The Response to International Terrorism as a Threat to Liberal Democracies in Europe

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Abstract

In light of the recent terrorist attacks in Western European countries and the ongoing discussions on how to adequately respond to them, this paper analyzes the current situation by questioning some of the controversial counterterrorism measures that have been implemented. As has already been argued by some political scientists and terrorism experts, responses to terrorism can in fact pose a greater threat to the liberal democratic values and principles than terrorism itself. This can happen when governments fail to respond in a way that is “limited, well-defined and controlled” (Chalk, 1998, p.373). In this scenario counterterrorism measures undermine human rights and consequently threaten the government’s legitimacy. This paper deals with the question whether counterterrorism measures in Western European countries pose a threat to liberal democracies. In order to answer this complex question, literature about terrorism and counterterrorism has been reviewed. As examples from Western European countries illustrate, most measures are aimed at preventing terrorist attacks. This preventive approach has caused the criminal law process to become proactive rather than reactive. As a result, innocent citizens can become the victim of counterterrorism powers. Due to the Islamic nature of the current terrorist threat, especially the Muslim community has been disproportionately targeted by the measures. This is likely to be counterproductive. Besides, the terrorist threat is not a short-term problem, so measures to fight it often remain active for an extended period of time. This results in the normalization of extraordinary powers, which is illustrated by the case of the state of emergency in France which lasted for two years. The risk of counterterrorism measures is, thus, that human rights and criminal law principles are systematically undermined. This is threatening the democratic legitimacy of the government. In order to stay true to their values in responding to terrorism, liberal democracies have to act within the rule of law and with respect for human rights, without disregarding democratic safeguards.

Keywords: Terrorism, Counterterrorism, Democracy, Human rights, Radicalization, Security.
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1. Introduction

Terrorism is currently considered as one of the most serious threats facing the international community. Since the beginning of this century the number of terrorist attacks committed by Islamist extremists in Western European countries has increased significantly (Speckhard, Shajkovci & Yayla, 2017; Global Terrorism Database, 2017). The battles are no longer fought ‘somewhere in a remote place’ in the Middle East, but they have expanded to the usually safe and peaceful Western democracies (Crone & Harrow, 2011). Mainly as a result of the atrocious attacks on the World Trade Center in New York City on 11 September 2001 (9/11), there has been a global increase in counterterrorism policies (Argomaniz, 2009).

At first, the United States (U.S.) suffered from attacks primarily committed by the transnational terrorist organization ‘al-Qaeda’, but more recently European countries such as France, Belgium, Germany and the United Kingdom (U.K.) have been victimized by members of the ‘Islamic State’ (IS) (Speckhard, Shajkovci, & Yayla, 2017). Both al-Qaeda and IS are Muslim extremist organizations that essentially aim to eliminate the Western influence, especially of the United States, in the Middle East and to restore the ‘true’ Islam (Wilkinson, 2011).

In the days following a terrorist attack, the authorities of the affected country usually feel a strong need and responsibility to accurately respond to the emergency situation (Chalk, 1998). Extra pressure is added as a result of extensive media attention; whenever there is a terrorist attack, all media platforms instantly cover the news (Wilkinson, 2011). However, the risk of this strong need for a quick response is that it might result in an overreaction (Chalk, 1998). For example, as a response to 9/11 President Bush was granted full powers from the U.S. Congress so that he could implement extraordinary legislative measures to fight the ‘war on terror’ (Bigo, 2002). Yet, the limits of these powers were only discussed after they were already granted (Bigo, 2002). As a consequence the legitimacy and extent of these measures were questioned, especially by scholars, NGO’s and the media (Wilkinson, 2011). On the other hand, not doing anything would undermine the sovereignty of a state and could even lead to the fall of the government (Bigo, 2002).

Therefore, the countries that suffer from terrorist attacks face the dilemma of how to respond in a manner which is both effective and in line with their liberal democratic values (Wilkinson, 2011). One of the fundamental tasks of any liberal democracy is to guarantee the security of its citizens through the enforcement of laws that are established to protect their interests (Chalk, 1998). On the other hand, liberty is also an indispensable characteristic of democracy (Raphael, 1990). Considering that the aim of most terrorist organizations is to pressure the existing government into giving in to their demands, for example to release prisoners or to achieve official recognition, terrorism undoubtedly forms a threat to the peace and security of the state and its citizens (Wilkinson, 2011). Consequently, it requires a firm response of the national authorities which often means that some of the ordinarily guaranteed liberties are being sacrificed in the name of security (Wilkinson, 2011). Yet, as Peter Chalk (1998) already argued; when a government
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fails to respond in a manner that is “limited, well-defined and controlled, it is likely that institutionalized counterterrorism policies will pose an even greater threat to the political and civil traditions that are central to the liberal democratic way of life” (Clark 1998, p.373). Considering the state’s urge for an immediate response to a terrorist attack, the likelihood of it being limited, well-defined and controlled is small. In this scenario the anti-terrorism policies risk to be counterproductive, meaning that they could in fact indirectly serve the cause of the terrorists by undermining human rights principles which will make the government loose public support and consequently legitimacy (Baradat, 1991; Wilkinson, 2011). In view of the recent attacks in Western European countries and the ongoing discussions on how to adequately respond to this problem, it is relevant to analyze the counterterrorism measures that have recently been implemented. Therefore, the main question that is discussed in this paper is:

Do counterterrorism measures in Western European countries pose a threat to liberal democracies?

In order to answer this complex question several sub-questions have been formulated which are divided over separate chapters:

1. What is terrorism?
2. What are the values and principles which form the basis of Western liberal democratic states?
3. What counterterrorism measures do European governments implement?
4. Do these measures threaten the values of liberal democracies and if so how?
5. How can democracies stay true to their values in their response to terrorism?

Since the phenomenon of terrorism has always formed a serious threat to democracies, similar questions have already been researched extensively. Yet, most of the literature on terrorism used for this paper was written shortly after 9/11. Considering the recent developments in counterterrorism in Western-Europe it is interesting to apply this question to the current situation. In order to do so, academic articles as well as reports and regulations of important organizations such as the United Nations (UN) and the European Union (EU), but also other governmental legislations and news articles are used as sources of information.

In order to be able to answer to the main question, some background information is needed. First of all, it is necessary to explore the following question ‘what is terrorism?’. Therefore, chapter 2 discusses the ambiguous concept of terrorism. It explains why it has proved so hard to define, and gives examples of social and legal definitions. Then, the ‘waves of terrorism’ as identified by David Rapoport (2004) show that modern terrorism until now has occurred in a cycle of approximately forty years, each time period with
its own terrorist organizations and varying tactics. After this short historical overview, the situation leading up to the more recent terrorist attacks in Europe is discussed, as well as the phenomena of homegrown terrorism and radicalization. In the third chapter some of the fundamental values and principles upon which the Western liberal democracies are built are explained briefly. These include the principles of liberty and equality; the legal and practical safeguards of democracy such as the separation of powers, the criminal justice system and human rights; and the legal principles of proportionality and subsidiarity. Then, in chapter 4 the counterterrorism measures implemented by the European Union and national governments are discussed. This is followed by the main question of whether these measures in fact threaten the values of liberal democracies and if so how. Different models of responses to terrorism are considered as well as some general dangers of counterterrorism policies. The most important human rights that are potentially threatened by controversial measures are discussed separately. Then, chapter 5 will shed light on the danger of the normalization of such extraordinary measures by giving the example of the “état d'urgence” (state of emergency) in France which persisted for two years after the attacks in Paris in November 2015. After all the threats of counterterrorism measures have been discussed, chapter 6 concludes by formulating an answer to the question whether the current measures in fact undermine the Western European democratic values and principles, and ends with recommendations about how the current counterterrorism measures could possibly be improved in the future.
2. The concept of terrorism

There is no universally accepted definition of ‘terrorism’ (Wellman, 2013). This is mostly due to the broad and complex nature of the concept (Caruso & Locatelli, 2014). Yet, for the sake of this paper it is necessary to establish a general understanding of terrorism. Therefore, this chapter starts by giving a brief overview of possible answers to the question ‘what is terrorism?’ Then, it will explain the ‘waves of terrorism’ as identified by David Rapoport (2004). The focus will be more on the current ‘religious wave’, considering that this is the most relevant form of terrorism for this study. Finally, the role of ‘radicalization’ will be discussed, since this concept is indefinitely linked to terrorism (Crone & Harrow, 2011).

2.1 What is terrorism?

As the American historian Walter Laqueur once stated: “you know terrorism when you see it” (Laqueur, 1987, p.5). Yet, establishing a definition of terrorism that is globally accepted has proved to be an extremely difficult, if not impossible task (Wellman, 2013). This section aims to explain why developing an accepted definition of terrorism is so difficult. This section will also give some of the existing social and legal definitions.

Specific versus general approaches

Even though there seems to be a general understanding of terrorism, it is an ambiguous concept (Wilkinson, 2011). Over time and place, terrorism has been expressed in many different forms, which makes that it can easily be mistaken for other forms of violence (Crenshaw, 2010). Theorists have suggested well over one hundred definitions, some of which broader and others more specific (Crenshaw, 2010). However, when using a broad definition, one risks including other criminal activities rather than merely those related to terrorism (Golder & Williams, 2004; Caruso & Locatelli, 2014). Governments often prefer a broader definition, because this allows them to expand their powers in the name of terrorism (Caruso & Locatelli, 2014). On the other hand, a more specific definition can exclude cases. For example, it does not cover all the possibilities created by new technologies. Furthermore, it fails to capture the true meaning of terrorism, since it does not differentiate between a terrorist act and other criminal acts (Caruso & Locatelli, 2014). However, in order to be able to effectively prosecute terrorists or terrorist actions, it is necessary to describe the concept as specific as possible (Golder & Williams, 2004).

Social scientific definitions

A social scientific approach acknowledges that defining terrorism is a subjective procedure: to label an actor or action as ‘terrorist’ necessarily depends on a value judgement (Caruso & Locatelli, 2014). Therefore, all definitions of terrorism carry moral judgement of the author, who is unavoidably influenced
by the time and place they live in (Crenshaw, 2010). Besides, the political nature of terrorism makes it difficult to create an objective definition (Wilkinson, 2011). The people that are labelled as ‘terrorists’ by the general public most likely do not identify themselves as such, rather they call themselves ‘freedom fighters’, ‘holy warriors’, or ‘revolutionaries’ (Wilkinson, 2011). Yet, in order to establish a general understanding of the concept two social definitions have been selected. First of all, Paul Wilkinson, who is an expert in the field of terrorism studies has defined terrorism as follows:

“Terrorism is the systematic use of coercive intimidation, usually to service political ends. It is used to create and exploit a climate of fear amongst a wider target group than the immediate victims of the violence, and to publicize a cause as well as to coerce a target to acceding to the terrorists’ aims. Terrorism may be used on its own or as part of a wider unconventional war. It can be employed by desperate and weak minorities, by states as a tool of domestic and foreign policy, or by belligerents as an accompaniment in all types and stages of warfare. A common feature is that innocent civilians, sometimes foreigners who know nothing of the terrorists’ political quarrel, are killed or injured. Typical methods of modern terrorism are explosive and incendiary bombings, shooting attacks and assassinations, hostage-taking, and kidnapping and hijacking. The possibility of terrorists using nuclear, chemical or bacteriological weapons cannot be discounted” (Wilkinson, 2011, p.17).

Even though this is still a broad definition, it captures the most essential characteristics of terrorism. Wilkinson rightly identifies the use of violence in order to draw attention to the terrorists’ cause as a main aspect of terrorism. He also includes the fact that its immediate victims are often innocent individuals, and that this apparent randomness of victims can result in ‘a climate of fear’ in the attacked society. Another interesting definition which is similar to Wilkinson’s is that of terrorism expert Martha Crenshaw:

“Suffice it to say initially that terrorism is a conspiratorial style of violence calculated to alter the attitudes and behavior of multiple audiences. It targets the few in a way that claims the attention of the many. Among systematic and organized modes of civil or international violence, terrorism is distinguished by its high symbolic and expressive value. The discrepancy between the secrecy of planning and the visibility of results gives it even more shock value. Terrorism is not mass or collective violence but rather the direct activity of small groups, however authentically popular these groups may be; even if supported by a larger organization or political party, the number of active militants who engage in terrorism is small. Moreover, governments and their agents can practice terrorism, whether to suppress domestic dissent or to further international purposes. Such use is usually carefully concealed in order to avoid public attribution of responsibility” (Crenshaw, 2010, p.4).
Crenshaw acknowledges that besides minority groups, states can also use terrorism. Governments typically qualify terrorism as illegal, since it is threatening their establishment. However, they do not consider their own use of violence as terrorism (Crenshaw, 2010). She also highlights the shock value of terrorist attacks; even though the likelihood of it might be small, and statistically the numbers of people killed or injured by it are relatively low, this shock value makes it appear as a large threat (Wolfendale, 2006). The ill intention behind terrorism makes it worse than other threats such as natural disasters or accidents (Wolfendale, 2006). Furthermore, as Crenshaw empathizes, terrorist actions are often performed by small groups. Yet, contrary to Wilkinson she does not give any concrete examples of such actions, nor does she mention anything about the immediate victims. Both definitions clearly state that terrorism uses violence as a tool to draw attention to a political cause. Terrorism is often applied in asymmetrical conflicts by a minority group against the government. Even though neither of these definitions are complete, these two examples capture a general understanding of terrorism.

Legal Definitions

To label a person as a terrorist or an action as terrorism has severe legal, political, social and economic consequences (Golder & Williams, 2004). Especially in a legal context it is, therefore, of vital importance that terrorism is defined as specific as possible. Most countries have adopted their own legal definitions of terrorism, which permits for wide and divergent definitions (Saul, 2005). Yet, without an international agreed upon definition, countries cannot unite against the international threat of terrorism (Saul, 2005). Hence, this section is focused on international legal understandings of terrorism rather than national ones.

I. United Nations

As a defender for international peace and security, the United Nations (UN) is one of the most important international organizations in the world. Therefore, it is interesting to consider their definition of terrorism. The UN General Assembly has dealt with the problem of terrorism since the 1970s (Roberts, 2008). Even though they have taken multiple measures against it, they have not yet been able to come up with a working definition of terrorism (Roberts, 2008). This is partly due to the fact that many states which are represented in the General Assembly used to be colonies. In their struggles to liberate their countries from the colonial powers their own campaigns were referred to as ‘terrorist campaigns’. So, working out the differences between a ‘terrorist’ and a ‘freedom fighter’ has proved difficult (Roberts, 2008). Yet, progress was made in 2004 when the UN Security Council passed Resolution 1566 which acknowledges that terrorist acts can never be justified by political or religious reasons (Roberts, 2008):

1 This is generally referred to as state terrorism or gross human rights violations (Crenshaw, 2010).
“The Charter of the United Nations recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do so or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”. (UN, 2004).

Even though Res 1566 was a step in the right direction in the fight against international terrorism, this definition is still fairly general. For example, according to the Resolution a political motive is not required, while terrorism is usually considered as a type of political violence (Saul, 2005). As a result this definition also allows for private acts to be labelled as acts of terrorism (Saul, 2005). Furthermore, the Resolution requires member states to prevent for terrorist acts, and when this fails “to ensure that such acts are punished by penalties consistent with their grave nature” (UN, 2004). The Resolution established a working group which “considers recommendations on practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities” (UN, 2004). Yet, there are no specific guidelines included as for what they consider as reasonable punishments for crimes of terrorism. This leaves room for the member states to define and respond to terrorism differently (Saul, 2005). While strict international protocols for the implementation of counterterrorism measures are not possible due to differences in national legal systems, it does prevent the member states from responding in a homogeneous manner (Saul, 2005). This makes it difficult for the UN member states to unite against the international threat of terrorism and respond effectively.

II. **EU rules on terrorist offences and related penalties**

Another important institution that deals with international terrorism is the European Union (EU). The EU has considerably less member states than the UN (28 vs. 193), which supposedly makes them more capable of uniting their countries against the threat of terrorism. The EU Council implemented a framework decision 2002/475/JHA and amending Council decision 2005/671/JHA on terrorist offences which every EU member country has to incorporate in their own national legislations. It defined terrorist offences as “a combination of objective elements and subjective elements” (EUR-Lex, 2005). For example, objective acts include “murder, bodily injuries, hostage taking, extortion, committing attacks, [and the] threat to commit any of the above” (EU Publications, 2015). Subjective elements are defined as “acts committed with the objective of seriously intimidating a population, destabilising or destroying structures of a country or international organisation or making a government abstain from performing actions” (EU Publications, 2015). The framework recognizes terrorist groups already when it encompasses “two or more persons”, is “structured” and acts in accordance “to commit terrorist offences” (EU Publications, 2015). Besides the
previously mentioned terrorist acts, it also criminalizes “preparatory acts” such as the recruitment and training for terrorism or publicly threatening to commit a terrorist offense (EU Publications, 2015). The framework also included minimum thresholds for penalties for crimes related to terrorism which had to be incorporated into the domestic legislation of each EU country. After evaluating the implementation of 2002/475/JHA and 2005/671/JHA, the European Commission concluded that most EU countries had adopted the measures even though it sometimes conflicted with national laws. However, due to the increase in terrorist activity in the recent years the EU Parliament and Council decided to replace them with Directive (EU) 2017/541. This Directive is aimed at combating terrorism and establishes more concrete rules about definitions of criminal offences, but also of activities related to terrorism and measures to protect and assist victims of terrorism (EUR-Lex, 2017). For example, it addresses the recent developments of terrorist threats such as ‘foreign terrorist fighters’ who are trained abroad and then return home, the issue of financing terrorist groups, and use of social media for purposes linked to terrorist activities (EUR-Lex, 2017). It has defined more extensive guidelines for the member states considering the implementation of the counterterrorism measures. An important addition is recorded in paragraph 35 which emphasizes that the Directive has to be implemented in respect with the fundamental rights and freedoms, taking into account the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and other international human rights obligations (EUR-Lex, 2017).

2.2 Waves of terrorism

Terrorism is not a new phenomenon. On the contrary, terrorism has existed in all times (Rasler & Thompson, 2009). Yet, depending on the era and the developments of each period in time, the forms and expressions of terrorism can differ greatly (Rasler & Thompson, 2009). As David Rapoport (2004) pointed out in his research on modern terrorism, different ‘waves’ of terrorism can be identified throughout the past couple of decades. He described a wave as:

“a cycle of activity in a given time period- a cycle characterized by expansion and contraction phases. A crucial feature is its international character; similar activities occur in several countries, driven by a common predominant energy that shapes the participating groups’ characteristics and mutual relationships” (Rapoport, 2004, p.47).

In other words, each wave represents the drives of international terrorist groups of a certain period. The disappearance of old groups leads to the emergence of new groups, each with their own goals and strategies (Crelinston, 1989). This shift in priorities can be the result of generational differences; children do not always value their parent’s ideas as much, rather they come up with their own ideas (Rapoport, 2004). Nevertheless, a common characteristic of these terrorist groups so far has been their aim to trigger a revolution in order to gain power or support to realize their goals (Rapoport, 2004). In his theoretical

**First wave: the “Anarchist” wave (1880-1920)**

The first wave marks the first genuine international terrorist experience. It started in Russia in the 1880’s and was mainly a consequence of slow processes of political reform (Rasler & Thompson, 2009). The key strategy of this wave was the assassination of powerful figures in order to draw attention to the terrorists’ ideas (Rapoport, 2002). Technological developments such as the telegraph and daily mass newspapers, but also transportation by train made news travel faster and further, increasing the terrorists’ impact (Rapoport, 2002). At the same time, it made it easier for the anarchists to travel and receive support for their ideas throughout other parts of Europe (Rasler & Thompson, 2009). The Russian anarchists were self-defined terrorists whom considered themselves as liberators, thus using ‘terrorist’ as a positive term (Rapoport, 2004). Outside of the Russian Empire other anarchist groups appeared with similar goals and strategies (Rapoport, 2004). This first wave is also known as the ‘Golden Age of Assassination’, as monarchs and presidents were eliminated one after another (Rapoport, 2002). This was the first time that governments were forced to cooperate internationally in order to fight terrorism. Nevertheless, their attempts were not successful because of the conflicting interests of countries (Rapoport, 2004). On the other hand, despite their international impact, the anarchist groups also failed to create societies without the rule of a government (i.e. full freedom). The first wave declined because of the start of the First World War (Rasler & Thompson, 2009).

**Second wave: the “Anticolonial” wave (1920-1960)**

The end of the First World War led to the rise of the second wave. Post-war treaties acknowledged the importance of self-determination² (Rasler & Thompson, 2009). Especially the defeated countries had to give up their empires and colonies, which resulted in new states governed by temporary arrangements (Rasler & Thompson, 2009). This led to power struggles in these newly independent countries, for they had been governed by colonial powers before. On the other hand, the victors of the war were able to hold on to their empires and colonies, which was not taken well by both the defeated countries and part of their own citizens (Rapoport, 2004). Questions about the legitimacy of these empires and their (overseas) colonies were raised, resulting in terrorist groups such as the Irish Republican Army (IRA) (Rapoport, 2002). This time the strategy was to assassinate members of the police, rather than authority figures in order to provoke military responses (Rasler & Thompson, 2009). The terrorists reasoned that the military would respond by

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² Self-determination “means that states and their peoples have the right to independence from foreign domination” (Hannum, 1990, p.48).
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carrying out counter-atrocities which would lead to more social support for their cause (Rasler & Thompson, 2009). Another characteristic of the second wave terrorists was their use of guerilla tactics, such as committing ‘hit-and-run’ attacks and concealing their weapons and identities (Rapoport, 2002). Rather than terrorists they called themselves freedom fighters, because ‘terrorist’ had become a negative term after the first wave (Rapoport, 2004). The second wave was more successful than the first wave. An important development was the establishment of the United Nations (UN) after the end of the Second World War in 1945 (Rapoport, 2004). The institution’s supranational powers supported the decolonizing processes by acknowledging the right to self-determination (Rapoport, 2004). Eventually, most second wave groups dissolved because the colonial rule had ended (Rasler & Thompson, 2009).

Third wave: the “New Left” wave (late 1960-1990)

The third wave was triggered by tensions caused by the Cold War and the Vietnam War (Rapoport, 2004). ‘New Left’ terrorist groups were inspired by Marxist socialist ideas, which formed a counterpart for the Western capitalist system (Rapoport, 2004). They were also stimulated by the Viet Cong’s capability to withstand the military of the United States during the Vietnam War, which revealed a vulnerable side of this Western world power (Rasler & Thompson, 2009). Many different third wave groups developed independently around the world. The most well-known terrorist organization of this period was the Palestine Liberation Organization (PLO) in the Middle East (Rapoport, 2004). The PLO aimed to liberate Palestine from the Israeli through the use of violence. They started working together internationally with other groups by training their terrorists in shared camps and by dividing their resources (Rasler & Thompson, 2009). The main tactics of this wave were the hijacking of planes and public offices as well as kidnappings, hostage takings and assassinations (Rapoport, 2004). All of those actions would result in rapid international response and publicity (Rapoport, 2004). As in the Anarchist wave, the targets of the New Left terrorists were mostly influential people, only this time they often had ties to the U.S. or they had done something wrong in the eyes of the terrorists (Rapoport, 2004). Internationally the terrorists were in some cases considered as freedom fighters, for example by the leaders of the Soviet Union who shared the desire to end capitalism (Rapoport, 2004). During this wave the UN played a crucial role once again (Rapoport, 2004). They criminalized the terrorists’ actions, as well as the financing of terrorism, thus “international counter-terrorist cooperation became increasingly effective” (Rapoport, 2004, p.60). However, the UN General Assembly eventually recognized the PLO as representatives of Palestine in 1974, despite of their terrorist actions (Rapoport, 2004). They recognized the right of the Palestinians to self-determination, yet they rejected the PLO’s use of violence (Rapoport, 2004). The end of this wave coincided with the end Cold War (Rasler & Thompson, 2009).
Fourth wave: the “Religious” wave (1979-present)

Religious convictions have been of significant influence in all kinds of modern terrorism (Rapoport, 2004). Though, during the first three waves the aim of the terrorist groups was to establish secular sovereign states, while during the fourth wave they consider religion to be the legitimate base of governments (Rapoport, 2004). Islamic terrorist groups play a central role during this wave, so even though there are examples of Christian, Jewish and Buddhist groups as well, the focus will be on the rise of the Islamic ones (Rapoport, 2004).

The Iranian Revolution in 1979 is considered one of the main triggers of the fourth wave (Rapoport, 2002). The revolution was a consequence of political unrest and social inequality, aimed to overthrow the pro-Western ‘Shah’ (Rapoport, 2002). The Iranian Shah had close ties with the United States which led to a growing disconnect between the Shah and the people. They resented the fast pace at which the Shah was westernizing and secularizing Iran and the influence that the US had over him (Wilkinson, 2011). So, it was not initially a religious revolution. After the Shah was overthrown, power was taken over by Islamic clerics who established the Islamic Republic of Iran (Rasler & Thompson, 2009). The successful revolution inspired radical Muslim groups in neighboring countries to believe that they could put an end to their pro-Western governments as well (Wilkinson, 2011). As a result, Islamist movements emerged in many Muslim countries by the early 1980s (Rapoport, 2004). Examples of significant groups are “Hezbollah in South Lebanon, Hamas based in Gaza and the West Bank and al-Gama’al al-Islamiyya in Egypt and the transnational al-Qaeda network” (Wilkinson, 2011, p.31). Common tactics of these fourth wave terrorist groups are assassinations and hostage taking (similar to third wave), however a popular new method is ‘suicide bombing’, meaning that terrorists blow themselves up, often in a crowded place, with the intention to kill others as well (Rapoport, 2004). The global development of technology has facilitated an increase in terrorism, for instance by creating new vulnerable targets such as airplanes, and by the rise of (online) mass media that instantly rapport about terrorist attacks, giving them world-wide publicity (Wilkinson, 2011).

The most deathly and well-known terrorist attacks took place on 9/11 when civil airplanes were hijacked and flown into the World Trade Center in New York and the Pentagon in Washington (Wilkinson, 2011). Nearly 3,000 people were killed as a result of these attacks for which al-Qaeda claimed responsibility (Wilkinson, 2011). The 9/11 attacks had severe consequences for counterterrorism policies in countries all over the world (Wolfendale, 2006). This will be discussed in more detail in the next paragraph.

What can be concluded from Rapoport’s waves of modern terrorism is that terrorism is not

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3 For example, the Buddhist/Hindu cult ‘Aum Shinrikyo’ in Japan, the ‘Christian Identity’ movement in the U.S., and the Christian ‘Lord’s Resistance Army’ in Africa (Rapoport, 2004).

4 ‘Shah’ was a title given to kings in Iran (Rapoport, 2002).
intrinsically different for each group, rather it evolves over time. The drivers of terrorist movements can typically be found in political convictions, sometimes combined with religious motivations (Bianchi & Keller, 2008). New groups learn from the mistakes of previous ones, and they take over the strategies that have proved successful (Rapoport, 2004). Innovation plays a central role; the development of new tactics as well as the use of mass media lead to an increase in terrorist influence. If the fourth wave follows the pattern of its preceding waves it could be replaced by a new wave by 2025. However, that is merely a speculation which time will tell.

2.3 Modern terrorism in Europe: post-9/11

As pointed out in the previous paragraph, modern terrorism can be divided in ‘waves’ of different types of terrorism. Right now the world is facing the fourth wave, which is also known as the ‘religious wave’ (Rapoport, 2002). This section dives deeper into this current phase by listing some of the most important events related to terrorism since the 9/11 attacks in 2001. The focus will be on terrorism in Europe specifically, for there have been many recent attacks in European countries by members or associates of Islamist terrorist groups. In 2004 the first large scale modern Islamist terrorist attack on European ground took place; trains were bombed in Madrid, killing 191 and injuring over 1,600 people (Nesser, 2008). Responsible for this attack were men who were inspired by the deeds of al-Qaeda, yet they were no actual members of the terrorist organization (Nesser, 2008). One year later, the first suicide bombers in Europe targeted the London underground system during rush hour, killing 52 people and injuring hundreds (Nesser, 2008). This time responsibility was claimed by al-Qaeda (Nesser, 2008). After these two large-scale attacks there were some smaller attempts and single killings, yet there were no significant attacks in Europe for almost 10 years (Sarma, 2016). However, this was a turbulent period in the Middle East, which allowed for the rise of more radical terrorist groups (Cheterian, 2015). In order to attempt to understand what drives these terrorist groups, it is necessary to look at their ideology as well as the socio-political context in which they developed (Cheterian, 2015). Therefore, the next paragraph aims to explain this, focusing on the Islamic State (IS) especially.

The rise of the Islamic State

First of all, the ideology behind the extremist groups such as al-Qaeda and IS will be discussed and then more context will be given. The origin of the religious violence within in the Muslim community lies in the Sunni-Shi’ite conflict (Gonzalez, 2009). The Sunnis and the Shi’ites are the two major denominations of Islam (Gonzalez, 2009). Their division stems back to the first century when there was disagreement about who would be the rightful successor of Prophet Muhammad (Smeulers, 2015). According to the Shi’ites this had to be Ali, because of his family ties to Muhammad (Smeulers, 2015). On the other hand, the Sunnis believed that it had to be someone experienced and more qualified, and thus opted for his friend
Abu Bakr (Smeulers, 2015). Eventually the Sunnis won this conflict and Bakr became the first successor (or ‘Caliph’) of Muhammad (Smeulers, 2015). Up to the present day the Muslim community (‘Ummah’) is still divided, not merely over this issue; they have adopted different interpretations of the Islam as well. In general the Sunnis hold on to more orthodox teachings of the Quran, and they do not consider the Shi’ites as ‘true’ Muslims (Smeulers, 2015). On the other hand, the Shi’ites generally have more open-minded interpretations, and therefore consider the Sunnis as too dogmatic (Smeulers, 2015). Worldwide the majority of all Muslims are Sunni (85%), however this division differs per country (Smeulers, 2015). For example, in Iran and Iraq the majority of Muslims are Shi’ite (Smeulers, 2015). Over time different branches developed within these two denominations, of which the Salafi ideology (or Salafism) is most important for understanding religious extremist groups. Salafism is a branch within the Sunni Islam that is extremely conservative and it rejects all Western influences and values such as democracy and human rights (Smeulers, 2015). Their aim is to revive the ‘true’ Islam by purifying it from all Western influences (Hellmich, 2008). Salafis strictly hold on to the writings of the Quran (Hellmich, 2008). They desire to create a state that is ruled according to orthodox Islamic laws and customs, just as in the ancient caliphate\(^5\) which was known as the Islamic golden age (8\(^{th}\) – 14\(^{th}\) century) (Gonzalez, 2009). Radical terrorist movements such as al-Qaeda and later IS hold on to Salafi jihadism, which is a minority of the Salafis that actually uses terror in order to pursue their desire to re-establish Muslim glory (Hellmich, 2008). They consider all other Muslims as inferior or even as not ‘real’ Muslims.

As mentioned previously, terrorist groups emerged in many Muslim countries by the 1980s (Rapoport, 2004). Among the developing groups in Afghanistan were two important future jihadist\(^6\) leaders: Osama Bin Laden, who became the leader of al-Qaeda, and Abu Musab al-Zarqawi, who created another Islamist group that would eventually transform into the Islamic State (IS) (Cheterian, 2015). As a response to the 9/11 attacks the U.S. declared the ‘war on terror’ and invaded Afghanistan in October 2001, because of their assumed ties to al-Qaeda (Smeulers, 2015). Consequently, Bin Laden fled to Pakistan whilst Zarqawi fled to Iraq. In March 2003, the U.S. also invaded Iraq, toppling the regime of the ruthless dictator Saddam Hussein in April that same year (Smeulers, 2015). However, the U.S. failed to democratize Iraq as they had intended, instead their invasion resulted in more unrest and uprisings which eventually led to a civil war (Smeulers, 2015). In 2011 the U.S. withdrew from Iraq, however, in that same year the Arab Spring spread through the Middle East which caused more unrest (Cheterian, 2015). In March 2011 the unrest started in neighboring country Syria due to uprisings against the regime of Bashar al-Assad, which

\(^5\) A caliphate is an Islamic state, led by a ‘Caliph’ (successor of Muhammad) who holds both political and religious power (Chandler, 2014).

\(^6\) A jihadist is a radical Muslim who uses violence in order to achieve religious and political goals (Davies, 2018).
also led to a violent civil war (Cheterian, 2015). Yet, Assad remembered the intervention of the U.S. in Afghanistan and Iraq and wanted to prevent this from happening in Syria too (Cheterian, 2015). To divert the international focus on him, he allegedly released jihadists from Syrian prisons which consequently led to an increase in extremism among the insurgents (Cheterian, 2015). This made it impossible for the international community to support the insurgency, meaning that they focused on the rise of these extremist jihadists rather than worry about Assad’s regime (Cheterian, 2015). These unstable situations in Iraq and Syria led to the rise of Salafi-jihadi groups, such as al-Qaeda in Iraq and Jabhat Al-Nusra had and later IS (Smeulers, 2015).

What is now known as the Islamic State was originally founded in 2004 under the name al-Qaeda in Iraq (AQI) by Abu Musab al-Zarqawi who was a violent Jordanian militant (Smeulers, 2015). The Islamist group played a major role in the fight against the U.S. troops in Iraq. They also pledged alliance to al-Qaeda in 2004, but even bin-Laden was shocked by his extreme use of violence (Cheterian, 2015). Besides, where bin-Laden focused mainly on U.S. targets, Zarqawi (and his successors) emphasized on the religious fight against the shi’ites and the Arab regimes (Cheterian, 2015). This eventually led to a split of the two terrorist groups. In October 2006, AQI merged with other Salafi-jihadi groups in Iraq and consequently their name changed to Islamic State of Iraq (ISI). After al-Zarqawi was killed by the U.S. Abu Musab al-Baghdadi took over leadership. When he, too, was killed in 2010, the current leader, Abu Bakr al-Baghdadi replaced him. In April 2013 he declared their alliance with al-Qaeda’s branch in Syria (Jabhat al-Nusra) (Cheterian, 2015). He also changed the name to Islamic State of Iraq and al-Sham (ISIS). In March 2013 the group took over the Syrian capital Raqqa (Cheterian, 2015). From here they could attract new fighters and focus on other targets in Iraq. By June 2014 ISIS had invaded Iraq and took over a third of the country, including the major city Mosul, and assassinated thousands of civilians (Cheterian, 2015). This time al-Baghdadi changed the group’s name to Islamic State (IS) to confirm that they effectively created their own state, and proclaimed to revive the ancient caliphate by establishing IS’ religious authority all across the planet (Farwell, 2014). Their main tool to achieve this goal is the use of extreme violence, however besides this the group predominantly relies on social media to spread their messages and establish legitimacy (Farwell, 2014).

**Attacks in Europe**

Especially after IS proclaimed their establishment of a caliphate across Iraq and Syria in June 2014, they gained world-wide media attention (Farwell, 2014). Even though this message largely shocked the international community, it also inspired thousands of Muslims from the Middle East as well as from other parts of the world to join their fight (Farwell, 2014). This international influence of IS also increasingly led to attacks in Western European countries, starting in January 2015 with the attacks on Charlie Hebdo in
Paris when 12 people were killed (Musch, 2016). Later that year the most lethal attack of IS in Europe took place in Paris on November 13th. It started with suicide bombers outside the Stade de France, and continued later that evening with mass shootings at the Bataclan theatre as well as shootings in cafés and restaurants in the center of Paris, altogether killing 130 and injuring around 350 people (Musch, 2016). In 2016 airports in Brussels and Istanbul were attacked, both resulting in dozens of deaths and hundreds of injuries. On July 14 that same year a truck drove into a crowd in Nice, which killed at least 84 people and injuring hundreds (Musch, 2016). This same ‘method’ was applied at an attack at a Christmas market in Berlin that same year, killing 12 and injuring 56 others (Musch, 2016). Multiple similar attacks with cars or trucks have been carried out on a smaller scale, for example at the London Bridge in June 2017, and at a shopping street in Stockholm in April 2017 (Telegraph Reporters, 2018). The use of vehicles illustrates how IS inspires people to kill with any means at hand, resulting in less organized and smaller scale attacks compared to al-Qaeda, however increasing the likelihood for an attack (Mush, 2016). Rather than symbolic targets, IS has mostly opted for ‘soft’ targets, such as people going to work or a concert. For example, in May 2017 bombs went off at a concert in Manchester which was attended by mainly young girls, proving IS’ ruthlessness (Challman, 2017). This increasing focus on attacks abroad is also due to IS losing most of its territory in the Middle East in 2017 (Speckhard, Shajkovci, & Yayla, 2017). Important to note is that not all of the attacks suffered in Europe were committed by actual members of IS; many of the smaller scale attacks were the result of so called ‘lone wolves’ who were inspired by the online propaganda of ISIS and radicalized without actually travelling to the Middle East themselves (van Dongen, 2017). Especially the attacks with vehicles are committed by independent individuals, for it is relatively easy to obtain a car or van and drive this into a vulnerable crowd (Byman, 2017). An example of a lone wolf is Mohamed Lahouaiej Boudhel, who was the perpetrator of the attacks in Nice on July 14th 2016 (Byman, 2017). He had no known ties to a terrorist organization and acted on his own (Byman, 2017). The next paragraph will elaborate on this phenomenon of homegrown terrorism and radicalization.

2.4 Homegrown terrorism and radicalization

Prior to the London bombings in 2005, Islamist terrorism was considered by the West to be a foreign threat (Crone & Harrow, 2011). The Islamist organizations involved in terrorism were based in countries “on the other side of the planet” (Crone & Harrow, 2011, p.521). Yet, as recent examples of terrorist attacks have shown, the threat has shifted from external to internal (Crone & Harrow, 2011). This means that the modern terrorists are not necessarily from foreign countries, but are often born and raised in Western countries. This phenomenon is known as ‘homegrown terrorism’. Terrorist organizations such as IS are still based in the Middle East, but they can inspire people from Europe to become radicalized (Crone & Harrow, 2011). This is mainly a result of social media platforms such as Twitter and Facebook, through
which members of IS are able to reach world-wide audiences and promote their ideas online (Farwell, 2014). Social media is also essential for IS in order to build a large network and to recruit, or to connect with, potential fighters (Farwell, 2014).

**Radicalization factors**

The term ‘radicalization’ can have different meanings. A person can have radical ideas without actually being willing to use violence in order to realize those ideas (van Dongen, 2017). However, in this case ‘radicalization’ is considered as the increasing willingness to use violence (i.e. to commit terrorist attacks) in order to bring about profound changes in society (van Dongen, 2017). In other words, radicalization is used to describe the process of becoming a terrorist. The question of why someone becomes a terrorist has proved difficult to answer for a couple of reasons. First of all, this is due to limited reliable data; it is practically impossible to directly interview a terrorist (Silke, 2008). Therefore, most research in this field is based on publicly available information, such as media reports and transcripts of court proceedings (Silke, 2008). Furthermore, there is not one definite combination of factors which leads to the radicalization of a person (Silke, 2008). However, research on this topic has showed that often there are certain common factors. Terrorists are generally young males between the ages of 15 to 25, though not exclusively so (Silke, 2008). There have been examples of female terrorists as well as examples of older terrorists (Silke, 2008). In contrary to public expectations, people involved in terrorism are not typically raised in poor socioeconomic circumstance, nor do they suffer from any psychological disorders or mental illnesses (Silke, 2008). Terrorism is a kind of political activism, which is like other kinds of political activism primarily the domain of wealthy and educated people (van Dongen, 2017). Certainly there are also terrorists who purely act out of frustrations due to bad socioeconomic circumstances, but this does not hold for the majority of the terrorists who have committed attacks (Silke, 2008; van Dongen, 2017).

**Generational differences**

So far, three different generations of jihadist terrorists can be distinguished. The first generation of terrorists wanted to join al-Qaeda in Pakistan and Afghanistan during the 1980s to fight the Soviet Union (Sageman, 2008). Most first generation jihadists were relatively mature when they joined the battle, namely about 30 years old, and they were generally well educated middle-classers from Afghan Arab origin (Sageman, 2008). The second generation consisted largely of upper class citizens from the Middle East that immigrated to the West to study there (Sageman, 2008). However, being away from home “led many to feel homesick and marginalized”, which in turn led to the radicalization of some (Sageman, 2008, p.38). These radicalized second generation jihadists travelled to Afghanistan to join al-Qaeda’s training camps in the 1990s (Sageman, 2008). After 9/11, however, al-Qaeda was forced to operate underground and physical
headquarters ceased to exist (Sageman, 2008). The new, third generation differs from the first two generations because of this lack of physical places they can travel to in order to unite (Sageman, 2008). Though, the development of the internet and social media allows them to communicate and to connect online (Farwell, 2014). These third generation jihadists often lack ties to a formal organization and they operate leaderless (Sageman, 2008). Radicalized individuals that independently commit terror attacks are known as ‘lone wolves’ (van Dongen, 2017). These kind of attacks are extremely difficult for counterterrorism organizations to prevent, because they are almost impossible “to discover through traditional intelligence gathering” (Sageman, 2008, p.40).

The ‘pyramid’ of radicalization

In order to explain the process of radicalization McCauley and Moskalenko (2008) created a pyramid model. The bottom of the pyramid represents the largest group of people; they support the main idea the terrorists say they are fighting for (McCauley & Moskalenko, 2008). Only a small percentage ‘climbs’ up to higher levels of the pyramid which “are associated with decreased numbers but increased radicalization of beliefs, feelings and behaviors” (McCauley & Moskalenko, 2008, p.417). Climbing to higher levels is a gradual process that can take years (Silke, 2008). The question then is how individuals move from the base to the apex. Religion is assumed to play a leading role in Islamist terrorism (Silke, 2008). Yet, as Sageman’s (2004) research on members of extremist Islamist organizations shows, only half of the 172 jihads that he studied were religious during their youth and only 18% of them had had religious education. However, before joining an Islamist organization 99% of them were described as being extremely religious (Sageman, 2004). This indicates a shift, which as Sageman (2004) argues can often be traced back to a period in which the individual lived away from their hometown and family, and became isolated from the society around them. This was especially common for the second generation of jihadists who often studied at Western universities, far away from their home countries and cultures (Sageman, 2008). A mosque then provided a safe place to go to and meet people with similar backgrounds (Silke, 2008). Sageman’s (2004) results also show this can lead to the creation of small, like-minded groups of people. As groups grow closer over time, individual members adopt the ideas of the most extreme members (Silke, 2008). As a result of this change in beliefs the members become even more distanced from their families and old friends (Silke, 2008). This strong sense of group identity and loyalty towards the members can eventually lead to the radicalization of the group members (Silke, 2008). This is supported by Sageman’s results which show that the majority of people that were studied, were recruited in small groups rather than as isolated individuals (Sageman, 2004). This holds especially for the first two generations of jihadists, and less so for the third generation who often radicalized through social media and online propaganda rather than through physical meetings (Sageman, 2008).
Important to note is that the extreme ideas are not merely a result of religious convictions (Silke, 2008; van Dongen, 2017). It can be the case that religious ideas create motives, but most often it is the other way around (van Dongen, 2017). Jihadists feel the need to use political violence and choose parts of the Quran and from the available (online) propaganda that fits their view of the world, creating their own ideology (van Dongen, 2017). In this way religious ideas are used to justify their violence, meaning that religion plays a supporting role rather than a leading one (van Dongen, 2017).

**Conclusion**

Before the effects of counterterrorism can be discussed it is useful to understand what is being countered. Therefore, this chapter aimed to establish a general understanding of the phenomenon of terrorism. The first part explained that, due to the ambiguousness of the concept, it is hard to agree upon a universal definition of terrorism (Wellman, 2013; Wilkinson, 2011). Terrorism is generally considered as “the systematic use of coercive intimidation, usually to serve political ends” and to create a “climate of fear amongst a wider target group than the immediate victims of the violence” (Wilkinson, 2011, p.17). It often targets innocent civilians by means of suicide bombs, shootings or other violent methods (Wilkinson, 2011). Yet, for legal reasons international consensus is needed (Golder & Williams, 2004). Therefore, organizations such as the UN and the EU focus on the international implementation of counterterrorism legislation. Terrorism is a phenomenon that has existed in all times (Rapoport, 2004). As David Rapoport (2004) argued, different waves of terrorism can be identified over time. In each period there are particular motivations and goals that drive the terrorists (Rapoport, 2004). Currently, the world is facing the fourth wave also known as the ‘religious wave’. In essence this wave is a consequence of the westernization of the Islamic world (Rapoport, 2004). Islamist movements that wanted to remove this Western influence developed in the end of the previous century (Hellmich, 2008). The conflicts first started in the Middle East, however since the beginning of this century Western countries have been targeted as well, starting with 9/11 (Sarma, 2016). There have been terrorist attacks in European countries, for instance in France, Germany, Belgium and the U.K., mainly carried out by members of IS (Musch, 2016). However, most of these modern terrorists were not originally from the Middle East themselves, in fact they were often born and raised in Western countries (Crone & Harrow, 2011). They often radicalized in their home country through (online) propaganda and then decided to go to Syria to join IS, or they instantly committed attacks in their home country (i.e. ‘lone wolves’) (van Dongen, 2017). This phenomenon is known as homegrown terrorism and is one of the characteristics of modern terrorism (Silke, 2008). All these underlying causes and characteristics of terrorism are relevant to understand before one is able to analyze consequences of counterterrorism measures. The next chapter will discuss the liberal democratic values that are at stake in the fight against terrorism.
3. Liberal democracy and its main values at stake

In order to discuss the effects of counterterrorism measures on Western liberal democracies, it is necessary to first establish a general understanding of their values and principles. Therefore, some of these fundamental ideas will be discussed in this chapter. The democratic system in its primary form originates from ancient Greece. However, most modern democracies were founded by the end of the 18th century (Taylor, 2011). It was not until the 20th century that all people, both men and women, rich and poor, were able to vote in Western democracies (Taylor, 2011). Traditionally, democracies are based on the power of the people who choose representatives to govern them (Taylor, 2011). Globally speaking it is the most popular governing system. Even though there are different types of democracies, they all share similar characteristics (Taylor, 2011). This chapter discusses some of these fundamental elements of democracy. Firstly, the concept of human rights as well as the important treaties in which they are entrenched are discussed. Then, the concepts of liberty and equality are explained, as well as the legal and practical safeguards of liberal democracies. They include the rule of law, the separation of powers and the criminal justice system. Since terrorism threatens these fundamental ideas, it is considered as one of the main challenges for democracies to cope with. This chapter aims to explain the most important values and principles that are at stake.

3.1 Human rights

Human rights are, literally, the rights that every person is inherently entitled to simply because we are all human beings (Donnelly, 1999). Since no one is more or less human than someone else, everyone ought to enjoy equal rights (Donnelly, 1999). Therefore, they are often referred to as ‘universal’ or ‘natural’ rights (Donnelly, 2008). Human rights define “an inalienable set of individual goods, services, and opportunities that the state and society are, in ordinary circumstances, required to respect or provide” (Donnelly, 1999, p.613). The first important international convention that entrenched these fundamental human rights is the Universal Declaration of Human Rights (UDHR) in 1948. This declaration was later complemented with two important treaties; the International Covenant of Economic, Social and Cultural Rights (ICESCR) in 1966 and the International Covenant on Civil and Political Rights (ICCPR) in 1976 (Crelinsten, 1998). Yet, since the focus of this paper is on European countries it will primarily refer to the rights as entrenched in the European Convention on Human Rights (ECHR) of 1950. Some important rights that will be discussed in the context of counterterrorism are the right to life (Art. 2); the right to liberty and security (Art. 5); the right to fair trial (Art. 6); the right to respect for private and family life (Art. 8); and the prohibition of discrimination (Art. 14) (ECtHR, 1950). Member states are obliged to “respect, protect and fulfil human rights” (OHCHR, 2008, p.4). Priority ought to be given to human rights over the interests
and desires of the state (Donnelly, 1999). When a state fails to uphold this responsibility this could jeopardize its legitimacy (Donnelly, 1999).

3.2 Liberty and equality

Most Western states practice a type of ‘liberal democracy’, which is largely characterized by its focus on individual liberty and equality (Raphael, 1990; Baradat, 1991). The concept of individual liberty is generally considered as a personal sense of ‘freedom’ (Hayek, 2011). However, there are different types of freedom. Essentially, “freedom means the absence of restraint” (Raphael, 1990, p. 56). It suggests a state in which people are free to choose whatever action they would want to perform. Therefore, the option to choose between possible actions is crucial for the experience of freedom (Raphael, 1990). ‘Political freedom’ is the “participation of men in the choice of their government, in the process of legislation, and in the control of administration” (Hayek, 2011, p.69). This is an essential aspect of liberal democracy, for it is based on fair and free elections between political parties (Taylor, 2011). On the other hand, the power to act, speak or think as one wants is also considered as a type of freedom (Hayek, 2011). This type of freedom is essentially recorded in Articles 9, 10, and 11 of the ECHR. Besides, Art. 5 ECHR (right to liberty and security) acknowledges the importance of physical liberty, and that to be ‘free’ necessarily means to be safe. When liberty is deprived, this has serious consequences for the well-being of citizens. Yet, since one can only experience liberty when one feels safe, security is often considered as a precondition for liberty to exist (Hayek, 2011). Therefore, whenever security is threatened, its protection often results in the restriction of civil liberties (Zedner, 2009). However, what seems to be forgotten is that liberty can also be considered as a precondition of security, for “individual freedom legitimizes the existence of the State in the first place” (Michaelson, 2006, p.1). This makes that liberty and security are two interrelated and mutually reinforcing goods, which cannot be ‘balanced’ against each other (as is often argued in counterterrorism legislation) (Michaelson, 2006).

Equality, then, means the equal protection of human rights, civil liberties and political freedoms for all people (Baradat, 1991). The concept of equality does not imply that everybody is equal to one another in respect of qualities and competences, but rather that “we are all equal in our humanity and therefore are all entitled to fundamentally equal treatment” (Baradat, 1991, p.30). So, every human being is supposed to enjoy equal rights and liberties. This is entrenched in Protocol No. 12 ECHR which states that “all persons are equal before the law and are entitled to the equal protection of the law”. A general prohibition of discrimination is entrenched in Prot. No. 12, Art. 1 ECHR and ought to secure this equal treatment. Next to the ECHR, in order to guarantee these liberties, government regulations (i.e. laws) are required. Yet, a

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7 Freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association (ECHR, 1950).
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classic liberalist idea is that the power of the government should be limited (Baradat, 1991; Raphael, 1990). One of the most discussed questions considering liberalism is where these limits should be placed (Raphael, 1990). The underlying principle that explains why people are willing to give up some of their liberties in exchange for security is known as the ‘social contract’. This social contract theory was first established by Thomas Hobbes and is based on the idea of popular sovereignty, which in essence means that a government can only be legitimate when it is supported by the consent of the people it governs (Chalk, 1998). Thus, it is based on the belief that the source of political power comes from the individuals in society (Baradat, 1991). Therefore, trust in the government is essential for the proper functioning of democracies. The social contract is a reciprocal political obligation; in return for the security and order offered by the state, citizens should accept and obey the laws that guarantee these democratic principles (Chalk, 1998).

3.3 Legal and practical safeguards

In order to function legitimately and practically, liberal democracies have established institutions. Primarily, all states draw upon a constitution, which is a document that captures all the fundamental principles according to which is governed (Hayek, 2011). It also limits the power of the government by allocating and distributing its powers over different bodies (Hayek, 2011). The constitution is considered as a ‘higher law’ that governs the current legislation (Hayek, 2011). Acting with respect for the constitution is important in order to function legitimately. This paragraph will explain some of these fundamental legal principles, which are relevant in context of counterterrorism.

Separation of powers

In order to make sure that the democratic principles are respected, each state has three sorts of powers: legislative, executive and judicial (Taylor, 2011). According to the principle of ‘trias politica’, these powers should be divided into separate bodies (Taylor, 2011). This idea originates from the enlightened philosopher Montesquieu, who argued that freedom would be destroyed if all these powers were to be in the hands of one ruler (Bianchi & Keller, 2008). So, to prevent the abuse of such extreme powers, he believed that they should be divided amongst different bodies with their own responsibilities, and that they necessarily needed to cooperate and supervise each other (Bianchi & Keller, 2008). This separation of powers is still incorporated in many modern democratic systems (Taylor, 2011).

The legislative power is generally held by democratically chosen representatives who together form the parliament (Raphael, 1990). They are responsible for creating new laws and changing or abolishing existing laws, and for governing the national budget and passing bills (de Mulder, 1998). The executive body consists of “officials in the civil service or the local government” and includes police authorities as well as ministers (Raphael, 1990, p.92). In most countries the executive power is led by a president (de
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Mulder, 1998). The executive body is responsible for the governance of a state and holds the power to impose sanctions on unlawful behavior, or in other words, to make sure laws are executed properly (de Mulder, 1998). They have to act according to the laws made by the legislative body (Raphael, 1990). Finally, the judicial body is the authority that decides whether someone is guilty of breaking the law and if so, what punishment they deserve; they interpret the laws (de Mulder, 1998). This power is held by independent and impartial courts and judges. The three powers are not always divided the same way in each country, however the idea of separating powers does form the basis of modern democracies (de Mulder, 1998). Even though the bodies have independent tasks, they ought to check each other’s work (Raphael, 1990). For example, the judicial power checks the legislative power, for they aim to guarantee the rights of all human beings (e.g. if the legislative power passes a law that is in fact discriminating against certain individuals, the judiciary power can demand its repeal) (de Mulder, 1998). The legislative power checks the executive, since latter has to correctly enforce the laws made by the former. Besides, the executive body is not made up of chosen representatives, so it is of additional importance that they are under the control of the other two powers. This mutual control is essential for safeguarding the equal separation of powers.

In the context of counterterrorism these three bodies play distinct roles as well. First of all, the legislative body is responsible for developing new, or modifying existing counterterrorism measures (Donohue, 2008). The pressure on them is high, for they are trying to fulfill the wishes of the citizens that they represent (Donohue, 2008). Therefore, “in the aftermath of a terrorist attack… [they] often grant the executive broader authorities without thorough debate” (Donohue, 2008, p.i). The executive body, then, has the crucial task of applying these measures in order to prevent (more) terrorist attacks. The police authorities are responsible for tracking down suspects of terrorism as well as arresting them. Yet, thanks to their increased powers they can sometimes, for example, conduct house searches without a search warrant, which normally has to be authorized by the judiciary (Ottow, 2018). The judiciary’s role is restricted, for they are unable to perform control on the executives as they normally do (Donohue, 2008). So, a risk of counterterrorism is that the balance of the three powers gets disturbed due to this “rapidly expanding executive authority” (Donohue, 2008, p.i). This is risk that can arise principally at a national level.

The criminal justice system

In addition to the separation of powers, liberal democracies depend on law enforcing systems in order to preserve order and security (Raphael, 1990). The focus will be on the criminal law system since this is the most relevant legal system that deals with terrorism. The principle aim of criminal law is to “prevent unconstrained individual behaviour from upsetting the order of society as a whole” (Chalk, 1998, p.374). The law restricts freedom to the extent that it forbids some actions that people might otherwise be inclined to do, and it also encourages some actions that people otherwise might not want to do (Raphael,
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1990). In principle, laws restrict some of the individual liberty in order to protect the liberty of others (Raphael, 1990).

A distinction can be made between criminal law and criminal procedural law (Anonymous, 2015). Criminal law essentially “defines the rights and obligations of individuals in society” and it specifies criminal behaviour (Anonymous, 2015, p.4). Criminal procedural law records the regulations that the police and judicial authorities must adhere to during the criminal process (Anonymous, 2015). In other words, it is concerned with “the enforcement of individuals’ rights” (Anonymous, 2015, p.4). However, this does not mean that no criminal procedural law can ever temporarily deprive or curtail these rights (Ashworth & Horder, 2009). In fact, it can be necessary for authorities to intervene with them in a democratic context. For example, if a person is spreading messages of hatred and/or is provoking violence through a public communication system, interference with his right to freedom of expression can be justified (Ashworth & Horder, 2009). So, even though some human rights are harmed during the criminal process, human rights treaties such as the ECHR provide for that option as long as the criminal procedural law is respected (Ashworth & Horder, 2009). Criminal law is in essence repressive, meaning that unlawful behavior is restricted (Chalk, 1998). Yet, someone can also be prosecuted when they pose an immediate threat to society, or might inflict serious harm in the future when left off the hook (Chalk, 1998). For example, in order to prevent terrorist attacks criminal law sometimes becomes proactive, which means that a potential terrorist can be arrested before in fact committing an actual attack (OHCHR, 2008). This is possible because criminal law also criminalizes preparatory acts (e.g. planning a terrorist attack is illegal) (Anonymous, 2015). However, due to an increasing urge for preventive counterterrorism measures, some criminal procedural law principles are no longer properly respected (OHCHR, 2008). The most important condition that needs to be met in order to arrest or detain someone is that there is at least a reasonable suspicion (Art. 5(1c) ECHR). So, in case someone is suspected of planning a terrorist attack, there needs to be a certain amount of proof that justifies this suspicion in order to arrest them. This is important to prevent arbitrary arrests or detentions, which are prohibited by Article 9 of the UDHR. Yet, since the focus of counterterrorism legislation is on preventing attacks, this can result in a lowered threshold for reasonable suspicion. This makes it easier for the police to arrest and/or detain someone. This can also be considered as a violation of the ‘presumption of innocence’, which is the principle that a suspect should be treated as if they are innocent until their guilt has been proved (Art.6 (2) ECHR) (Stevens, 2013). The danger of this lack of suspicion required in the context of counterterrorism, is that human rights can be violated more easily than in normal criminal law procedures, without the actual justification needed. In turn, this can potentially lead to power abuses by the executive body, of which examples will be discussed in the next chapter.
The European Court of Human Rights

There are European safeguards that can intervene when national control falls short. An important supranational court is the European Court of Human Rights (ECtHR) based in Strasbourg (Garlicki, 2008). The ECtHR “decides on individual applications and has the power to declare that the rights of individuals have been violated by a member country” (Garlicki, 2008, p.510). The ECtHR, therefore, is an independent and decisive court that monitors national states’ compliance with the ECHR. According to Art.34 ECHR “the Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation”. The decision of the ECtHR is binding, meaning that it overrules decisions of national courts (Art.46 ECHR). In principle, this supranational court ought to guarantee the equal protection of human rights of European citizens. The ECtHR is, thus, supposed to function as an important safeguard of European democracies. Any individual from a European country that feels that their rights are violated by their state, can appeal to the ECtHR. This can happen, for example, in case of restrictive counterterrorism measures (e.g. that are depriving liberty and thus violating Art.5 ECHR). Before being able to appeal to the ECtHR, however, one has to first exhaust all domestic remedies (Art.35 ECHR). This is a time-consuming procedure which can take years. Moreover, as statistics of the ECtHR show, 82% of all applicants in 2016 were declared inadmissible (ECHR, 2018). Considering the large scale on which counterterrorism measures are applied, the individual likelihood that one’s application is accepted by the ECtHR is small. Taking into account that it is a process that presumably takes years and has a small chance to succeed, it can be argued that the ECtHR in practice does not offer sufficient protection to deal with all violations. Especially in the context of counterterrorism measures, which are often enforced without thorough debate, quick intervention is necessary to safeguard the democratic principles.

Proportionality and subsidiarity

Along with the aforementioned safeguards of democracy, proportionality and subsidiarity are two essential principles of the criminal procedure (Stolp, 2007). First of all, the principle of proportionality means that the response to a certain crime should be in proportion with the seriousness of the offense. In other words, the more serious the crime, the heavier the punishment must be (e.g. different penalties for theft and murder) (Stolp, 2007). The same holds for the measures taken in case of a mere suspicion. This principle aims at protecting the suspect by preventing an overreaction. Similarly, the principle of subsidiarity in case of criminal offenses entails that the least offensive measure is always preferred over a more invasive one (Stolp, 2007). In essence this means that if an action can be performed peacefully, there is no need to use violence. So according to this principle, if there are multiple ways to achieve the same goal the least invasive one ought to be performed (Stolp, 2007). For example, in case of a house search; if
the police has the opportunity to ring a doorbell there is no need to force the door, unless no one answers it. Yet, if this measure is disproportionate with the (suspected) crime, the option to force a door can still be rejected by the proportionality principle.

Conclusion

This chapter presented some fundamental ideas upon which democracies are based. In one way or another these principles all aim to protect the individual against the (abuse of) state power. First of all, human rights are entrenched in international declarations such as the UDHR and the ECHR to guarantee equal treatment of all human beings (Crielinsten, 1998). As follows from Art. 1 ECHR it is the duty of each state to respect and protect human rights (Donnelly, 1999). Besides, this principle of equality, liberal democracies are characterized by principle of liberty (Raphael, 1990; Baradat, 1991). Liberty can be interpreted in many ways (Hayek, 2011). Most relevant in this case are the freedoms entrenched in Articles 5, 9, 10, and 11 of the ECHR. Since one can only experience freedom when one is safe, laws are needed to guarantee these liberties (Hayek, 2011). This might seem contradicting, for laws are generally restricting (Baradat, 1991). Subsequently, a classic liberalist question is where the limits of the government’s powers should be placed (Raphael, 1990). In order to prevent power abuses of the government, they are separated into different bodies (Bianchi & Keller, 2008). The legislators make the rules, the executors enforce them, and the judiciary checks whether the laws are correctly upheld and do not violate the constitutional and other rights (Raphael, 1990). In that way the three powers form an effective system of checks and balances. However, in case of counterterrorism the balance of these powers can be disturbed, which can lead to the abuse of rights in the ECHR. Important safeguards of democracy are the rule of law and the criminal justice system (Raphael, 1990). Even though human rights ought to be respected, in some cases (i.e. when someone committed a criminal offence) the criminal procedural law holds that individuals can (temporarily) be deprived from these liberties (Ashworth & Horder, 2009). However, in the case of counterterrorism this can happen proactive (e.g. preparatory acts), if there is at least a reasonable suspicion. Yet, the danger of counterterrorism legislation is that the threshold for reasonable suspicion is sometimes lowered, which can result in unjustified human rights violations by the executive authorities (Stevens, 2013). In case national states fail to uphold these rights, the ECtHR can intervene and reprimand the state (Garlicki, 2008). Two essential principles for the criminal procedure that aim to prevent an overreaction of the state are that of proportionality and subsidiarity (Stolp, 2007). However, as the next chapter will illustrate, these criminal justice principles are not always taken into account in the context of counterterrorism.
4. The threat of counterterrorism

Modern terrorism undoubtedly threatens the international community, for it undermines the authority of national governments and institutions, it threatens the international peace and security, and it creates a climate of fear among civilians (OHCHR, 2008). As explained in the previous chapter, a democratic government ought to guarantee security for its citizens (Chalk, 1998). Therefore, terrorism clearly demands for a response of the affected countries. Though, the question of how governments ought to respond to international terrorism is a controversial one. In the decision-making process leading questions are “what works?” and “what is allowed?” (van Gunsteren, 2007, p.123). In other words, the response needs to be effective as well as it has to be in conformity with laws and human rights (Wilkinson, 2011). Counterterrorism is typically led by national governments and includes elements of “diplomacy, legislation, policing, intelligence, technology, economics and the military” (Reding, et al., 2013, p.11). Moreover, considering the international scope of the current terrorist threat, efficient international cooperation is essential in successfully responding to terrorism (Reding, et al., 2013). This international counterterrorism strategy mainly exists of intelligence sharing in which organisations such as Europol play an important role (Reding, et al., 2013). However, considering the fact that some countries have been affected worse than others, the national responses to terrorism differ (Jarvis & Lister, 2015). As Chalk (1998) argued, when states fail to respond in a manner that is “limited, well-defined and controlled, it is likely that counterterrorist policies will pose an even greater threat to the political and civil traditions that are central to the liberal democratic way of life” (p. 373). So, when the state’s response undermines its own values and laws (e.g. due to ‘fighting fire with fire’) it can in fact become counterproductive, meaning that it could result in the emergence of a police state which is characterized by the infringements of civil liberties (Wilkinson, 2011). This chapter discusses this potential threat by analyzing counterterrorism measures that Western European liberal democracies have recently adopted. An example that will be discussed is the impact of mass-surveillance and data collection (e.g. the Dutch ‘dragnet’) on the right to privacy, for it illustrates how invasive counterterrorism measures are applied on a large scale. The effect of such measures on the democratic values and its legal and practical safeguards as explained in the previous chapter will be evaluated. Before this, however, different models of responses will be discussed.

Models of response

Responding to terrorism includes many aspects and happens on different levels of governance (e.g. national, supranational). Terrorism expert Paul Wilkinson (2011) discusses the following different models of response in his book: the diplomatic response, the military response, and the criminal justice response.

A diplomatic response is based on negotiations between the conflicting parties, in this case between the international community and the terrorist organizations (Wilkinson, 2011). In order for such a response
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succeed Wilkinson (2011) argues that “there must be a sufficient political will among both parties in a conflict to initiate and sustain a peace process” (p.73). The role of international peace organisations such as the UN is crucial in this procedure, for they practice major influence and have sufficient economic resources which are needed for recovering from the conflicts (Wilkinson, 2011). Crucial, too, is the role of individual leaders who are willing to compromise and take risks for peace (Wilkinson, 2011). However, in the current situation a diplomatic way out of terrorism seems unrealistic, for terrorist organisations such as IS are unlikely to negotiate about a peace offer with the West. The reason for this being that they in fact reject all Western values and principles (e.g. man-made law, human rights and democracy), as well as any Arab regime that cooperates with these ‘infidel’ governments (Wilkinson, 2011).

A military response can be necessary to deal with situations that the police is not trained or equipped for (Wilkinson, 2011). For example, in case of a hostage taking or bomb clearance the military powers are called upon. Though, the danger of relying too much on military powers is that is can be hard to withdraw them, possibly resulting in the normalization of these extraordinary powers (Wilkinson, 2011). Moreover, the use of military powers can result in an overreaction, because the harsh approach of the military often undermines the rule of law (Wilkinson, 2011). Even though military actions abroad can be effective, for example military campaigns against IS resulted in their loss of territory in Iraq and Syria, it does not “resolve the underlying conflicts or governance failures that allow terrorist groups to implant themselves” (Dworkin, 2017, p.1). Furthermore, having military authorities present on the streets creates more visible targets for the terrorists and can even motivate them to carry out more attacks (Wilkinson, 2011). So, unless carefully applied, a military response can in fact become counterproductive. Finally, the criminal justice response is a rule of law based approach. Since liberal democracies already have well-developed legislation to deal with crime this approach entails that terrorism is to be countered primarily by acting within the existing legal framework (Nacos, 2016). Crucial in this approach is that the government and security forces consistently act in accordance with the law, because otherwise they risk undermining fundamental democratic principles (Wilkinson, 2011). However, many countries have already adopted new legislation in order to fight terrorism, or have special legislation for emergency situations (Nacos, 2016).

Rather than applying one of these models of response, Wilkinson (2011) argues for ‘the hardline approach’ which combines elements of these three models. An important aspect of this approach is to “win the intelligence war” in order to prevent terrorist plans from happening (Wilkinson, 2011, p.76). However, the security institutions involved in combating terrorism must be under strict control of the judiciary to prevent abuses of power (Wilkinson, 2011). Furthermore, governments often face dilemmas when dealing with the demands of terrorists (e.g. cash ransoms) (Nacos, 2016). Wilkinson reasons that giving in to these demands should be avoided when possible, because compromises only lead to increased power of the terrorists and weakens the power of the authorities.
Besides distinguishing between different levels of response, one can identify ‘soft’ and ‘hard’ approaches within counterterrorism measures (Ragazzi, 2016). Non-violent measures (e.g. preventive measures) classify as ‘soft’ whilst repressive and coercive measures of the police (e.g. raids and arrests) are considered as ‘hard’ measures (Ragazzi, 2016). A balance of both types of measures is needed to form an effective approach (Rineheart, 2010). On the one hand, prevention of terrorism in the long-term and the tackling of its root causes by means of soft measures is crucial (Rineheart, 2010). Yet, more direct, hard measures are needed in order to fight terrorism in the short-term (Rineheart, 2010).

4.1 General threats of counterterrorism

Terrorism is generally considered to pose a serious threat to the liberal democratic way of life (Chalk, 1998). Due to its malevolent intentions (i.e. deliberately creating civilian casualties), terrorism is often considered as more serious than other threats such as accidents or natural disasters (Wolfendale, 2006). It predominantly threatens people’s sense of ‘basal security’ which is “the unarticulated affective sense of safety and trust through which one (sometimes unconsciously) judges and assesses risks” (Wolfendale, 2006, p.81). In other words, it threatens the extent to which one feels safe in a given situation. Since security is one of the fundamental human rights, states tend to prioritize it over other goods (e.g. health or education) (Zedner, 2009). As has been claimed by some state officials, the significance of the threat is “so great that it imposes a positive moral duty on governments to protect the individual’s right to security even at the expense of many basic civil liberties” (Wolfendale, 2006, p.754). Consequently, states use the protection of security as a justification to pass through counterterrorism measures that would usually be rejected (Zedner, 2009). The nature of these measures is in most cases pre-emptive, meaning that it is aimed at targeting threats before they emerge (Lynch, McGarrity, & Williams, 2010). In counterterrorism literature this term is often preferred over the term ‘prevention’, which essentially predicts a certain outcome that cannot be empirically supported (Lynch, McGarrity, & Williams, 2010). Nevertheless, the perception that it is justified to undermine civil liberties in the name of security is dangerous (Wolfendale, 2006). States have access to the resources of the police, military and intelligence services, and therefore carry more destructive power than the terrorist organizations (Primoratz, 2004). Hence, when states fail to respond to terrorism in a manner that is in line with their own rule of law and human rights, counterterrorism can become a larger threat to liberal democracies than terrorism itself (Chalk, 1998).

Radical counterterrorism measures pose a threat to the liberal democratic way of life on several levels. Most importantly, when governments breach human rights, they are in fact lowering themselves to the level of the terrorists (Wilkinson, 2011). ‘Fighting fire with fire’ is known to be risky and is likely to be counterproductive. For example, pre-emptive measures that reduce due process requirements (e.g. sufficient evidence) in order to arrest or detain a terrorism suspect will unquestionably lead to an increase
of convicts (Waldron, 2003). However, it is not sure whether convicting more terrorist suspects will result in less terrorist attacks (Waldron, 2003). In fact, it may cause anger with the terrorists if one of them is prosecuted, which could possibly lead to more attacks (Waldron, 2003). What is even more concerning; counterterrorism procedures that lower the threshold for arresting and detaining suspects and for conducting house searches are breaching the rights to liberty and security, due process, and privacy (Articles 5, 6, 8 ECHR) (Wolfendale, 2006).

Besides, some counterterrorism measures can arguably be counterproductive. As Lucia Zedner (2009) warned in her article about the paradoxes of seeking security:

“Although security is held up as a public good, the manner in which it is pursued too often tends to erode trust and other attributes of the good society. Many security measures and practices are based upon a presumptive mistrust of strangers and many security technologies operate further to erode trust by presuming everyone to be a potential source of threat” (p.149).

In other words, she argues that security measures such as mass surveillance and data retention in fact create a ‘climate of suspicion’ rather than one of trust. The state’s monitoring of citizens can be interpreted as them lacking trust in the public. In turn this can foster a lack of trust of citizens in the state as well (i.e. the state collects all this secret information about the public, without them knowing what happens with this data) (Zedner, 2009). Moreover, this distrusting attitude of the state inevitably means that innocent people become the victim of security measures such as the lowered threshold for arresting or detaining someone (Zedner, 2009). The measures have also proved to be discriminative against Muslim citizens (Wolfendale). Since the members of Islamist terrorist groups are linked to the Muslim community, it is primarily Muslims who are arrested and investigated (Wolfendale, 2006). Within society this can lead to the ostracization of the Muslim community and to the generation of hate actions against Muslim citizens (Wolfendale, 2006). As a result, Muslim citizens are likely to lose trust in the government as well as in fellow citizens (Zedner, 2009). This inevitably leads to more conflicts within society, which is counterproductive.

So, counterterrorism measures potentially undermine human rights (e.g. right to privacy or right to due process) (Waldron, 2003). Besides the fact that innocent civilians become victims of these measures, it is also not clear how efficient these measures are in actually reducing the terrorist threat (Wolfendale, 2006). In fact, it is likely that they are counterproductive, since the discrimination of citizens leads to more unrest among the society (Wolfendale, 2006). Subsequently, governments attempt to resolve these conflicts by adopting even more repressive measures (Primoratz, 2004). It becomes gradually harder to withdraw these extraordinary measures until they eventually become normalized (Wilkinson, 2011). In turn, this can lead to the emergence of a police state in which the normal rule of law is rejected and military powers rule the streets (Wilkinson, 2011). This would mean victory for the terrorists whose aim is to destabilize Western
governments. Even though this scenario might sound a bit extreme, the dangers of counterterrorism should not be underestimated. The next part will discuss more concrete examples of how current counterterrorism measures are breaching liberal democratic values and human rights that have been explained in chapter 3 of this paper.

4.2 How counterterrorism is threatening fundamental human rights

As has been argued, it is the duty of the state to protect its citizens against the threat of terrorism by assuring security. In its response to terrorism the state has to act in compliance with the rule of law and human rights (OHCHR, 2008). Even though regular criminal law is retroactive, in case of counterterrorism it can become proactive (OHCHR, 2008). As government officials argue, terrorism poses an ‘exceptional threat’ which calls for ‘exceptional measures’ (Wolfendale, 2006). This attitude results in the adoption of pre-emptive measures that aim to prevent terrorist attacks by tackling suspects before they have committed an attack (Fenwick & Phillipson, 2011). However, due to this urge for prevention criminal law principles and human rights are potentially undermined (Fenwick & Phillipson, 2011). The previous paragraph already warned for the risks that are involved when governments fail to respond to counterterrorism in a manner which in line with its own laws and values. This paragraph focusses on the actual counterterrorism measures and discusses whether they are infringing civil liberties and breaching human rights, and if so how.

4.2.1 Right to liberty and security

Liberty and security are undoubtedly two fundamental concepts of any liberal democracy (Taylor, 2011). Article 5(1) of the ECHR aims to guarantee the liberty and security of any person and states that “no one shall be deprived of his liberty” unless in lawful cases (ECHR, 1950, p.7). Deprivation of liberty in this article aims at the physical liberty of a person, so in essence this means the freedom to go wherever and do whatever one wants (as long as this is in accordance with the law). This article aims to protect citizens against power abuses of the state, which could result in arbitrary arrests and detentions. Though, sometimes it can be necessary for the state to restrict someone’s liberty of movement (e.g. curfews or house arrests). Under normal circumstances this is only justifiable when a person is suspected of a serious crime (pre-trial) or as part of a sentence. Nevertheless, exceptions can be made according to Article 15(1) ECHR which provides that derogation is permissible in emergency or war situations “to the extent strictly required by the exigencies of the situation”8 (ECHR, 1950, p.13).

European governments have appealed to Art. 15(1) to implement ‘control orders’ which “represent an attempt to devise new methods of pre-emptive, quasi-criminal procedure in order to protect public safety

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8 However, countries can never derogate from Art. 3, Art. 4 (1), and Art. 7 ECHR. Derogation from Art. 2 ECHR is only justifiable if deaths result from ‘lawful acts of war’.
while retaining a measure of procedural fairness and (purportedly) avoiding actual deprivations of liberty” (Fenwick & Phillipson, 2011, p.873). Control orders have been applied in the U.K. under the Prevention of Terrorism Act 2005, but there are similar examples of such measures in France, the Netherlands and Denmark (Fenwick & Phillipson, 2011). Control orders placed restrictions on terrorist suspects, these included “curfews, limitations on their freedom of movement, their ability to access electronic communications, and their ability to associate with others” (Fenwick & Phillipson, 2011, p.875). These curfews could last up to 18 hours a day, which classified as virtual house arrest. Besides not being able to leave the house during most of the day, the suspects had to wear electronic tags that monitored their location, and they were sometimes restricted to visit certain areas (Fenwick & Phillipson, 2011). Occasionally they even got relocated whilst they were not allowed to receive visitors, to access the internet or to use a phone (Fenwick & Phillipson, 2011). These orders were imposed on a person for a year, but could be renewed, which made them indefinite (Fenwick & Phillipson, 2011). In case the suspect broke any of the conditions involved, this was considered as a serious criminal offense which could result in imprisonment up to five years (Fenwick & Phillipson, 2011). The restrictions did not only affect the liberty, privacy and associational rights of a suspect, but also their family life (Fenwick & Phillipson, 2011). So, control orders were in fact invasive punishments that did not require any conviction before being applied. They were imposed on mere suspects of terrorism, whom often did not even meet the requirement for reasonable suspicion (Fenwick & Phillipson, 2011). This is problematic, since these restrictions (which could last for a couple of years) upon liberty are far graver than a simple arrest or search (Fenwick & Phillipson, 2001). In fact, the control orders derogated from Art.5 ECHR and the restrictions went beyond what ECtHR case law permits (Fenwick & Phillipson, 2011). Therefore, the Terrorism and Investigation Measures Act 2011 replaced the control orders with revised measures (‘TPIMs’) so that they became less likely to infringe Art.5 ECHR (Turner, 2016). However, this ‘relaxation’ of freedom resulted in some suspects that absconded (Turner, 2016). Hence, in the Counter-Terrorism and Security Act 2015 new provisions were added; the temporarily seizure of passports of suspects in order to prevent them from fleeing abroad, and temporarily ‘exclusion orders’ from entering the U.K. (Turner, 2016). Other European countries have adopted, or are considering similar regulations (e.g. France, Spain, the Netherlands, Germany, and Denmark). These are controversial measures which nevertheless deprive suspects of their liberty, and its efficiency is to be debated as well.

In addition to these issues with the deprivation of liberty, human rights organisations such as Amnesty International have warned for power abuses by the state. They are concerned that the emergency powers are not merely used in order to fight terrorism, but also for other purposes (van Laere, 2017). For example, 24 climate activists in France were put on house arrest in November 2015 to prevent them from joining the COP21 (van Laere, 2017). The sole reason for these house arrests being to silence these activists
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(van Laere, 2017). This is undoubtedly an abuse of emergency powers which undermines the legitimacy of the state as well as it comprises a serious deprivation of liberty (van Laere, 2017).

All in all, this section provides examples of how difficult it is for states to adopt counterterrorism measures that are protecting security as well as respecting liberty. It is important that these measures are regularly revised and it is positive development that the invasive control orders have been repealed. Yet, the newly adopted measures (e.g. seizure of passports) are also concerning. It remains a challenge for states to guarantee both liberty and security.

4.2.2 Right to fair trial

As the previous chapter explained, any liberal democracy has to rely on a criminal justice system in order to fight crime and preserve order and security (Raphael, 1990). An important human right that has to encourage the fairness of the criminal procedure, is the right to fair trial as captured in Article 6 of the ECHR. It states that everyone who is suspected of a crime is “entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by the law” (ECHR, 1950, p.9). In addition, according to Art.6 (2) ECHR everyone “shall be presumed innocent until proven guilty according to law” (ECHR, 1950, p.9). Consequently, a legal burden of proof is required to convict a suspect. This principle is crucial to protect the suspect in case they are not guilty of committing the crime. It also ought to prevent from misconduct of the police and judiciary, since the proof needs to be gathered in a legitimate manner. If the police fails to act in accordance with the criminal procedural law, a suspect can be released on the basis of these mistakes (even if the suspect actually committed the crime). The criminal justice process is repressive, meaning that someone is prosecuted after committing a crime (OHCHR, 2008). However, because of the urge to prevent terrorist attacks, pre-emptive measures have been adopted. The application of such ‘pre-crime’ measures mark a partial shift in the criminal justice system, from retroactive to proactive (Zedner, 2009). This means that terrorist suspects are tackled prior to actually carrying out an attack (Fenwick & Phillipson, 2011). The use of pre-emptive powers is likely to violate due process rights, as will be illustrated in this section (Fenwick & Phillipson, 2011).

One of the modifications that is especially problematic is the lowered standard of proof required in order for the police to stop, search or arrest a person, (Parmar, 2011). Normally, at least a reasonable suspicion is needed in order to justify such actions (Lerner, 2006). However, due to the ‘exceptional’ threat that terrorism is alleged to pose, this threshold is lowered (Stevens, 2013). An example of pre-emptive powers are the stop-and-search powers under section 44 Terrorism Act 2000 in the U.K. (Bowling & Phillips, 2007). They enabled police officers in the U.K. to stop and search any person or vehicle whenever they had “reasonable grounds to suspect” that the person was involved in terrorist activities (Bowling & Phillips, 2007, p.937). However, in practice this suspicion was interpreted widely which resulted in the
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arbitrary application of these powers (Bowling & Phillips, 2007). Statistics of the British Crime Survey estimated that around 8.5 million car stops and 2.6 million foot stops were carried out annually (Bowling & Phillips, 2007). This is violating the second part of Art. 15(1) for the powers have been used on a larger scale than required by the situation (Lennon, 2015). Due to this disproportionate use and the lack of reasonable suspicion, the U.K. government had to repeal these powers in 2010 and replaced section 44 by section 47A which is a revised version that ought to protect civil liberties (Lennon, 2015).

Another example are the previously discussed control orders, which also breach Art.6 ECHR on multiple levels. First of all, these orders were imposed on mere suspects of terrorism whom often lacked a burden of proof to support their suspicion (Fenwick & Phillipson, 2011). Then, even if there were to be a reasonable suspicion, this would not be sufficient grounds to impose such grave measures (Fenwick & Phillipson. 2011). The control orders are violating the presumption of innocence as entrenched in Art.6 (2), ECHR, for the attitude in these cases seems to be ‘guilty until proved innocent’ rather than the other way around. Besides, the principles of proportionality and subsidiarity were not respected in these cases; the orders were intrusive as they deprived the suspects of their physical liberty (Fenwick & Phillipson, 2011).

In both cases (control orders and stop-and-search powers), the suspects were regularly not informed about the nature of the suspicion (Fenwick & Phillipson, 2011). This is in violation with Art.6 (3a) which states that “everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him” (ECHR, 1950, p.9). Because of this use of ‘secret’ or ‘closed’ evidence, it becomes impossible for the suspect to defend themselves (Fenwick & Phillipson, 2011). In an attempt to align this with the due process requirements, ‘special advocates’ were installed to protect the suspect (Fenwick & Phillipson, 2011). They are allowed to inspect the closed material, however they cannot discuss this with the suspect, which makes it virtually impossible to challenge it (Fenwick & Phillipson, 2011).

So, the right to fair trial is breached by pre-emptive counterterrorism measures in multiple ways. The lack of reasonable suspicion, which is normally required in order for the police to stop, search or arrest a person, is undermining the presumption of innocence (Parmar, 2011). Besides, the excessive scale on which measures are applied as well as the intensity of them are violating the principles of proportionality and subsidiarity. Due process is also undermined by not revealing the evidence on which a suspicion is based.

4.2.3 Right to respect for private and family life

Another concern that often arises when discussing counterterrorism measures is based on the invasion of privacy. In the name of security governments push through invasive surveillance measures which results in the mass collection, storage and exchange of personal data (Zedner, 2009). Surveillance
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measures are pre-emptive, for they aim to find information that is linked to terrorist plans in order to tackle them. This collection of ‘security intelligence’ happens on national as well as international and European level (den Boer, 2015). An important criminal intelligence service is Europol, which exchanges information with EU member countries and analyses data (Reding, et al., 2013). What is meant when referring to security intelligence is “the state’s gathering of information about and to counter perceived threats against the security and stability of the state by means of espionage, sabotage, foreign-influenced activities, political violence and subversion” (den Boer, 2015, pp.403-404). Yet, the legitimacy of the implementation of mass surveillance measures can be questioned, especially for liberal democracies. According to Article 8(1) of the ECHR “everyone has the right to respect for his private and family life, his home and his correspondence” (ECHR, 1950, p.10). This article aims to protect the individual from state interference with these private matters. Yet, Article 8(2) ECHR states that:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (ECHR, 1950, p.10).

As a result states use this article to claim that the transnational threat of terrorism justifies the “mass accumulation, storage and exchange of information about individuals and organizations” (Zedner, 2009, p.145). Though, Art.8(2) ECHR gives a very broad description of situations in which a derogation of Art.8(1) would be legitimate, which is open for interpretation. This possibly results in power abuses of states, since the information gathered is not only from actual suspects of terrorism, but from innocent citizens too. An example of a controversial surveillance law that entered into force in the Netherlands in January 2018 is known as the ‘dragnet bill’ (Korteweg & Austin, 2018). Prior to the introduction of this new law, the secret services were already able to perform ‘targeted’ surveillance, meaning that they collected data of suspicious individuals (Korteweg & Austin, 2018). Yet, the new dragnet law expands these powers to allow for the systematic collection data of anyone who might be related to a suspect (e.g. friends or family) (Chen, 2017). This resulted in resistance of experts, politicians and citizens, whom are concerned about the privacy rights that are violated by this law (Chen, 2017). Their concerns are based on multiple factors. First of all, the new law allows secret services to collect information by hacking ‘third-parties’, meaning that not merely suspects can be hacked, but also innocent people who might possess useful information (Mens, 2018; Korteweg & Austin, 2018). In addition, untargeted ‘metadata’ is collected on large scales; this is the main measure the dragnet refers to. This data can be saved up to three years, so

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9 Metadata gives information about other data (e.g. e-mails or WhatsApp messages), such as the time a message was sent, from where and where to. It does not reveal the actual message, but is still highly informative (Mens, 2018).
even though it might not be used straight away, there is a possibility that it will be in the future (Mens, 2018). This collected ‘bulk’ data can also be shared with foreign services prior to being analyzed (Korteweg & Austin, 2018). This means that unevaluated, private data of individuals can be disclosed to other countries without exactly knowing what purposes they will use it for (Mens, 2018). Besides privacy concerns, one can question the efficiency of mass surveillance to detect potential terrorists. Where targeted data is aimed at suspected persons, the dragnet is untargeted and thus increases the ‘haystack’ in which the ‘needle’ has to be found (Mens, 2018). As the Dutch Scientific Council for Government Policy argued:

“Data mining is probably an ineffective method for preventing terror attacks. Because each terror attack is unique, it is nearly impossible to create an accurate profile. Combined with the small number of attacks, this results in an unusably high error rate” (de Zwart, 2017, p1).

Moreover, there are issues with the supervisory board that ought to control the legitimate and proportionate application of the new law (Ottow, 2018). In practice, the board consists of only six responsible persons. This seems inadequate to supervise the implementation of the law considering its large scale (Ottow, 2018). Moreover, the supervisors act outside of the legal system (Ottow, 2018). This means that the secret services do not have to ask permission of a judge to apply any of the dragnet measures (in contrast to for example investigation authorities that require judicial permission for a search warrant) (Ottow, 2018). This does not comply with the separation of powers which are fundamental for liberal democracies.

Besides these ‘soft’ counterterrorism measures, there are also many examples of ‘hard’ measures that are threatening privacy rights, including; house raids without a search warrant, arrests, and the stop-and-search powers (Ragazzi, 2016). The ECtHR ruled in 2010 that the stop-and-search measures under section 44 infringed the right to privacy under the ECHR (Lennon, 2015). In France, emergency measures have resulted in large scale house searches that were conducted without search warrants (Amnesty International, 2016). Statistics indicate that less than one percent of the approximately 4,300 house searches turned out to be related to terrorist offenses (Amnesty International, 2016). On a balance, thousands of innocent people and families were the victims of the often violent and unannounced house searches, whilst they did not actually seem efficient to track down potential terrorists (Amnesty International, 2016). One can therefore question whether the (lack of) results of such measures, that are invading the private sphere and thus form a breach of Art. 8(1) ECHR, are worth the collateral damage they cause.

All in all, the discussed counterterrorism measures are both ‘virtually’ and ‘physically’ invading privacy of individuals; from mass surveillance (e.g. the Dutch Dragnet) to violent house raids and stop-and-search powers. Even though Art. 8(2) ECHR allows for a (temporary) invasion of privacy, the extensive scale on which the measures have been applied raises alarm bells for human rights organisations such as
Amnesty International. Especially when considering the fact that the efficiency of the measures have been doubted in almost all cases (de Zwart, 2017).

4.2.4 Prohibition of discrimination

As the examples discussed previously in this chapter have illustrated, counterterrorism measures impact the daily life of citizens by restricting their civil liberties (Wilkinson, 2011; Zedner, 2009; Wolfendale, 2006). However, “the burdens of these measures do not fall evenly, as the security interests of the majority are commonly set against the loss of civil liberties by a minority of people who fall into predetermined suspect groups” (Zedner, 2009, p.149). In other words, the measures disproportionately target certain people who fall into a ‘suspect community’ (Zedner, 2009). Due to the ‘religious’ nature of the modern terrorism threat, the Muslim community is inevitably linked to it (Wolfendale, 2006). As a result, members of the Muslim community are more likely to be targeted by the counterterrorism measures than non-Muslims (Choudhury & Fenwick, 2011). This can thus easily result in a breach of Article 14 of the ECHR which prohibits discrimination as it states that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (ECHR, 1950, p.12).

So, the state ought not to make any prejudicial distinctions of citizens on any ground. However, when policing powers are increased “there is a risk that such activities may be carried out (in part) on the basis of generalisations relating to race, ethnicity, religion or nationality instead of on the basis of individual behaviour and/or objective evidence” (van der Leun & van der Woude, 2011). As research on the effects of counterterrorism policies on citizens in the U.K. has shown, Muslims are targeted more often than non-Muslims (Choudhury & Fenwick, 2011). Research results show that, whilst living in the same neighbourhoods, Muslims and non-Muslims have different experiences in terms of encountering counterterrorism policing (Choudhury & Fenwick, 2011). Overall, Muslims were more likely to have experienced the effect of counterterrorism policies or were able to recall encounters of friends and family (Choudhury & Fenwick, 2011). For example, they were more frequently stopped on the street or even arrested, while non-Muslims were in most cases not able to recall any incidents (Choudhury & Fenwick, 2011). Rather than establishing reasonable grounds for a suspicion, the results suggest that in most cases the main reason behind the stops or searches was based on ethnic profiling (Ragazzi, 2016). Even though this research was focused on the U.K., counterterrorism measures have been exercised in a discriminatory manner against Muslims throughout Europe (Fenwick & Phillipson, 2011). In France, the counterterrorism measures such as house searches or arrests were mainly suffered by Muslims and persons of North African descent, making them feel targeted because of their religion (Human Rights Watch, 2016). The
disproportionate and discriminatory application of counterterrorism measures also contributes to the stigmatization of the Muslim community among society at large (van der Leun & van der Woude, 2011). This lack of trust in Muslim citizens by the state as well as by non-Muslim citizens is likely to further isolate them. This alienation is counterproductive since it discourages “cooperation between Muslim communities and law enforcement efforts that could assist in identifying local terrorism threats based on radical Islam” (Human Rights Watch, 2016).

Holding a whole community responsible for actions of only a few of its members does not seem a fair nor efficient way to prevent for more incidents. In fact, this approach is likely to be counterproductive since it results in the stigmatization and ostracization of, in this case, the Muslim community. Counterterrorism measures in Europe such as stop-and-search powers or house raids have disproportionately targeted Muslims, without there being any other ground for suspicion than their ethnicity. Such ethnic profiling by police powers forms a breach of Art. 14 ECHR and can therefore not be justified.

4.2.5 Derogation in time of emergency

The previously discussed human rights (Art. 5, Art. 6, Art. 8, and Art. 13 ECHR) all ought to be respected by states under normal circumstances. However, sometimes it can be necessary to breach the rights of (certain) individuals in order to protect the larger interests (Zedner, 2009). Therefore, derogations can be made in times of emergency according to Article 15 of the ECHR, which provides that:

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law” (ECHR, 1950, p.13).

However, according to Art.15 (2) states can never derogate from Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery), and Article 7 (no punishment without law) of the ECHR. Derogation of Art. 2 ECHR (right to life) can only be made if deaths result from ‘lawful acts of war’. Besides, as follows from Art.15(3) states are obliged to inform the Council of Europe about all the derogating measures taken and the reasoning behind them. So, Art. 15 cannot be used as a justification to completely disregard human rights as states always have to account to the European Court of Human Rights (van Laere, 2017).

European governments have relied on Art.15 ECHR in the context of fighting terrorism. For example, the U.K. appealed to the law to implement control orders under the Prevention of Terrorism Act 2005 (Fenwick & Phillipson, 2011). More recently, France announced a ‘state of emergency’ after the attacks in Paris on 13 November 2015 (van Laere, 2017). The emergency laws that became active were aimed to track down the terrorists and prevent for new attacks (van Laere, 2017). These laws give the police
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extra powers to strengthen security, however as a ‘side effect’ they are also sacrificing civil liberties (van Laere, 2017). Therefore, the scope of this derogation “raises the question when, why and in what degree it should be permissible” (Zedner, 2009, p.508). Bearing in mind these questions, Art. 15 ECHR does not give any specific answers due to its broad phrasing. For instance, “strictly required by the exigencies of the situation” is open for interpretation, and states have the tendency to abuse such ‘grey areas’ of the law (Zedner, 2009; Fenwick & Phillipson, 2011). Even though the possibility to derogate from the ECHR can be necessary in emergency or war circumstances, when dealing with terrorism the details of what is allowed should be more specific. This is important in order to protect citizens against the power of the state, as well as for the prevention of the normalization of extraordinary measures that restrict civil liberties and breach human rights.

Conclusion

In context of the battle against terrorism, states hold the responsibility to respond in a manner that is both effective in upholding security to protect their citizens, and at the same time is in conformity with the law (van Gunsteren, 2007). Considering the fact that states have access to significantly more resources than the terrorist organisations, they also carry more destructive power (Primoratz, 2004). This makes it especially important that their responses are limited, controlled and well-defined (Chalk, 1998). Human rights are established to protect individuals from power abuses by the state (Waldron, 2003). Therefore, if a state imposes counterterrorism policies that disrespects these rights, it cannot legitimately claim to protect them (Michaelson, 2006). Yet, derogation of some rights are justifiable in times of war or emergency according to Article 15 ECHR.

Though, as examples in this chapter have illustrated, counterterrorism measures are restricting individual liberty (e.g. house arrests), disregarding due process rights (e.g. house search without warrant nor reasonable suspicion), and are invading privacy (e.g. mass surveillance, stop-and-search powers) (Bowling & Phillips, 2007; Zedner, 2009; Fenwick & Phillipson, 2011; Parmar, 2011; Chen, 2017). Besides these restricted civil liberties, the scope in which extraordinary measures have been applied seems to be dragged out of proportion (Lennon, 2015). This results in thousands of innocent citizens becoming the victims of invasive measures, which are often applied in arbitrary or discriminatory manners (Choudhury & Fenwick, 2011). Especially the Muslim community has been targeted disproportionately which breaches the prohibition of discrimination (Choudhury & Fenwick, 2011). Moreover, these extraordinary powers are likely to be abused by the government and police forces as they are not merely used for the purpose of countering terrorism (e.g. environmental activists were given house arrest to prevent them from attending the COP21 in Paris) (van Laere, 2017).

So, even though it is necessary to have the option to derogate from certain human rights in
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emergency or war situations, Art. 15 ECHR is open for interpretation which can result in state abuse of ‘grey areas’ of the law (Zedner, 2005; Fenwick & Phillipson, 2011). Moreover, it does not specify any measures nor does it set a time limit for these extraordinary measures; how long can these emergency measures stay in place? This is a question that was raised in discussions around the prolongations of the state of emergency in France. The next chapter will analyze this extraordinary response and, whilst acknowledging that it can indeed be necessary for a state to operate outside of the legal system under emergency circumstances, it shows what the dangers of normalizing extraordinary measures are for liberal democracies.
5. The danger of normalizing extraordinary measures: The state of emergency in France

On the evening of November 13, 2015, Paris was struck by a series of organized terrorist attacks by affiliates of the Islamic State (IS) (van Laere, 2017). The attacks began with three suicide bombings outside of the Stade de France where the international teams of France and Germany were playing a friendly football match at that moment (Neiberg, 2017). The stadium which has a capacity of 80,000 people was filled with supporters including the French President at that time, Francois Hollande (Naudet & Naudet, 2018). Fortunately, the suicide bombers were prevented from entering the stadium so they blew themselves up outside of it, killing one innocent bystander with them (Neiberg, 2017). Shortly after the bombings at the Stade de France, there were shootings in the city center of Paris, killing random people in and outside of four different cafés and severely injuring dozens (Naudet & Naudet, 2018). The final attack was carried out at the Bataclan theatre where a concert of the American band ‘Eagles of Death Metal’ was playing (Naudet & Naudet, 2018). There were approximately 1,500 people inside when three terrorists entered the building and started shooting at the crowd with automatic rifles (Naudet & Naudet, 2018). These shootings lasted around twenty minutes and, whilst some survivors were able to escape or hide, the terrorists took hostages whom they threatened to kill if the police would enter the building (Naudet & Naudet, 2018). Attempts to negotiate with the terrorists failed, so the police forces decided to breach and enter the theatre (Naudet & Naudet, 2018). Thanks to their actions the hostages were released and the terrorists all died inside of the theatre (Naudet & Naudet, 2018). The final toll of the evening counted 130 deaths and 350 injured people, which made it the largest jihadist terrorist attack on European grounds (van Laere, 2017).

France had already been targeted earlier that year; in January twelve people were killed and eleven injured in a shooting at the headquarters of the satirical newspaper ‘Charlie Hebdo’ (Neiberg, 2017). Around the same time hostages were taken at a supermarket in Paris, resulting in the death of four people and the injury of nine (Neiberg, 2017). These attacks were followed by smaller scale incidents and an attempted mass shooting on the Thalys which fortunately was prevented in August 2015 (Neiberg, 2017). Due to all of these violent attacks the French society was shocked and frightened (Neiberg, 2017). The brutal attacks on November 13 triggered the French government to respond immediately. The same night President Hollande announced the ‘état d’urgence’ (state of emergency) for the whole of France. In essence this entails that the police gets extra powers and that regular civil liberties are suspended in order to prevent for more attacks (Pasquino, 2018). It is a controversial phenomenon which has been criticized widely, especially by human rights organizations such as Amnesty International and Human Rights Watch (Boutin & Paulussen, 2016). They warn that the state of emergency breaches human rights and the rule of law (Boutin & Paulussen, 2016). Nevertheless, after its announcement in November 2015 the state of
emergency was extended six times, in total lasting two years until November 2017 (Pasquino, 2018). After its termination it was replaced by permanent counterterrorism legislation, which also includes controversial measures and lacks judicial control (Chassany, 2017). This ‘normalization’ of emergency powers can be dangerous for democracy as it can result in a ‘permanent state of emergency’ which no longer recognizes civil liberties and the rule of law (Chrisafis, 2017). Since France is the Western European country that has suffered the most jihadist terrorist attacks, it is interesting to analyze their response in order to assess the effects of such exceptional counterterrorism measures on liberal democratic states (Pasquino, 2018). This chapter first explains the legal basis for the state of emergency and then discusses its application and its consequences for the French democracy.

The legal basis for the state of emergency

The state of emergency is an exceptional French jurisdiction which suspends the regular workings of political and social procedures (Pasquino, 2018). As is provided by Law No. 55-385 of April 3, 1955, the state of emergency can be activated by the Council of Ministers in case of imminent danger resulting from serious breaches of public order, or in case of a natural disaster of exceptional magnitude (Boring, 2016). The law was first introduced after the Algerian war of independence in 1955 (Chassany, 2017). It expands the powers of the executive authorities and restricts certain civil or individual liberties for persons suspected of posing a threat to public security (Boring, 2016). The initial duration of a state of emergency is twelve days. Its extension must be authorized by the Parliament, though the possibility to prolong it is indefinite (Pasquino, 2018). Besides, the state of emergency can be announced for the whole country or for only part of it (Vie Publique, 2017). Law no.55-385 authorizes the Minister of the Interior:

“…to limit or prohibit traffic in certain places, to prohibit certain public assemblies, to temporarily close certain public spaces, to requisition private property or services, to prohibit certain persons from staying in French territory, to put people under temporary house arrest, and to issue “administrative” search warrants (Law no.55-385 Articles 5, 6, 6-1, 8 & 11)” (Boring, 2016).

In other words, this law provides extra power for the executive authorities to increase national security and to protect the French citizens. Police powers are expanded as they no longer need judicial approval in order to conduct house searches. The law restricts certain civil liberties such as freedom of assembly and freedom of movement. Nevertheless, Article 15 of the ECHR allows for derogation on most human rights in times of emergency, which makes it possible to temporarily suspend them\(^\text{10}\). However, the provisions in Law no.55-385 as well as Art.15 of the ECHR are formulated in a way which makes them open for multiple

\(^{10}\) Except for Art. 3, Art. 4 (1), and Art. 7 ECHR. Derogation of Art. 2 ECHR is only justifiable if deaths result from ‘lawful acts of war’.
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interpretations. This is due to the different scenarios in which these legislations can be applied. It is, therefore, necessary that the measures following from these provisions are under democratic control to prevent for power abuses.

Application and human rights concerns

During the state of emergency the main aim of the French authorities was to prevent more attacks. The expanded executive powers allowed the police to conduct house searches without the prior authorization of a judge. On the one hand, this seemed necessary in order to be able to act fast in an emergency situation (Ferejohn & Pasquino, 2004). However, in practice this resulted in a lack of judicial oversight which normally serves as an important safeguard for the democratic functioning of the criminal justice process. As statistics illustrate, during the state of emergency over 4,300 police raids on homes and mosques were conducted of which less than 1 percent turned out to be related to terrorism (Chassany, 2017; Amnesty International, 2016). Moreover, approximately 440 people were placed under house arrest without reasonable suspicion (Chassany, 2017). Meaning that the burden of proof reversed on to the defendants (i.e. ‘guilty until proven otherwise’) rather than the other way around (Chassany, 2017). This is in conflict with the presumption of innocence. Besides, this lack of judicial control disturbs the balance that the separation of powers normally provides. The exceptional powers that the state of emergency facilitates must be limited by democratic safeguards in order to prevent for possible abuses of those in power (Pasquino, 2018). This is a basic principle of liberal democracies that has mostly been ignored in the French debates around counterterrorism (Pasquino, 2018).

Due to this lack of judicial control, the application of emergency measures has been criticized. The police raids tended to take place unannounced, either during day- or nighttime, they were often needlessly violent, and offered no compensations in erroneous cases (which almost all raids were) (Amnesty International, 2016). In one instance the police violently forced a door, thereby injuring a six-year-old girl, whilst it turned out they were supposed to raid their neighbors flat (McQueen, 2017). The force used in these raised seems out of proportion, for in most cases the police could have just rang the doorbell rather than forcing it (Amnesty International, 2016). This is violating the proportionality and subsidiarity principles, as well as the right to respect for private and family life. Moreover, the lack of judicial authorization needed to place someone under house arrest also resulted in the abuse of the emergency powers. As Amnesty International reported, environmental activists were put on house arrest under the emergency laws to prevent them from going to the COP21 (Amnesty International, 2016).

Other concerns were based on the fact that almost all cases targeted Muslim citizens or mosques. The police closed 16 mosques which “fuelled a feeling that the measures were not just targeting terrorists, but were being used as a way to put France’s Muslim community on notice” (Chassany, 2017). This
distrusting attitude towards Muslims can be considered as ‘religious profiling’. This is illustrated by the statement that: “those targeted often complained that there has been no justification for this beyond the fact that they are “visibly” Muslim” (McQueen, 2017, p.1). France has a relatively large Muslim population which consists of around 4 million citizens (Chassany, 2017). The emergency measures have targeted the whole Muslim community either directly, by searches or arrests, or indirectly, by suffering the social consequences which involve the exclusion and stigmatization of Muslims (van Laere, 2017). Measures that affect such a large part of the community are most likely counterproductive in fighting terrorism as it potentially causes “a minority of European Muslims to embrace jihadist ideologies” (McQueen, 2017, p3). As Sageman (2004) already argued, an important factor in the radicalization process is being isolated from society. Research results from the UN also support the claim that social exclusion can lead to the radicalization of an individual (el-Said & Barret, 2017).

All in all, Human Rights Watch has warned that the state of emergency measures “interfere with the rights to liberty, security, freedom of movement, privacy, and freedoms of association and expression” (FRANCE 24, 2016). The lack of judicial control could constitute a ‘threat to democracy’ (FRANCE 24, 2016). This threat to democracy is mainly based on the long-term adoption of emergency measures; when they become the norm rather than an exception.

The danger of normalizing extraordinary measures

The state of emergency lasted for two years straight, from November 2015 till November 2017. A question that has been discussed intensively during this period, was how long it should last. Law no. 55-385 provides that the state of emergency can be extended for an indefinite period. However, as has been argued, “jihadist terrorism is a phenomenon that is not characterized by a short duration – like an emergency or an exceptional condition – but that it is very likely going to stay with us, our worries, and anxieties, for an unforeseeable stretch of time” (Pasquino, 2018, p.259). Due to the fact that it is impossible to know when exactly a terrorist threat is dissolved, there is the risk of the emergency powers becoming ‘normalized’. In other words this entails that exceptional measures in fact become the norm and civil liberties are suspended indefinitely. As the example of the state of emergency in France shows, it is becomes increasingly harder to discard exceptional measures over time (Chassany, 2017). Even though former President Hollande already planned to end the state of emergency in 2016, on 14 July that year France suffered another large scale terrorist attack. A truck drove into a crowd in Nice, killing 87 people and injuring over 350 (Chrisafis, 2017). This resulted in another extension of the state of emergency. Even though it was finally suspended in November 2017, the state of emergency was replaced by new antiterrorism laws (McQueen, 2017). The current French president, Emmanuel Macron, proposed a bill which in fact incorporates many of the emergency powers into ordinary law (Chassany, 2017). These new
laws are not as broad as the full state of emergency, as they are focused on terrorism prevention specifically (Chassany, 2017). The bill:

“… makes permanent certain special policing powers including placing suspects under house arrest, closing places of worship, expanding police “stop-and-search” operations in designated areas. It would also allow house raids and searches – now renamed “house visits” – with what critics say is insufficient judicial oversight” (Chrisafis, 2017, para. 13).

These powers seem similar to the state of emergency, yet there are some differences. For example, the rules concerning house arrest are less restrictive under the new law; suspects can wear electronic bracelets which allows them to continue working (McQueen, 2017). Yet, the new measures still lack judicial control and the lowered standard of proof needed for police decisions remains (Chassany, 2017). So, even though the state of emergency is officially terminated, the exceptional powers are transferred into ordinary law (Chrisafis, 2017). The measures are set to be revised in 2020, however they are planned to stay in place until at least then (Chassany, 2017). Human rights groups, lawyers and academics are concerned that “the bill marks a step back for the rule of law” (Chrisafis, 2017). As UN rapporteur Michel Forst warned, these new laws risk to create a “permanent emergency situation, handing the state special policing powers without the proper control of judges and the legal system” (Chrisafis, 2017). Other UN experts notified that the new counterterrorism bill does not include a clear definition of terrorism which could result in the arbitrary application of the laws (Chrisafis, 2017). Moreover, these laws will continue to disproportionately target French Muslims based on their appearance, which has proved to be counterproductive (McQueen, 2017). After three years the measures will most likely feel ‘normalized’ to the majority of French citizens (Chassany, 2017). This normalization is a gradual process that occurs over time when the extraordinary measures are increasingly becoming more intertwined with the ordinary legislations until they eventually become the norm. This adaptation is dangerous for the French democracy since the ordinary democratic values and safeguards are disregarded.

Conclusion

All in all, the terrorist attacks seem to “have trapped French politicians in a security spiral from which they cannot get out, [since] they do not want to be cast as impotent” (Chassany, 2017). It is comprehensible that the French authorities want to respond to the attacks in a firm manner, since it is their responsibility to protect the country. Due to the fact that the threat of terrorism is not a short-lived one, France has remained in a state of emergency for two years (Pasquino, 2018). Besides concerns for human rights and the democratic system, the duration of the state of emergency was questioned by human rights organisations as well as academics and lawyers (Chrisafis, 2017). After the French President Macron
terminated the state of emergency in November 2017, he replaced it with a new antiterrorism bill (Chassany, 2017). Yet, this bill is also controversial since it incorporates a large part of the emergency measures into ordinary law (Chassany, 2017). There is no evidence that the new bill is in fact efficient in fighting terrorism (McQueen, 2017). It can even be argued that it is counterproductive, since it is systematically allowing the infringement of civil liberties and the measures continue to disproportionately target the French Muslim community (McQueen, 2017; Chassany, 2017). As “judges and lawyers warn it will further erode the presumption of innocence in matters of terrorism and, as such, will “contaminate” the rule of law and the justice system as a whole” (Chassany, 2017). So, rather than permanently relying on extraordinary measures by incorporating them into ordinary law, other options should be explored.
6. Conclusion: Improving current counterterrorism measures:
Effective counterterrorism without undermining democratic values

As this paper aimed to illustrate, responding to terrorism is an important and complex task for any liberal democracy. On the one hand, it is the responsibility of the state to protect its citizens by guaranteeing security, whilst on the other hand also recognizing civil liberties (Chalk, 1998). Because of the international scope and the malevolent nature of the current terrorism threat, governments of Western European countries are triggered to adopt pre-emptive counterterrorism legislation (Zedner, 2009; Wilkinson, 2011). Due to the pressure of wanting to respond to an attack immediately, the response is not always well-defined and controlled (Chalk, 1998). Especially European countries that have suffered from large scale terrorist attacks, such as France and the U.K., have implemented exceptional powers to prevent new attacks (Speckhard, Shajkovci, & Yayla, 2017). These security measures are often at the expense of civil liberties and certain human rights (Wolfendale, 2006). Even though international provisions such as Article 15 of the ECHR allow for derogation in times of emergency, human rights organisations have warned that this provision has disproportionately been appealed to (Human Rights Watch, 2016). Besides, the threat of terrorism is not a temporary one but has existed in all times and is going to remain present in the foreseeable future (Pasquino, 2018). Therefore, states risk to rely on extraordinary measures for an extended period of time until these measures gradually become normalized and the ordinary rule of law is replaced (Chrisafis, 2017). This paper aimed to identify this threat as well as other possible threats of counterterrorism for liberal democracies in Western Europe. The next section summarizes the findings of this literature review and gives recommendations of how counterterrorism measures might be improved in the future.

The threat of counterterrorism to Western European liberal democracies

The main question this paper aimed to research is whether counterterrorism measures in Western European countries pose a threat to liberal democracies. In order to answer this question the first chapters aimed to establish a general understanding of the concept of terrorism as well as of the values and principles of liberal democracies. Terrorism is an ambiguous phenomenon which is hard to specifically define. It is generally considered as “the systematic use of coercive intimidation, usually to serve political ends” and to create a “climate of fear amongst a wider target group than the immediate victims of the violence” (Wilkinson, 2011, p.17). It often targets innocent civilians by means of suicide bombs, shootings or other violent methods (Wilkinson, 2011). Terrorism has existed in all times, however, the aims and motivations of terrorists differ for each group (Rapoport, 2004). Currently the world is facing the threat of Islamist terrorist groups such as IS (Farwell, 2014). An important characteristic of modern terrorism is that the
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terrorists are often born and raised in a Western country and become radicalized here too, this phenomenon is known as homegrown terrorism (Crone & Harrow, 2011). This makes that the threat of terrorism has shifted from external to internal (Crone & Harrow, 2011). In response to this shift, European governments aim to increase pre-emptive measures to tackle the terrorist threat before it occurs (Lynch, McGarrity, & Williams, 2010). However, in their response they have to take into account the fundamental values and principles that liberal democracies are based on (Chalk, 1998). Important are the principles of liberty and equality of all citizens as well as the equal protection of human rights (Donnelly, 1999). Furthermore, liberal democracies rely on the rule of law and the criminal justice system in order to function legitimately (Raphael, 1990).

According to the literature used for this paper, it can be concluded that the current counterterrorism legislation implemented by Western European countries indeed forms a threat to these liberal democracies. A general threat of counterterrorism is that, due to the strong urge for terrorism prevention, the criminal law system has shifted from in essence repressive to proactive (OHCR, 2008). In other words, this enables the government to prosecute mere suspects of terrorism without any grounds for reasonable suspicion (Stevens, 2013). Besides the fact this undermines human rights, this pre-emptive approach sends the message to the public that the government does not trust them (Zedner, 2009). For example, a climate of suspicion is created by measures such as mass surveillance (e.g. Dutch dragnet) (Zedner, 2009; Korteweg & Austin, 2018). In turn this leads to a distrusting attitude of the public towards the government (van der Woude, 2009). Innocent citizens become the victims of counterterrorism measures, especially the Muslim community for they are linked to the current terrorist threat (Wolfendale, 2006). Examples of European counterterrorism measures in chapter 4 have illustrated that some measures are restricting individual liberty, disregarding due process rights, invading privacy as well as discriminating against Muslim citizens (Bowling & Phillips, 2007; Fenwick & Phillipson, 2011; Parmar, 2011; Chen, 2017). Moreover, the measures are applied in excessive manners rather than merely on suspects of terrorism (Fenwick & Phillipson, 2011). The state of emergency in France showed how difficult it is for states to reject emergency measures after they have been in power for a while (Boutin & Paulussen, 2016). Gradually, the extraordinary powers become normalized and are sometimes even adopted into the ordinary law (Chrisafis, 2017). This is dangerous for democracy since the measures lack judicial oversight whilst at the same time grant extra powers to executive authorities. This can result in power abuses as well as general repression of the population (Pasquino, 2018).

Effective counterterrorism without undermining democratic values

The question, then, becomes how the current counterterrorism measures can be improved. Besides the fact that counterterrorism is threatening human rights and liberal democratic principles and values, the
efficiency of the measures can be questioned (Mens, 2018; de Zwart, 2018). The efficiency of measures plays an important role in deciding whether the measures are actually necessary and proportionate (van der Woude, 2009). If they are efficient in countering terrorism, they can perhaps be justifiable even though they might be infringing liberties (van der Woude, 2009). On the other hand, a measure which has not proved efficient at all, is certainly not justifiable (van der Woude, 2009). It is, however, difficult to assess to what extent a counterterrorism measure is efficient. Van der woude (2009) argues that counterterrorism legislation often lacks sunset clauses, which is a section of the law that provides beforehand when it shall cease or when it will be revised. The lack of proper assessment results in the measures not being hold under strict obligations (van der Woude, 2009). Therefore, it is important that such agreements are made beforehand (van der Woude, 2009). Wilkinson (2011) adds to this that “the laws must be temporary, subject to frequent revised by parliament’s approval before any renewal” (p.76).

Furthermore, as the examples have illustrated, liberal democratic states adopt excessively repressive counterterrorism measures that lack judicial and constitutional control. Philosophically, this undermines the fundamental liberal idea that:

“…all human beings have the right to be protected against the arbitrary and coercive actions of institutions which have legal and political power. Ignoring this fundamental dictum brings the liberal democratic policy one step closer to the type of illegitimate and indiscriminate strategies that are characteristically employed by authoritarian states” (Chalk, 1998, p.386).

So, Chalk (1998) warns for a situation in which fundamental liberal democratic ideals such as equal rights and legal protection of citizens are no longer respected. Liberal democracies that adopt repressive measures are risking to gradually turn into an authoritarian system, which is “a regime that threatens the basic civil liberties of all” (Chalk, 1998, p.386). In order to prevent this, he argued that the main obligation of liberal democracies is to “uphold and maintain constitutional principles of law and order” (Chalk, 1998, p.386). This can be realized if the response is limited and well-defined (Chalk, 1998). So, it is essential that the counterterrorism measures are in proportion with “what is demanded by the exigencies of the immediate situation” (Chalk, 1998, p.386). This is also in line with what Art. 15(1) ECHR provides, yet due to the possibility to appeal to Art.15 in different scenarios this provision is not limited and well-defined. Antiterrorism laws in general have proved difficult to define specifically, for the concept of terrorism itself is also hard to define (Wilkinson, 2011). This has resulted in the disproportionate use (and abuse) of counterterrorism measures, for example in case of the state of emergency in France. To prevent this, it is important that the language used in counterterrorism legislation is revised and is made as clear and specific as possible. Moreover, the measures should be limited in a way that they only target the actual terrorists and ought not to be extended to their relatives or sympathizers (Chalk, 1998). Yet, as the examples of counterterrorism measures in Western Europe (e.g. dragnet surveillance, house searches) have shown,
friends, family and neighbors of suspected terrorist have been targeted (Chen, 2017). The Muslim community particularly becomes the victim of antiterrorism measures (Wolfendale, 2006). This strategy mirrors that of many dictatorial regimes (Chalk, 1998). This general repression estranges the citizens from the government and could even result in support for the terrorists (Wilkinson, 2011).

Besides limited and well-defined, the response has to be credible (Chalk, 1998). There has to be a general consensus among the public that the counterterrorism measures are both effective and required (Chalk, 1998; van der Woude, 2009). In case of the Dutch dragnet surveillance bill the Dutch citizens expressed their concerns through a popular referendum, in which the majority voted against the new laws (Kiesraad, 2018). In France, however, the state of emergency was supported by a small majority of the French citizens and the new antiterrorism bill is allegedly supported by 80% (Hartmann, 2017). So, even though human rights organisations might express their concerns, gaining public support is especially important for a state to uphold a credible position (Chalk, 1998).

Finally, it is crucial that the counterterrorism measures are placed under strict “parliamentary supervision and judicial oversight” (Chalk, 1998, p.387). This is necessary in order to prevent from power abuses of the state as well as to protect civil liberties and individual rights (Chalk, 1998). Control mechanisms are especially important considering the covert nature of the majority of the antiterrorism actions (Chalk, 1998). Therefore, it is important that “they take place within a clear framework of legal controls” (Chalk, 1998, p.387). This judicial control often lacked in the examples of counterterrorism as discussed in this paper (e.g. house searches, house arrests, stop and search powers). Even though the ECtHR holds the power to intervene in cases national states fail to comply with the ECHR, this is a time-consuming process and the ECtHR is unable to address all applications.

All in all, in order to protect the liberal democratic principles and values it is crucial that states stay true to these fundamental ideals in their response to terrorism (Wilkinson, 2011). This means that they have to act in accordance with the rule of law and with respect for human rights. If emergency laws are found necessary due to a serious terrorist threat, they have to be under judicial control and have to be revised before renewal (Wilkinson, 2011). Besides, to prevent them from normalizing they have to be temporary and they cannot be used for other purposes than preventing terrorism (Wilkinson, 2011). Taking into account that Western European democracies carry significantly more power than the terrorist organizations, they are be able to counter them as long as they do not lower themselves to their level (Primoratz, 2004). As Wardlaw (1989) already argued: “to believe that depriving citizens of their individual rights and suspending the democratic process is necessary to maintain ‘order’ is to put oneself in the same [mistaken] moral plane as the terrorists who believe that the ‘end justifies the means’” (p. 69). So, if states fail to abide by their own legal principles and democratic values, counterterrorism can pose a serious threat to liberal democracies (Chalk, 1998).
7. References


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