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# COMMUNICATING INTELLIGENCE WITH THE CITIZENRY: THE EXPERIENCE OF THE NETHERLANDS REFERENDUM ON THE ACT ON INTELLIGENCE AND SECURITY SERVICE

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***Abstract:*** *In The Netherlands on March 21st, 2018 a non-binding referendum was held on the new act on the intelligence and security services. In many respects this was a unique moment in the (Dutch) history of intelligence. The Netherlands has no long lasting history of referenda and probably never will. In 2016 it held a referendum on the EU association agreement. It led to a clear no-vote and although the referendum was not binding, it was a shock to the government, which had to bend over backwards to explain to its European partners how it had gotten itself into this position and to legitimize to the voters that it still signed the agreement. As far as the government was concerned this was a -once-and-never-again experience. However, just before it managed to close down the possibility of national referenda, enough signatures were collected to have a non-binding vote on the Dutch act on the intelligence and security services. The outcome of the referendum surprised friend and foe: 49.5 percent of the voters rejected the act against 46.5 yes-voters. This paper discusses the issues that were involved and the way the government treated the referendum. The government tried to follow two objectives simultaneously when it drafted the act. First, it wanted a law that would be independent from technological developments, precisely because a former one had restricted the services' room for manoeuver especially due to technological considerations. Second, it wanted to make a law that would be ECRM-proof. This led to a balancing act and a very complicated bill. Opponents stated that past practices and the vague wordings of the bill were reasons for distrust. Champions of the bill said that it combined the enhancement of the services' powers with a broadening of the oversight mechanisms. They blamed the opponents because of factual misunderstanding. What they did not take into account enough was that it was not so much a matter of good intentions or practice but an issue of images. In a belated effort to save the act unscathed representatives of the services appeared more often in the media in the three months before the referendum than in the preceding half century. This contributed to the beginning of a serious intelligence debate in The Netherlands. The changes the government promised after the referendum were not inserted into the law itself and were considered to be only cosmetic by opponents. The law entered into force on May 1st, 2018 as scheduled. At the time of writing both summary and substantive proceedings against the law, initiated by both humanitarian and privacy organizations and professional associations of lawyers and journalists, are pending.*

***Keywords****: intelligence; security; referendum; public opinion; law*

## 1. INTRODUCTION

In 2002 a law on the intelligence and security services became effective which was much more elaborate than the previous one, the first such law in The Netherlands, which dated from 1987. The 2002 law had become necessary for several reasons. First, the European Court of Human Rights (ECHR) had judged that the powers of the services should be better circumscribed in the law, that an independent oversight committee was lacking and that there was no individual right to complain against actions of the services. The second reason was more institutional. In 1994 the Dutch government had abolished its Foreign Intelligence Service, expecting that it was no longer needed. However, in the following years it became clear that The Netherlands could not do without a civilian foreign intelligence capacity.

The 2002 law remedied all this. It provided for two intelligence services: the General Intelligence and Security Service (AIVD, Algemene Inlichtingen- en Veiligheidsdienst) and the Military Intelligence and Security Service (MIVD, Militaire Inlichtingen- en Veiligheidsdienst). It also established an independent Committee for Oversight (CTIVD, Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten). And citizens got the possibility to complain about actions of the services to both the CTIVD and the National Ombudsman.

The law had hardly become effective when it showed a major flaw from the perspective of the AIVD and the MIVD. The law allowed for both bulk interception of wireless transmissions and targeted interception of communication that went through cables, but not for cable-bound bulk interception. Soon after the law had become effective a technological change occurred after which most of the current communications took place through the cable. Consecutive governments lent a willing ear to the services' complaints that thus they were becoming deaf while hearing and blind while seeing, as the saying went. It was understood, however, that a new law expanding the powers of the services would be a hard sell. Therefore in 2013 the government set up a commission-Dessens (named after its chairman), which concluded that a widening of the powers of the services should have to be counter-balanced by an increase in oversight.

This led to a bill that had to serve two purposes. It should be both technology-independent and ECHR-proof. The bill introduced the possibility of bulk interception via the cable and made it possible to exchange this bulk material with befriended foreign services. It made special provisions for tapping phones of lawyers and journalists, because in judicial processes the government had been condemned for not having done so. In the end the bill also provided for an independent committee of two judges and an IT-expert, who should give ex ante permission for the use of special powers by the services.

## 2. OPPOSING VOICES

Those who had hoped for a bill that would end all controversy around the intelligence and security services, engendered for instance by the so-called revelations of Edward Snowden, were disappointed. The act was an unfortunate mismatch between two ambitions: in order to be technology-independent the law had to use general terms, in order to be ECHR-proof it had to be as specific as possible. Those who had hoped that the intention to make the act technology-independent would open a grand vista could not detect a vision about the future of technology. Words like 'the internet of things' or 'brain-computer-interfaces' were lacking from the bill's explanatory memorandum. However, it did make explicit the services' powers to hack into electronic systems and made cooperation of service providers mandatory. It also opened the possibility of hacking through third parties.

Furthermore, the ECHR-proof intention did not take into account the case law that could be expected in the years to come from the European Court of Human Rights. It just tried to withstand current ECHR case law. In this sense the law was rather meant to mend the broken pieces of the past than to make a future-oriented document.

The first draft of the act was published in July 2015. It was open for public internet consultation and an amazing number of 1100 reactions were received from organizations and individual citizens criticizing the bill for allowing too many and too large infringements in people's privacy. Among them were not only defenders of privacy and human rights but also telecom providers and the largest organization of employers in The Netherlands. Also the Council of State, which has to counsel the government on every bill, and the Oversight Committee CTIVD voiced substantial criticism.

However, the Dutch government in 2015-2016, Rutte-II, did not heed all criticism. It had made an estimate of its chances in Parliament and decided to push the bill into a law. A great number of amendments in the Lower House were killed. The then minister of the Interior Ronald Plasterk treated opponents of the law as if they were endangering national security, which led even one Member of Parliament, the spokesman for the Socialist Party, Ronald van Raak, to leave the parliamentary debate prematurely.

In the Senate the government did concede a few points. However, these did not change the law and although these concessions do have some legal status, they do not have the same legal force as a provision in the law. In the end the law got clear majorities in both the Lower House and the Senate, respectively 114 against 35 and 50 against 25.

## 3. A REFERENDUM

Several human rights and privacy activists announced that they would appeal to the European Court of Human Rights as soon as the law would become effective. A bigger surprise though was the announcement in August 2017 by five students of the University of Amsterdam that they wanted to have a referendum about the law. They focused mainly on Article 48 of the Act, which allows for 'the tapping, receiving, recording and listening of any form of telecommunication or data transfer by means of an automated work, irrespective of where this takes place'.

The Netherlands has no long lasting history of referenda and maybe never will. In 2016 it held its

first national referendum, a referendum on the EU association agreement with Ukraine. That one led to a clear no-vote and although the extant Dutch referenda are not binding, it was a shock to the government, which had to bend over backwards to explain to its European partners how it had gotten itself into this position and to legitimize to the voters that it still signed the agreement. As far as the government was concerned this had been a once-and-never-again experience. In 2017 a new government under Prime Minister Mark Rutte, Rutte-III, took shape and during the preceding coalition discussions it was decided to abolish the possibility of referenda, even though until then this instrument had been used only once. Then the announcement of another referendum was made.

In order to make a referendum possible in The Netherlands 300,000 signatures are needed. For a long time reaching this goal seemed unlikely as the discussions about the bill had been foremost an affair for well-informed insiders. When, however at a late stage, a Dutch satirical newscommentator, Arjen Lubach, promoted the demand for a referendum the required number of signatures was soon reached. It was decided that the referendum would take place on March 21, 2018, simultaneously with the elections for the municipality councils, which would guarantee that the quorum of thirty percent of the electorate casting their vote would be achieved. Intriguing detail: the referendum would take place just before the government intended to close down the possibility of referenda.

## 4. AN ABSENT GOVERNMENT

Still, the government felt it had little to worry about and remained almost absent from the debate. The result was that the opponents of the law had a free playing field and coined the law the ‘dragnet law’, a word even serious media began to use, together with the words ‘eavesdropping’ or ‘tapping law’. The law had provided for three stages of bulk-processing: collection, pre-processing and processing. In the final stage, government sources said, about two per cent of the original bulk would be retained and therefore, Dutch citizens had little to worry about, as real surveillance would start only at that final stage. Some citizens on the other hand maintained that surveillance would already start as soon as bulk information was collected. However, this fundamental difference of opinion was hardly addressed in the debate. It led satiricist Arjen Lubach to ask his audience: would you allow the AIVD to hang a few cameras in your bedroom if the service promises never to use them?

Nevertheless, all polls in the months before the referendum showed that about fifty percent of the voters would vote in favor of the law, thirty or less percent were against and about twenty percent remained undecided. As the undecided vote normally splits proportionally along the yes-no vote, it seemed the Dutch government still had little to worry about.

The new government, Rutte III, came into power on October 26, 2017. It consisted of Rutte’s conservative liberals (VVD), the Christian democrats (CDA), the progressive democrats (D66) and the small Christian party Christian Union. Of those the progressive democrats were in the most difficult position. They had voted against the law and one of their principles had always been the possibility for the Dutch citizenry to express themselves through referenda. In order to become part of the coalition they had to embrace the law and go along with the abolition of the referendum in The Netherlands. Furthermore, the minister primarily responsible for both the law on the intelligence and security services and the abolition of the referendum was the minister of the Interior, Kajsa Ollongren, who happened to belong to D66, the progressive democrats. In order to appease the progressive democrats it was promised that two years after the coming into effect of the law it would be evaluated and, if necessary, changed.

For ‘campaign technical reasons’ the members of the Cabinet stayed aloof from the debates leading up to the referendum. Instead they sent the heads of the AIVD and MIVD into the field, who in the final months before the referendum were seen more often in public debates and on television than in the preceding fifty years. It put them into an awkward position. It was hard for them to answer their audiences’ frequent questions about the technical ins and outs of the powers they would be able to use under the new law, as they are obliged to keep their methods and sources secret. Neither could they discuss recent intelligence successes, because this would mean that the extant law was not so bad after all. This was for instance one of the reactions when several weeks before the referendum news was leaked to the media about a successful hacking operation by the AIVD in 2014 against the Russian hacking group Cozy Bear. And neither could the intelligence chiefs point out explicit failures due to the ineptness of the law, because by doing so they would give directions to people with malicious intent. It was also hard for them to indicate whether the new powers would

indeed lead to greater success, e.g. in the fight against terrorism.
They could only state that based upon their secret inside knowledge they just knew that the law would be an improvement and that many of the objections raised against the law were based upon misunderstandings about the actual workings and real intentions of the services. Thus they ended up in an 'I am right and you are mistaken'-debate, whereas the public formed its opinions not so much upon facts as well upon images. And facts do not necessarily change images. The government and the services overlooked the fact that in Dutch society authority is no longer accepted naturally. Politicians, judges, policemen, teachers and professors have all experienced this. Not only is their authority no longer accepted as such, their claim to authority makes them suspicious in the eyes of a mistrustful audience keen on detecting semblances of inequality. Authority that is shrouded in secrecy is doubly suspicious and a government that is suspected to surveil its citizens should be prepared for the counter-question by its citizens: and how transparent are you, government, yourself?

## 5. AN INTELLIGENCE DEBATE

Several of the opposition leaders were also notoriously absent from the debate, such as the leaders of the two populist parties, Geert Wilders (PVV) and Thierry Baudet (Forum for Democracy), who preferred to focus on their campaigns for the municipal council elections. In spite of or maybe thanks to the depoliticized character of the referendum discussions for the first time in history an actual intelligence debate took place in The Netherlands. On the op-ed pages of newspapers, in explanatory articles and broadcasts, and in meeting rooms people debated the law. Most of the questions that arose from these debates concerned technical aspects of the law, such as how the bulk interception was done and how the different oversight mechanisms would interact.

The criticism focused mainly on the idea that collecting bulk information would infringe upon people's privacy, the exchange of bulk un-analysed information with foreign services, the retention of some bulk information for up to three years, hacking via third parties, the notion that journalists would not get enough safeguards and the idea that medical data could be seen by the intelligence and security services.

Other aspects of the law were surprisingly hardly discussed at all, such as the algorithms that would be used to select particular information from the bulk, the fact that the law allowed the services to establish a DNA-database of their own, and the possibility of impairment of physical integrity in case people would have electronic systems inserted into their bodies. Another aspect which drew not enough attention was the fact that the AIVD and MIVD are both intelligence and security services. Powers given to the services by law are often intended to be used abroad, especially in order to protect and further the missions of military troops. However, in the discussion it was often thought that these powers would be used against Dutch citizens. Also, the government and the services often stated that in order to enhance security the citizens would have to offer some of their privacy. The fact that privacy enhancing software is available that serves both values was hardly discussed. And also overlooked was the fact that hacking by the services becomes more and more important in relation to interception.
There were other interesting developments in the run-up to the referendum, all part of a public relations offensive by the government and the services. First, the public appearances of the chiefs and other (former) personnel of the intelligence and security services. The head of the MIVD even called populism a danger to the democratic order, an issue that had been shunned by sister organization AIVD for years. Second, after years of refusal the government finally revealed the numbers for telephone and internet taps by the intelligence services over the past years. Third, the annual report of the AIVD appeared more than a month earlier than usual. In it for the first time the cyberthreat was pictured as a more prominent threat than terrorism. Fourth, the minister of the Interior did not inform Parliament about a report written by the oversight committee CTIVD on faults in the intelligence exchange with other countries until a few days after the referendum. She stated publication had had to wait because not all permissions from foreign governments had been received before the referendum.

## 6. THE OUTCOME OF THE REFERENDUM

When the votes in the referendum were counted it turned out that to the surprise of friend and foe approximately 49.5 per cent had voted against the law and about 46.5 per cent in favor. It is hard to explain why the actual vote differed so much from the polls in the months before. It seems

at least three reasons are likely. The first is that some of the no-voters actually wanted to express their desire to leave the instrument of the referendum intact. Their no-vote against the law on the intelligence and security services was wholly or partially a pro-referendum vote.

The second probable cause was the news about the Facebook-Cambridge Analytica scandal, which broke just a few days before the referendum. It touched a nervous string with people worried about their privacy, the more so because the head of The AIVD had repeatedly told his audiences that the Dutch intelligence and security services did not have the same powers as Facebook, Google, Twitter and Tinder. This clumsy comparison between a government agency and citizens on the one hand and a private firm and clients on the other might unintentionally have primed the voters, when they were confronted with the Facebook-scandal, and consequently have influenced them to vote against the law.

And the third possible explanation would be the high-handed manner in which government politicians treated the case in the days before the referendum. Prime Minister Rutte compared the referendum with lace-making and other hobbies. It was a blow in the face of all people who in preparation of the referendum had earnestly tried to understand the intricacies of the law and had often for the first time immersed themselves in a study of intelligence and security services. On the eve of the referendum, following the final election debate on television, a televized debate about the law took place between Prime Minister Rutte, the leader of the Christian-democrats Sybrand Buma, part of the government coalition, and two members of the opposition, the leader of the Green Left (GroenLinks) Jesse Klaver and the Socialist Party Lilian Marijnissen. The government politicians just stonewalled the opposition leaders' doubts and arguments. Buma even repeated that as far as he was concerned nothing would be changed in the law even if a majority would vote against it.

As said the Dutch referendum is not binding, but in case of a no-vote the government has to reconsider the debated law. So, the question now was what position the government would take regarding the law after the referendum. Would it modify certain parts of the act and if so, which ones? And would the government's action be the end of the intelligence debate or would it rekindle it? Whereas it had taken Prime Minister Rutte many months to formulate the Cabinet reaction after the Ukraine referendum, his new government decided to clear the air this time as soon as possible. Within a few weeks it came with what they called some concessions that did not need to be enacted, but should be accepted as elucidation. Opponents called them merely cosmetic. E.g one of the concessions was that intercepted bulk material could no longer be retained for three years, as the law allowed, but only for one year. However, this one-year limit could be postponed twice with another year. Another concession was that bulk interception would have to be as goal-oriented as possible, but this had already been included in one of the few Lower House amendments which had been accepted.

The reason the government was in such a hurry was also the fact that the law would become effective on May 1st, 2018. Although the government said to have made some concessions these did not change the law itself, as both the opponents and the Committee for Oversight had wanted. Bits of Freedom, Privacy First, Free Press Unlimited, The Dutch Lawyers' Committee for Human Rights, the Dutch Association of Criminal Lawyers and several other organizations objected that the law would enter into force without Parliament having had an ability to debate the government's concessions. Therefore they asked the government to refrain from such action, otherwise they would institute summary proceedings to postpone the entry into force of the law. The ultimatum ended on April 27. The day before the government published the changes, indicating that it would not insert them in the law. This means that the summary proceedings will take place, although at the moment of writing (April 28, 2018) it is not clear when. However, they will be held after the law has become effective on May 1, 2018. Meanwhile the Netherland Association of Journalists has begun substantive proceedings to have the act reviewed in the light of European law.

## 7. CONCLUSION

The way the governments-Rutte II and so far also Rutte-III have pushed the law disregarding broad and often well-funded criticism. By doing so they have turned national security and the intelligence and security agencies into a question of the current government instead of a case of the state. This is a situation that should have been avoided and it will take quite some effort if the government would like to redress this situation. Both this situation and the execution of the law itself ask for continuous communication, explanation and elucidation. It has been a benign experience to finally see the heads of the AIVD

and MIVD appear in broad daylight to discuss the work of the services with the public, but the government should take their responsibility as well and not stay absent from the scene. The intelligence debate that has started in The Netherlands over the past few months should be prolonged, but then the government should understand that it takes two to tango.

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