisions and its application against fundamental rights (potentially, this mainly involves the Constitution, the European Convention on Human Rights and the UN Human Rights Treaties).
c. A discussion follows of whether the respective Dutch anti-terrorism measures, their provisions and their application have been reviewed against fundamental rights by international human rights organs and, if so, which fundamental rights are concerned and the results of the review. To answer this question we have looked at the jurisprudence from the European Court of Human Rights, the reports of the Council of Europe's Commissioner for Human Rights, findings in the context of the UN Human Rights Council's Universal Periodic Review, and jurisprudence, reports and other relevant documents from the UN Convention Committees.
d. All the anti-terrorism measures on which this research concentrates are then analyzed more closely on the basis of decisions and judgements by the European Court of Human Rights that are not directly related to the Act or other measure under discussion, but which are relevant to the question of whether it, its provisions and its application are in conformity with the rights and freedoms issuing from the European Convention on Human Rights and associated Protocols.
e. Finally, the discussion of the respective anti-terrorist measure closes with a list of conclusions about the measure.

In view of the large number of individual conclusions (more than 70), and having regard to the fact that these are presented in summary form in the foregoing chapters, we shall not repeat all the conclusions here. Rather, we select here some of the most important conclusions and draw some connections between them.

Reviewing measures against fundamental rights by the Dutch Courts

The measures dealt with in this investigation have not previously been reviewed by the Dutch Courts in regard to fundamental rights, or only marginally so. In some cases this is because the measure concerned has not yet passed into law, or has not been in effect for long. This applies to the National Security Administrative Measures Bill and the Terrorist Training Act. In some cases it would appear that the measure has scarcely been used, such as the Protected Witnesses Act and the Detection and Prosecution of Terrorist Crimes Act. By contrast, the Terrorist Criminal Offences Act has been invoked in dozens of criminal cases, including the well-known *Mohammed B.* case, the *Piranha* cases, and the *Hofstad Group* prosecutions. In none of these cases, however, were fundamental rights reviewed, or only barely so. Only the Personal Disruption Measure has been reviewed twice against fundamental rights in the Dutch Courts. The measure's application was found once to be in conflict with the proportionality requirement, which affects the right to privacy under article 8 ECHR. In both cases, the measure *itself* was not found to conflict with any national or international, fundamental right.

Reviewing measures against fundamental rights by international organs

None of the measures have thus far been reviewed by the European Court of Human Rights (ECtHR) against a provision of the European Convention on Human Rights (ECHR) or associated protocols. This is not especially surprising, in that several of the measures investigated are of relatively recent origin. Moreover, such a review may only be contemplated after an individual complaint by a person who believes that his/her fundamental rights have been infringed by the measure or its application.

With the exception of the Terrorist Training Act, all measures have been assessed by the Council of Europe's Commissioner for Human Rights, who was critical or even very critical of them. For example, he finds the concepts in the substantive criminal law Terrorist Criminal Offences Act and criminal prosecutions under the Detection and Prosecution of Terrorist Crimes Act too vague and too broad. In respect of the latter Act he also discerned a conflict with the right to a defence under article 6 ECHR due to the possibility that the defence can be denied sight of documents. His judgement of the Protected Witnesses Act is that it harms the defence's position, in part because the defence may not always attend the interrogation of the protected witness (who will be an agents of a Dutch intelligence service), the witness will remain anonymous in most cases, and further, the witness plays a crucial role in deciding whether the record of the interrogation can be introduced in criminal proceedings. According to the Commissioner, the National Security Administrative Measures

Bill and Personal Disruption Measure are also in conflict with a number of rights under the Convention.

Finally, a number of UN treaty committees have also posed critical questions, made remarks and offered recommendations in respect of several of the anti-terrorism measures, including the Detection and Prosecution of Terrorist Crimes Act, the Protected Witnesses Act, the National Security Administrative Measures Bill and the Personal Disruption Measure.

Assessment of measures in light of applicable case law of the ECtHR

The analysis of the measures in light of jurisprudence from the ECtHR relates especially to the right to freedom (article 5), the right to a fair trial (article 6), the legality principle (article 7), the right to privacy (article 8), freedom of religion (article 9), freedom of expression (article 10), the right to property (article 1, Protocol 1) and the right to freedom of movement (article 2, Protocol 4). The central question here is always whether the measure, its provisions and its application meet the absolute minimum level for the protection of human rights as set out in the ECtHR's jurisprudence. This is thus expressly not concerned with the question of whether the minimum level is or is not the most desirable level of protection and whether the measure does or does not meet that most desirable level.

The first thing to emerge from the analysis is the conclusion that none of the Acts or other measures discussed is *in and of itself* in conflict with the Convention. In a number of cases, though, the analysis leads to the conclusion, were the application of certain provisions of a number of measures to be reviewed by the Court, that these provisions would *in and of themselves* possibly be regarded as insufficiently foreseeable. In respect of the Detection and Prosecution of Terrorist Crimes Act, for instance, it is concluded that there is a non-negligible risk that the Act is insufficiently foreseeable in regard to powers to investigate objects, vehicles and clothing in the sense of article 8 paragraph 2 ECHR (right to privacy). Further, in regard to the imposition of individual measures under the National Security Administrative Measures Bill, there is a non-negligible risk that the Court would regard these provisions as insufficiently foreseeable in the sense of a right of freedom of movement in consideration of article 2, Protocol 4. Moreover, in respect to the Personal Disruption Measure, the analysis leads to the conclusion that there is a very considerable risk that the provisions underlying the Personal Disruption Measure, if reviewed by the Court, would be viewed as insufficiently foreseeable as such in the sense of the right to privacy under article 8, paragraph 2 ECHR.

Furthermore, in relation to all the measures looked at, it is the case that their *application* – at least insofar as this breaches the right to privacy under article 8 ECHR and/or the freedom of religion under article 10 – would very probably be characterised by the European Court as serving a legitimate aim. This relates especially to the goal of preventing criminal acts and protecting national security and public safety. At the same time, in regard to all the measures, their *application* under certain circumstances can lead to a violation of the Convention because the application could not be regarded as "necessary in a

democratic society" in the sense of the provisions just noted. The risk that this will occur is greatest when recourse is had to the Personal Disruption Measure, individual measures under the National Security Administrative Measures Bill, and the special detection measures and authority to conduct preventive searches of vehicles, clothing and objects under the Detection and Prosecution of Terrorist Crimes Act. It is also the case that the *application* of the Protected Witnesses Act *under certain circumstances* may come into conflict with the right to a fair trial under article 6 ECHR, even when the guarantees offered under the Act are observed in their entirety. By contrast, in regard to the Terrorist Criminal Offences Act and the Terrorist Training Act, our conclusion is that it is unlikely that application of the penalties under these measures would come into conflict with the ECHR. At least, as long as the Dutch Court issues an explanation and applies the law having reasonable regard to the essence of these measures. The same holds for application of the special penalty of prohibiting the exercise of a profession under the Terrorist Training Act, as long as the Court does not apply the Act when passing sentences for which the Act does not afford the possibility to prohibit the exercise of a profession.

ECtHR versus Commissioner for Human Rights and UN Committees

In none of the cases considered does the analysis based on the jurisprudence of the European Court of Human Rights lead us to conclude that the legal basis of the measures, their provisions or the application imply with certainty that fundamental human rights are violated, even though some measures are associated with a risk, a considerable risk or even a very considerable risk that they are. At the same time, the Council of Europe's Human Rights Commissioner in particular, and to a lesser degree several UN Human Rights Committees, have expressed their concern about some of the measures. In some cases they adopted the standpoint that the Act or similar measure needed amending in view of fundamental rights. To that extent, then, one may judge that there is a discrepancy between the ECtHR's jurisprudence and the findings of the Commissioner and the UN committees. Nevertheless, in our view, this does not mean that one or the other has drawn erroneous conclusions.

When one assesses the assessment of the Court and the Commissioner, in any case, it should be born in mind that we are here dealing with two supervisory mechanisms, which differ materially in their nature and their tasks, and which seek to complement each other. Where the decisions and judgements of the Court nearly always involve a detailed legal revieuw of fundamental rights in an individual case, the Commissioner's intent is to provide a much more general assessment of a country's legislation and practice in order to track down possible human rights shortcomings and to enter into dialogue with the authorities about them. Moreover, the Court's jurisprudence indicates only the absolute minimum level of human rights protection that should be observed, while the Commissioner frequently demands a legal system and legal practice that provide an adequate level of protection for human rights, excluding as far as possible any risk that human rights are violated.

In this regard therefore, the Commissioner's findings do not need to be assessed strictly in accordance with the legal minimum standard that emerges from the Court's jurisprudence. To put it more strongly, where it follows from the Court's jurisprudence that there is an appreciable risk of violation associated with the application of a given anti-terrorism measure, while the Commissioner offers a critical opinion of the measure, the conclusion must be that the measure lies right at the limit of the permissible in regard to fundamental rights – and possibly even beyond it.