



Evaluation of the Temporary Law on Counterterrorism Administrative Measures

Nood zoekt wet (Necessity seeks law): summary

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Background

Terrorism and extremism are phenomena that can severely disrupt society. Therefore, it is crucial to have an adequate and effective toolkit to address these threats. The so-called 'broad approach' forms the basis of Dutch counter-terrorism policy. This approach involves a coherent deployment of targeted prevention, repression, and, when terrorist violence has occurred, recovery (curation).

One of the instruments within the broad approach is the Temporary Law on Counterterrorism Administrative Measures (Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding, hereafter Temporary Counterterrorism Act). The purpose of this law is to protect national security against terrorist threats. The Temporary Counterterrorism Act consists of administrative measures that can be applied in situations where criminal law (yet) offers no course of action. The administrative measures include the following measures:

- an requirement to report,
- an area ban,
- a ban on leaving the country,
- a ban on contact, and
- the possibility to reject or revoke subsidies, licenses, dispensations and recognitions.

These measures are explained in more detail below.

The law came into effect on March 1, 2017, for a period of five years and was extended for another five years on March 1, 2022. Article 12 of the Temporary Counterterrorism Act stipulates that the Minister of Justice and Security must submit a report on the effectiveness and practical effects of the law to the House of Representatives by September 1, 2024. This study provides that report.

Central research question

The central research question of this study is:

What are the underlying assumptions behind the measures in the Temporary Counterterrorism Act, how and under what circumstances are they applied, what are the necessity, effects, and proportionality of the measures, what are the conditions for maintaining the individual measures, what is the relationship to criminal law, and how can legal protection be strengthened if necessary?

Research approach

Literature and document study

The research commenced with a literature and document study. The focus was on parliamentary documents related to the creation and extension of the Temporary Counterterrorism Act. These documents were studied to understand the policy theory and to develop goal trees. In addition, we reviewed literature to see if it provided support for the assumptions on which the policy theory was based.

Case file analysis

To gain insight into the practical application of the Temporary Counterterrorism Act, we examined all cases where a Temporary Counterterrorism Act measure was applied. The study of the case files provided information on the justification of the necessity and proportionality of the measures, the type of threat, and the legal remedies employed.

Digital survey

We sent a questionnaire via email to all 342 mayors, requesting them to forward it to an employee involved in public order and safety and/or radicalization. The questionnaire inquired about their experiences with the application of the law and their expectations. The email addresses of the mayors are public and were collected by us. Each email contained a unique code to participate in the survey. The response rate for the survey was 59% (201 respondents).

The results show that some of the answers given by respondents about the use of the Temporary Counterterrorism Act in their municipality do not match the findings based on the facts. An explanation for the discrepancies between perception and actual application is that, for example, an area ban was imposed on a person in that municipality, but it was not based on the Temporary Counterterrorism Act but on another legal basis. Therefore, the answers regarding experiences with the Temporary Counterterrorism Act are not fully valid. We limited ourselves to the expectations about the functioning and effectiveness of the measures.

Interviews

We conducted initial interviews with six (former) employees of the Ministry of Justice and Security (including the National Coordinator for Counterterrorism and Security). These interviews were primarily used to elaborate on the policy theory. Additionally, to gain deeper insight into the considerations of local security partners to request the Minister to apply the Temporary Counterterrorism Act and their experiences with the law, we conducted interviews with professionals who may deal with the Temporary Counterterrorism Act in their roles. These included municipal employees, employees of Care and Security Houses, police officers, local advisors of the National Coordinator for Counterterrorism and Security, and two legal aid providers. Most of the interviewees had no direct or recent experience with the application of the Temporary Counterterrorism Act.

Legal analysis

Imposing a Temporary Counterterrorism Act measure can restrict certain fundamental rights, such as the right to privacy (Article 8 ECHR and Article 10 of the Dutch Constitution). We conducted an analysis to examine the tension between imposing a Temporary Counterterrorism Act measure and relevant fundamental rights and whether any restrictions can be justified within the framework provided by the Constitution and international treaties. Additionally, we analyzed to what extent the legal protection available when imposing a measure under the Temporary Counterterrorism Act differs from the protection offered when imposing similar measures under criminal law or immigration law. Finally, a legal analysis was performed to investigate the overlap between the ability to revoke or refuse permits under the Temporary Counterterrorism Act and the existing Bibob Act that offers a similar option.

Case law research

We studied the relevant case law of the Administrative Law Division of the Council of State to gain insight into the reasoning behind the imposition of a Temporary Counterterrorism Act measure and its judicial review. Additionally, rulings were examined concerning the potential tension between a Temporary Counterterrorism Act measure and a criminal measure. The rulings were also analyzed concerning the restriction of fundamental rights.

Findings and conclusions

Background for the introduction of the Temporary Counterterrorism Act

In 2014, the Dutch government established the Action Program Integral Approach to Jihadism. This initiative was prompted by the proclamation of the caliphate by IS in the summer of 2014.

The Action Program outlines a comprehensive strategy to counter the threat posed by jihadism and to prevent terrorist attacks. Among the various measures listed in the Action Program are the Administrative Measures for Risk Reduction of Jihadists.

The Temporary Counterterrorism Act was enacted in 2017 to provide a legal basis for the administrative measures mentioned in the Action Program. In the explanatory memorandum accompanying the Temporary Counterterrorism Act, the Minister of Justice and Security described the following developments and experiences that necessitate the measures outlined in the Temporary Counterterrorism Act:

- The toolkit for combating terrorism requires supplementation with preventive measures.
- Since the withdrawal of the previous legislative proposal, a clear role distribution has emerged, indicating that not everyone participates directly in armed conflict.
- A threat to national security can also emanate from individuals against whom criminal prosecution is (yet) not feasible for various reasons.
- There is a need for measures to prevent the Dutch government from indirectly financing or facilitating a terrorist organization.

Policy theories

The primary goal of the law is to protect national security. The measures outlined in the law aim to prevent terrorist activities or support thereof. According to the explanatory memorandum, the Temporary Counterterrorism Act measures are intended not only to combat jihadism but also to address the threat to national security posed by other forms of terrorism.

The assumptions behind the Temporary Counterterrorism Act as an instrument in a person-centered approach are broadly described and underdeveloped in the explanatory memorandum. Limited attention has been given to potential adverse effects of the law and its side effects, despite various organizations highlighting these during the legislative process. International literature emphasizes the importance of explicitly addressing these aspects in terrorism legislation.

Initially, the Temporary Counterterrorism Act was intended for a period of five years. Little was known in advance about its expected effectiveness. Therefore, the assumptions were not fully explicated or substantiated. Its effectiveness was to be demonstrated through practical application. In 2020, the temporary law was evaluated critically. It was noted that many expectations regarding the law's effectiveness had not been met. Despite this critical evaluation, the Temporary Counterterrorism Act was extended for another five years on March 1, 2022. The necessity for this extension, according to the Minister of Justice and Security, was due to the 'still existing terrorist threat.'

Below are the (evaluations of the) policy theories for the individual measures.

Requirement to report

The central assumption of the reporting obligation is that it provides 'visibility' of the person required to report, contributing to the protection of national security. The minister overlooks the question of how these occasional contact moments with a (heavily) radicalized person contribute to national security, and literature offers no indications for this either. Information on possible adverse effects, such as resistance from the individual, is not (explicitly) considered in the rationale for implementing this requirement to report.

The requirement to report also serves to enforce other Temporary Counterterrorism Act measures. For a specific area ban at a specific time, the combination with the requirement to report is relevant. For enforcing other Temporary Counterterrorism Act measures, this is less so, given the possibility of violating the measures between reporting moments.

Area ban

The area ban can be imposed if the threat posed by an individual targets a specific area. The area ban prevents the person from being in the designated area during the ban period (thus, in theory, preventing them from carrying out attacks there). In practice, considering the relatively low maximum penalty, it is conceivable that a (heavily) radicalized person intending to carry out an attack in the area may not be deterred by the area ban and might enter the area or carry out an attack elsewhere. Enforcing the area ban can be challenging in some cases. An electronic monitoring device, such as an ankle bracelet, can help enforce it in a timely manner, but this tool should not be used lightly and requires a proportionality and subsidiarity assessment.

The area ban can contribute to preventing individuals in the designated area from meeting to develop radical ideologies, thereby curbing the spread of such ideologies. However, this is not an explicit objective of the ban. Possible adverse effects of the area ban, such as resistance upon its imposition, are not (explicitly) addressed in the explanatory memorandum.

Ban on contact

The contact ban aims to prevent specific individuals from having physical contact with each other, thereby reducing the risk of one person convincing another of an individual obligation to defend Islam. This assumption is plausible and supported by literature. However, the ongoing nature of the contact ban complicates its effective enforcement: a person cannot be monitored 24/7. Another consideration is that individuals can still contact others via phone and digital means. The previous evaluation of the Temporary Counterterrorism Act in 2020 indicated that the contact ban could lead to displacement effects towards other radicalized individuals. Possible adverse effects of the ban are not (explicitly) identified.

Ban on leaving the country

The assumption that traveling to and returning from conflict areas poses national security risks is undisputed and confirmed in scientific literature. The policy theory behind this ban is plausible to the extent that the ban complicates travel for individuals with Dutch nationality. However, individuals with dual nationality can still leave the country, which cannot be prevented by imposing the travel ban.

Revoking and refusing subsidies, permits, exemptions, or recognitions

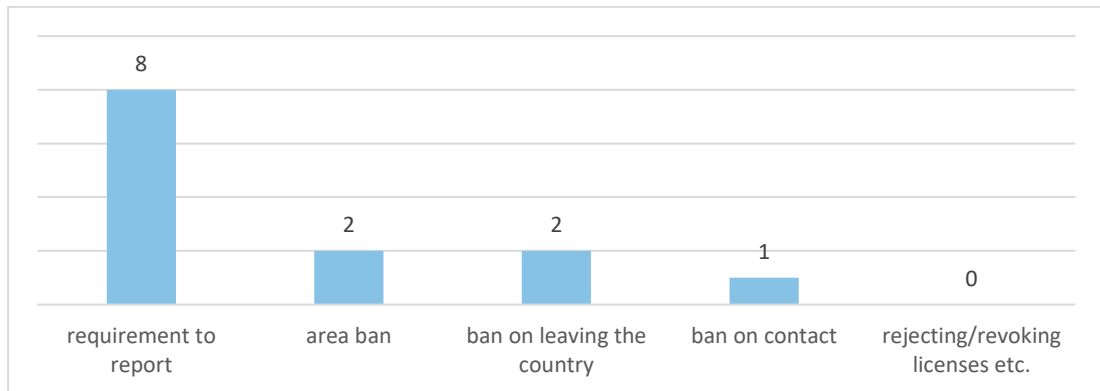
The Temporary Counterterrorism Act grants administrative bodies the authority to refuse or revoke subsidies, permits, exemptions, or recognitions. A plausible assumption of this measure is that it prevents unintended facilitation of terrorist activities by the government. Revoking or refusing permits and exemptions makes an activity 'legally impossible' but does not make the activity factually impossible, as it can still be carried out illegally. Similarly, revoking or refusing a subsidy does not make the activity impossible or illegal, but it does make it, according to the minister, 'more difficult to carry out.'

Application

Since its introduction in 2017, the Temporary Counterterrorism Act has been applied very sparingly. Between 2017 and June 2024, thirteen restrictive Temporary Counterterrorism Act measures have been imposed on nine individuals; four individuals were subject to multiple

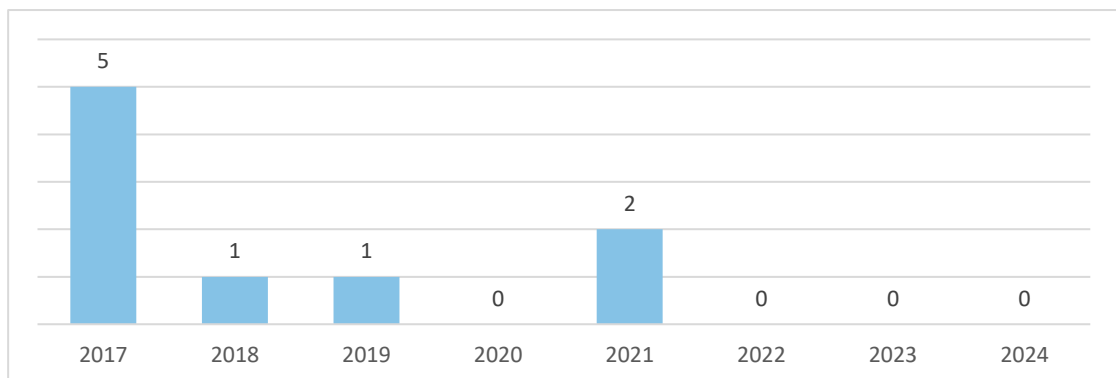
measures. The reporting obligation was the most frequently imposed measure, affecting eight out of the nine individuals. Additionally, two individuals were subjected to area bans, and two individuals were given bans on leaving the country. The contact ban was imposed on one individual. The measure for rejecting applications or revoking permits has not been utilized.¹

NUMBER OF MEASURES IMPOSED BY TYPE IN THE PERIOD 2017-JUNE 2024



Most of these measures were imposed during the initial period of the temporary law, as illustrated in the following figure.

NUMBER OF INDIVIDUALS PER YEAR SUBJECTED TO MEASURES UNDER THE TEMPORARY COUNTERTERRORISM ACT



Threat

Since the establishment of the Temporary Counterterrorism Act in 2014, the terrorist threat in the Netherlands has evolved. At the time of the Temporary Counterterrorism Act’s creation, the explanatory memorandum referenced the Terrorist Threat Assessment for the Netherlands (Dreigingsbeeld Terrorisme Nederland, DTN) 37, which emphasized the threat of global jihadism. In 2024, there remains a threat, but it has partially changed in character. The most recent DTN (60) from June 2024 indicates that jihadism continues to be the primary terrorist threat to the Netherlands. The likelihood of individuals or groups committing a terrorist attack in the Netherlands has slightly increased over the previous six months but remains within threat level 4. Mobilizing events, such as the war in Gaza and Quran desecrations in the Netherlands, and how global jihadist organizations exploit these in their propaganda, lead to (preparations for) terrorist acts in Europe. Interviews with professionals also highlight the changing nature of the terrorist threat. Several professionals note that the Temporary Counterterrorism Act was primarily aimed at preventing individuals from traveling abroad, but currently, there are hardly any travelers. This has implications for the application of the Temporary Counter-

¹ In some cases, multiple Temporary Counterterrorism Act measures have been imposed on a single individual.

terrorism Act. Interviewees suggest that within the jihadist movement, the focus has shifted from travelers to individuals returning from conflict zones ('returnees') and those reintegrating into society after detention, resulting in fewer instances where the law is considered or applied.

Effects

It is challenging to empirically determine whether the Temporary Counterterrorism Act has prevented attacks, as it is difficult to prove that certain events did not occur due to the measures taken. Conducting an experiment where the law is applied in some cases and not in others is obviously not feasible. However, the survey, case file study, and interviews with professionals provide some insights into the effects of the Temporary Counterterrorism Act.

Although the Temporary Counterterrorism Act offers various tools to counter terrorist threats, they have rarely been applied in practice. The current application of Temporary Counterterrorism Act measures reveals several practical challenges and inconsistencies. The ban on leaving the country, seen by many professionals as an important measure on paper, is often replaced in practice by the alternative measure of passport revocation. The reporting obligation, mainly intended to keep track of radicalized individuals, is often considered ineffective. This is mainly because reporting moments do not always lead to meaningful interactions and due to the lack of specific skills among the staff (typically police officers) to handle radicalized individuals. This indicates a gap between policy intentions and the realities of implementation. Area bans are considered difficult to enforce when imposed for extended periods over large areas. The contact ban, though appreciated for its potential to limit physical interactions, faces practical enforcement issues as digital and phone communication remains possible. There are also indications of negative and/or counterproductive effects when a Temporary Counterterrorism Act measure is imposed, such as stigmatization and polarization. The measure to reject applications or revoke permits has never been applied, indicating its lack of added value.

Legal Analysis

The Temporary Counterterrorism Act is an administrative law that allows for the imposition of area bans, contact bans, and reporting obligations. Similar provisions exist in criminal law, but they are not always specifically intended for counter-terrorism. However, they are generally applicable to terrorist crimes (including preparation and facilitation of such crimes). Criminal law is not always an alternative to the Temporary Counterterrorism Act, as it requires suspicion or conviction. In practice, the application of Temporary Counterterrorism Act measures often complements a criminal law trajectory.

The question arises whether the 'residual category' (situations where criminal interventions are not possible, but administrative interventions are) is substantial enough to justify the Temporary Counterterrorism Act's continuation. This is particularly relevant given the changes in the criminal law landscape since the Temporary Counterterrorism Act's enactment and extension; notably, Article 38z of the Criminal Code, effective from January 1, 2023, allows for the imposition of behavior-influencing and/or freedom-restricting measures on individuals convicted of terrorist crimes or their preparation or facilitation. This measure is now specifically designated for terrorist activities. Therefore, the 'safety net' provided by the Temporary Counterterrorism Act may have become very small.

Our analysis shows that the coexistence of criminal law and Temporary Counterterrorism Act measures does not conflict with the 'una via' principle. However, there are conceivable circumstances where imposing a Temporary Counterterrorism Act measure after a criminal law trajectory could conflict with the principle of proportionality and the 'una via' principle. For

instance, if a long-term area ban is imposed under the Temporary Counterterrorism Act based on the same facts and circumstances underlying the criminal prosecution, it could be seen as disproportionate. However, current case law does not generally consider this a violation of the 'una via' principle.

The application of Temporary Counterterrorism Act measures often limits fundamental rights, particularly Article 8 of the European Convention on Human Rights (ECHR). Other fundamental rights may also be affected. Justification for these restrictions must be provided, demonstrating that they are legally grounded, serve a legitimate purpose, and are necessary in a democratic society. When Temporary Counterterrorism Act measures are extended, the necessity of each extension must be demonstrated.

Regarding legal protection, Temporary Counterterrorism Act measures do not offer the same safeguards as criminal proceedings. While criminal law is based on the presumption of innocence and includes important safeguards such as the right to remain silent and the nemo tenetur principle, Temporary Counterterrorism Act measures must meet procedural and substantive standards applicable in administrative law, such as careful preparation, hearing affected parties, and proportionality. It is notable that decisions rarely address potential fundamental rights violations or the proportionality of the measure.

Necessity and Proportionality

This study shows that the Temporary Counterterrorism Act has been rarely applied, often as a supplement to a criminal law trajectory. The law appears not to meet a real need. In practice, other measures, such as preventive care interventions and measures under criminal or administrative law (e.g., Article 38z of the Criminal Code), are preferred as they are more suitable or easier to implement. There is also no need for the measure allowing the rejection or revocation of permits to prevent the government from indirectly financing or facilitating a terrorist organization, as it has never been used. Therefore, the assumptions behind the necessity of the Temporary Counterterrorism Act seem insufficient. These findings raise serious questions about the law's necessity.

Moreover, the study found no evidence that terrorist activities have been prevented by applying the act. Some interviewees believe it is useful to have the law in the 'toolbox,' suggesting a preference for having the Temporary Counterterrorism Act 'just in case.' However, none of the professionals from municipalities, police, or Care and Security Houses expressed a significant need for the law. This supports the general conclusion that the Temporary Counterterrorism Act is not a necessary tool in combating terrorist activities.

The concrete application of measures also raises questions about their necessity. In several cases, the judiciary found insufficient justification for the measure. The case file study indicates variability in the level of justification for measures, highlighting room for improvement. The necessity of imposed measures is not always convincingly substantiated, especially since measures are often applied after a criminal law trajectory. The legislator has provided in Article 38z of the Criminal Code the possibility to impose behavior-influencing and/or freedom-restricting measures in completed criminal cases related to terrorist crimes. If this option is not utilized in a criminal case (considered the ultimum remedium), it is difficult to justify the application of the Temporary Counterterrorism Act. This contradicts the principle that the Temporary Counterterrorism Act is not intended as an ultimum remedium.

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