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Prohibiting Remote Harms: On Endangerment, Citizenship and Control

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1. Introduction

On 1 October 2013, a new criminal offence was added to the Dutch Penal Code (DPC). Article 421 DPC penalizes the financing of terrorism.¹ Combating the financing of terrorism has been agreed upon in various international agreements, including the International Convention for the Suppression of the Financing of Terrorism and will also be an important part of the new EU Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.² Article 421 DPC was introduced after the Financial Action Task Force (FATF), an intergovernmental organization mandated 'to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system,' recommended the Dutch Government to introduce a separate prohibition of the financing of terrorism, in accordance with Recommendation 5 of the FATF's International standards on combating money laundering and the financing of terrorism & proliferation.³ The prohibition of the financing of terrorism is one of several crimes that have been introduced into the Dutch criminal justice system in order to comply with both international and transnational (European Union) agreements.⁴

Article 421 DPC prohibits the intentional gathering, acquiring, holding or financing of objects that serve to give monetary support to terrorism. As is the case in the legislation of other (Western) countries,

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1 Act of 10 July 2013, *Staatsblad* 2013, no. 292.

2 International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999; Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM(2013) 45. See on the forms and the historical development of the international measures against the financing of terrorism I. Bantekas, 'The International Law of Terrorist Financing', 2003 *The American Journal of International Law* 97, pp. 315-333.

3 *Kamerstukken II* 2012/13, 33 478, no. 3, p. 1; Financial Action Task Force, *International standards on combating money laundering and the financing of terrorism & proliferation*, February 2012, p. 13; Financial Action Task Force, *Mutual Evaluation Report. Anti-Money Laundering and Combating the Financing of Terrorism. The Netherlands*, 2011, p. 66.

4 See C.M. Pelsler, 'Preparations to commit a crime. The Dutch approach to inchoate offences', 2008 *Utrecht Law Review* 4, no. 3, p. 57. The prohibition of the financing of terrorism can also be found in the legislations of the United States (18 USC § 2339C), and of various European countries, including Austria (§ 278d Austrian Penal Code), Belgium (Art. 140 Belgian Penal Code), France (Art. 421-2-2 French Penal Code), Germany (§ 89a German Penal Code), and Spain (Art. 576bis Spanish Penal Code).

a terrorist offence does not have to be committed.⁵ Nor does there have to be certainty that a terrorist offence will be committed in the (near) future. The act that is prohibited counts as a form of preparing the causation of harms (which in the context of terrorism can no doubt be very serious harm). Next to this, the intentional gathering, etc. of objects that serve to prepare a terrorist offence is also made punishable under the new Article 421 DPC. Thus the preparation of the preparation (in German called *Vorfeld der Vorbereitung*) of terrorism is also criminalized.

The prohibition of such behaviour is called *Vorverlagerung* in German.⁶ In English, criminal offences that do not criminalize the actual causation of harms are called remote harms offences.⁷ What is criminalized is not the act that actually caused harm to others. A person can be held criminally liable because he created a danger that harm could be inflicted in the future (by himself or by another person, unknown to the person who committed the remote harms offence). Whether or not any harm will actually occur (and what harm that will be precisely) is irrelevant for criminal liability in many of the recently introduced remote harms offences in Dutch criminal law and the legal systems of various other countries, including Germany.⁸ The criminalization of the financing of terrorism in Dutch legislation and the legislation of various other countries, makes this very clear. Both German and English scholars argue that the criminal justice system has changed quite dramatically with the increasing number of remote harms offences.⁹

There is little public and political debate about these types of offences. Article 421 DPC was adopted by the Dutch Parliament without a thorough plenary debate.¹⁰ And, based on a quick search on LexisNexis Academic, the bill did not get much media attention. This lack of public and political discussion is not a typical Dutch problem. It can be explained, according to Peter Ramsay, because offences that prohibit remote harms appeal to our ‘common sense.’¹¹ On the other hand, the prohibition of remote harms has caused some serious debate among legal scholars. They do not only warn about the undermining of the existing dogmatic structure of the criminal law, they also claim that prohibiting remote harms leads to criminal liability too easily and puts the classical foundation of criminal liability (in Anglo-American legal terms based on *actus reus* and *mens rea*) under pressure. These objections require careful consideration. The question I will try to provide an answer to in this article is both why and how remote harms may be prohibited.¹²

A lot has been said about criminalizing remote harms among academic scholars in recent years. I would like to add my ideas to these discussions, focusing on endangerment, citizenship and control. I will take Article 421 DPC as an illustration of why and how remote harms may be criminalized. I will not

5 See for example Art. 421-2-2 of the French Penal Code: ‘Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l’intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu’ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l’un quelconque des actes de terrorisme prévus au présent chapitre, *indépendamment de la survenance éventuelle d’un tel acte.*’ (emphasis added)

6 L. Wörner, ‘Expanding Criminal Laws by Predating Criminal Responsibility. Punishing Planning and Organizing Terrorist Attacks as a Means to Optimize Effectiveness of Fighting Against Terrorism’, 2012 *German Law Journal* 13, pp. 1037-1055. Sieber uses the term *Vorfeld*. See U. Sieber, ‘Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt’, 2009 *Neue Zeitschrift für Strafrecht* 29, pp. 353-364. See also D. Roef, ‘Strafrechtelijke verantwoordelijkheid in de risicomaatschappij’, in P.L. Bal et al. (eds.), *Veiligheid of vergelding*, 2003, p. 39.

7 The term remote harms has been used by, among others, von Hirsch. See A. von Hirsch, ‘Extending the Harm Principle: “Remote” Harms and Fair Imputation’, in A.P. Simester & A.T.H. Smith (eds.), *Harm and Culpability*, 1996, pp. 259-276.

8 We could also refer to Art. 134a DPC (training for terrorism; Act of 12 June 2009, *Staatsblad* 2009, no. 245); and Art. 248e DPC (grooming; Act of 26 November 2009, *Staatsblad* 2009, no. 544). See on grooming R. Kool, ‘Prevention by All Means? A Legal Comparison of the Criminalization of Online Grooming and its Enforcement’, 2011 *Utrecht Law Review* 7, no. 3, pp. 46-69. See on the prohibition of training for terrorism in German criminal law (§ 129a German Penal Code), J. Thielmann, ‘Alles in allem strafbar oder: Die Vorverlagerung der Vorfeldstrafbarkeit’, 2012 *Onlinezeitschrift für Höchstgerichtliche Rechtsprechung zum Strafrecht* 13, pp. 458-465.

9 See e.g. B. Heinrich, ‘Die Grenzen des Strafrechts bei der Gefahrprävention. Brauchen oder haben wir ein “Feindstrafrecht”?’, 2009 *Zeitschrift für die gesamte Strafrechtswissenschaft* 121, pp. 94-130; A. Ashworth & L. Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’, 2008 *Criminal Law and Philosophy* 2, pp. 40-41.

10 *Handelingen II* 2012/13, no. 89, p. 3; *Handelingen I* 2012/13, no. 35, p. 22.

11 P. Ramsay, ‘Preparation Offences, Security Interests, Political Freedom’, in R.A. Duff et al. (eds.), *The structures of the Criminal Law*, 2011, p. 204.

12 I will not go into the international influence on present-day prohibitions of remote harms offences. See on this topic e.g. K. Karsai, ‘Tendenzen zur Vorverlagerung der Strafbarkeit auf europäischer und internationaler Ebene – Europäische und internationale Einflüsse auf die nationalen Rechtsordnungen’, in A. Sinn et al. (eds.), *Grenzen der Vorverlagerung in einem Tatstrafrecht. Eine rechtsvergleichende Analyse am Beispiel des deutschen und ungarischen Strafrechts*, 2011, pp. 549-571.

provide an answer to whether or not the financing of terrorism should be prohibited. In Section 2 I will focus on the meaning of two central concepts concerning remote harms: harm and danger. Then I will introduce the so-called standard harm analysis (Section 3), expanding this analysis in Sections 4 and 5, focusing on citizenship and control. With Section 6 I will conclude this article.

2. On harm and the harm principle

2.1. A description of harm

In this article the question of which acts should be criminalized will be answered with the help of the concepts of harm and the harm principle, first developed by John Stewart Mill.¹³

Simester and von Hirsch describe harm as ‘a diminution of the kinds of things that make one’s life go well’. When harm is inflicted, the prospects of another person’s life are deteriorated, physically, materially and immaterially, while that person had a justified claim that no harm was to be inflicted on him. In general, the harm inflicted by a legally responsible person cannot be justified. The harm that was inflicted must have changed the life of another person for some while and in some (serious) way.¹⁴ Harm can lead to victimhood, which means that the personal or physical sources of another person have in some way been violated. Personal victimhood, however, is not necessary for the occurrence of harm. Harm can also be inflicted when a specific victim cannot be identified immediately, and can be inflicted in an indirect way. The idea that life has changed as a result of harm makes a broader interpretation of harm possible, because change does not only mean that in order to be able to speak of harm, physical pain must have been inflicted. When we talk of inflicting harm in criminal law, we say that a person has unjustifiably caused a change in a certain situation, while that person had control over how and in what way that change was realized.¹⁵ This description leads to the conclusion that thinking cannot be criminalized, for someone’s thoughts do not lead to any change in another person’s life.¹⁶

From this description it follows that a substantial amount of acts can be criminalized. Critics of the use of harm and the harm principle in criminal law refer to this conclusion when they claim that both harm and the harm principle should not be used as a foundation of criminalization at all. Because so many acts can be seen as harmful acts, what distinguishes harmful from non-harmful acts is unclear. According to these critics, harm and the harm principle have lost their distinctive character.¹⁷ One could respond in two ways to these critical remarks. Firstly, we could strive for a stricter interpretation of harm and argue for the prohibition or the criminalization of remote harms.¹⁸ In most criminal law systems (at least in Western countries like France, Germany, the Netherlands, and the United Kingdom), the consequence of this response would be the end of many offences and should lead to a reconsideration of attempt and preparation as general concepts of substantive criminal law. This, in present-day criminal law, is utterly unrealistic and would put the criminal law scholar outside the actual political debate, giving him no influence on helping to shape the future of important parts of substantive criminal law. Secondly, we could look for more arguments on the basis of which remote harms may legitimately be prohibited. This response is, in my opinion, more realistic to look for arguments on the basis of which remote harms may be criminalized, in order to find a proper balance in which remote harms offences should or should not be criminalized.¹⁹

13 J.S. Mill, *On liberty*, 1975.

14 A.P. Simester & A. von Hirsch, *Crimes, Harms and Wrongs. On the Principles of Criminalization*, 2011, p. 36.

15 Unjustifiable (or wrong) and control formed the most important starting points for criminalization at the time of the introduction of the Dutch Penal Code in 1881, and most other penal codes, implemented in the nineteenth century. For the nineteenth century legislator it was quite certain what was meant by an unjustifiable act. This certainty has been lost. This has led to a scientific *and* political need for criminalization criteria. The meaning of control has not become clearer in the last decades. Control has become more and more equated with (political and/or social) obligations. To determine what amount of control could be demanded from a person is *ex post* up to the courts, but *ex ante* a task for the legislator. Unfortunately the meaning of control has been neglected in the recent discussions on criminalization. This is especially true when dealing with remote harms, where intent plays a large role in establishing criminal liability. I will turn to the issue of control in Section 5.

16 S. Wallerstein, ‘Criminalising Remote Harm and the Case of Anti-Democratic Activity’, 2007 *Cardozo Law Review* 28, pp. 2700-2701.

17 See e.g. the much-cited article by Bernard E. Harcourt, ‘The Collapse of the Harm Principle’, 1999 *The Journal of Criminal Law & Criminology* 90, pp. 109-194.

18 See for a further elaboration on this ‘purist’ approach, Ashworth & Zedner, *supra* note 9, pp. 44-45.

19 D. Husak, ‘The Criminal Law as Last Resort’, 2004 *Oxford Journal of Legal Studies* 24, pp. 215, 225. See also H. Landau, ‘Die deutsche

2.2. Danger of harm

A question is whether the criminal law should only respond to harms which have already occurred or whether it may also be used to prevent future harms. It comes as no surprise that criminal law can also respond when there is a danger of harm, in order to prevent harm from occurring.²⁰ In this article, I will use the term remote harms offences for offences that prohibit a danger of harm. Of the various forms of remote harms offences, in this article only endangerment offences will be discussed, that is offences that prohibit the creation of the danger of harm. For the purpose of this article, remote harms offences and endangerment offences will be used as synonyms.

What does the danger of harm mean?²¹ A danger of harm can be described as a condition in which the chance that harm will occur is unacceptably high.²² This means, first of all, that there must be a certain chance that an unjustifiable harm will occur. What harm will occur does not have to be explicated under the terms of a certain offence. When harm is explicitly mentioned in the offence, that offence is called a concrete endangerment offence. Offences in which harm is mentioned only in vague terms can be called abstract-concrete endangerment offences.²³ Offences in which harm is not mentioned explicitly can be called abstract endangerment offences. All three types of endangerment offences have long since been accepted.²⁴ However, it is clear that many offences that were introduced in the past few decades are described as abstract or abstract-concrete endangerment offences. Article 421 DPC is an example of an abstract-concrete endangerment offence, because the offences mentioned in Paragraph 2 of this Article refer to various types of (less or more serious versions of) harm, but do not make one specific type of harm explicit. Both abstract-concrete and abstract endangerment offences are in need for clear justification, because the reference to harm is vague. As will be discussed below, the level of the justification of abstract-concrete endangerment offences and abstract endangerment offences is in the end quite the same.

2.3. An objective or subjective view of endangerment

The debate on endangerment offences focuses mainly on the meaning of the word chance. I stated that in Dutch legal doctrine, the chance of harm in case of concrete endangerment offences is described as being unacceptably high. What does that mean? Some authors believe that the interpretation of the meaning of chance, and endangerment in general, has radicalized in the past few decades.²⁵ By this they mean that what was not seen as a chance of danger previously, is qualified as such now. On the one hand, looking at the development of endangerment offences (including the century-old debate on

Strafrechtsdogmatik zwischen Anpassung und Selbstbehauptung – Grenzkontrolle der Kriminalpolitik durch die Dogmatik?', 2009 *Zeitschrift für die gesamte Strafrechts-wissenschaft* 121, pp. 965-967. Landau urges legal scholars to develop a theory on how to deal with remote harms offences. See more critical H. Stewart, 'The Limits of the Harm Principle', 2010 *Criminal Law and Philosophy* 4, pp. 17-35, and, Ashworth & Zedner, supra note 9, pp. 46-48.

20 J. Feinberg, *The Moral Limits of the Criminal Law. Harm to Others*, Volume 1, 1984, pp. 190-193.

21 I have chosen not to use the term risk in this article, because, contrary to endangerment, risk is not a term familiar to legal doctrine in various legal systems on the European continent. The term risk is associated with important sociological and criminological perspectives on the development of the welfare state society into a so-called risk society or preventative state. The development towards a risk society has highly influenced the criminal justice system (D. Garland, *The Culture of Control*, 2001; B. Hudson, *Justice in the Risk Society*, 2003). It is argued that the risk society has led to a criminal justice system in which great faith is put into the prohibition of more and more endangerment offences. These offences are as such not invented by the risk society. However, the introduction of more endangerment offences, especially abstract endangerment offences, forms an important expression of the way the criminal justice system is interpreted and used in the risk society. In this view the term risk has not become a part of substantive criminal law doctrine; it is the endangerment offences that have been used to reshape the criminal justice system towards a more risk-oriented criminal justice system.

22 I have based this description on E.F. Stamhuis, *Gemeen gevaar*, 2006, p. 5. In the following, I sometimes refer to Dutch literature, because the ideas posed in the sources which I refer to have helped me to form my own opinion on issues discussed in this article. I will also refer to Dutch case law, as giving examples helps to make my position clearer.

23 K. Hoffmann-Holland, *Strafrecht Allgemeiner Teil*, 2011, p. 23.

24 The term abstract endangerment is the common term in both Dutch and German criminal legal doctrine. The term is also used by Simester & von Hirsch (supra note 14, pp. 57-58). Duff and Husak, however, use the term implicit endangerment. The endangerment is implicit because the relevant danger is not specified in the offence. The harm that could be inflicted is only mentioned implicitly, which means in more general rather than specific terms. Implicit and abstract are not quite the same: an abstract endangerment offence can still be an explicit endangerment offence because the danger is described in the offence, however abstract. I will not go into this any further. It shows the differences between common law and civil law legal doctrine, which one has to be aware of. See R.A. Duff, 'Criminalizing Endangerment', 2005 *Louisiana Law Review* 65, pp. 959-963; D. Husak, *Overcriminalization. The Limits of the Criminal Law*, 2008, pp. 162-163.

25 R. Pieterman, *De voorzorgcultuur. Streven naar veiligheid in een wereld vol risico en onzekerheid*, 2008, pp. 43-81.

attempt),²⁶ the presumption that there has been a radicalization of what constitutes a chance of danger is questionable, because far-reaching interpretations of what constitutes a danger of harm have always existed. On the other hand, if we look at several criminal offences that have been introduced over the past decade, we cannot but endorse the claim that the criminal liability described in those offences is in some cases extremely broad. This is the case with concrete endangerment offences (the sooner a certain act is considered as dangerous, the sooner a person can be held criminally liable), but also in the case of abstract(-concrete) endangerment offences. What seems to be the case is that the connection between danger and harm has become more loosened. It seems that it is no longer necessary to describe an act as dangerous because of the harm that can be inflicted. An act can be dangerous in itself. A connection with harm is not necessary. This is not a new phenomenon. What is new is that legislators take these offences very seriously. This already becomes clear if we look at the maximum sentences imposed for several recently introduced abstract(-concrete) endangerment offences, for example the financing of terrorism.²⁷

Taking Article 421 DPC as an example, what is penalized here is the act of donating money or other objects with a certain monetary value. This is something many people regularly do and in itself is quite innocent. One could say that prohibiting this kind of behaviour is unacceptable, because a government has no real interest in how people spend their money.²⁸ However, what is prohibited under Article 421 DPC is not the mere donation of money, but the fact that the purpose of the money is (for others) to commit terrorist offences.²⁹ The prohibition of donating money *for this purpose* concerns more of a governmental interest, because it is unquestionable that the serious harm that can be inflicted by terrorist offences is the concern of governments.³⁰ But even then the question is whether the person who donates money should be held criminally liable. From an endangerment perspective, the question is whether there is a certain chance that the money that was donated will be used to commit terrorist offences. The path from donating money to the actual terrorist offence can be very long, involving several people, other than the donator.³¹ There remains quite an amount of uncertainty whether the money will be used for terrorist offences and therewith actually lead to harm. This leads to the conclusion that the justification of the prohibition of the financing of terrorism is based mainly on the dangerousness of the act of financing. The connection with the harm that could be inflicted is so loose that this harm cannot be the sole justification of the prohibition of financing of terrorism.

However, being so loose does not mean that no connection can be made between the dangerous act and the harm that could be inflicted. There are different views on whether there is a danger of harm. We can distinguish two: an objective and a subjective view.³²

From an objective view on endangerment, there can only be a danger of harm when there is a certain probability (let us call it a considerable chance) that the act will result in harm. Whether an act is seen as constituting a (sufficient) danger of harm depends on the act, not on the intent of the actor. The more certainty there is about what will cause harm, the sooner it is accepted that this act is dangerous. This also means that the more (scientific) knowledge is gained on the dangers of certain acts, the sooner an act is objectively qualified as dangerous and could be prohibited.³³

26 H. Kemshall, *Understanding risk in criminal justice*, 2003, pp. 8-14.

27 See e.g. Art. 421 DPC (a maximum of eight years imprisonment and a fine of up to € 810 000), § 89a German Penal Code (six months to ten years imprisonment); Art. 140 Belgian Penal Code (five to ten years imprisonment and a fine of up to € 5000 (with a minimum of € 100)).

28 Husak, *supra* note 24, pp. 159-160, 162 et seq.

29 See e.g. also Art. 140 of the Belgian Penal Code which prohibits the financing of an activity of a terrorist group, while the donor knows that his financial donation will contribute to terrorist offences.

30 See e.g. Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330, 9.12.2008, p. 21.

31 Compare N. Crimm, 'High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Charitable Organizations and Global Philanthropy', 2004 *William and Mary Law Review* 45, pp. 1341-1451.

32 See V. Haas, 'Zum Rechtsgrund von Versuch und Rücktritt', 2011 *Zeitschrift für die gesamte Straf-rechtswissenschaft* 123, pp. 227-231. See also J. Remmelink, *mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht*, 1975, pp. 60-62.

33 The radicalization of endangerment, as described by Pieterman (*supra* note 25), has much to do with our increased knowledge about whether a certain act will lead to harm. The fact that nowadays more acts are considered dangerous is in my opinion not caused by a different view on danger, but first of all by our increased knowledge about what could lead to harm. This increased knowledge can be used in case law, because courts are allowed to use expert witnesses. The more experts know about the chances that certain acts will lead to harm, the more courts could consider certain acts as being dangerous. The criminalization of acts that are, according to experts, objectively dangerous, will probably not be considered a problem. However, when what counts as danger is based on vague ideas on how dangerous a certain act might be, this will not, from an objective view on endangerment, make the case for the criminalization of that

From a subjective view on endangerment, an act may be described as dangerous because of the intent of the actor. If it was the actor's intent to create harm, even without the act being objectively dangerous (the act does not create a considerable chance of constituting a harm), the act could still be considered dangerous. From this point of view, uncertainty as to whether an act constitutes a (sufficient) danger of harm is irrelevant for qualifying an act as dangerous, subject to the condition that the intent of the actor to cause harm is clear. Therefore, from a subjective view, no objective connection between the act and harm does not mean that this act cannot be considered dangerous.

2.4. The end of an objective view of endangerment?

Can acts become criminal solely because they have been committed with criminal intent? To answer this question, we could look at case law, for example the Dutch case against Samir A.³⁴ A. was prosecuted for, among other acts, the preparation of murder. In his apartment, the police found instructions on the use of firearms, batteries, Christmas tree lighting, an electric wire, fertilizer, various chemicals, a bulletproof vest, maps of various governmental and other buildings, etc. Primarily based on taped telephone conversations by A. with other persons, it was clear that A. wanted to attack various buildings (including the Dutch Parliament building, a nuclear power plant and Schiphol Airport). According to the Dutch Supreme Court, the objects that were found at A.'s apartment could, in their outward appearance, be considered instrumental for the defendant's criminal intent. The fact that the objects themselves were quite harmless³⁵ was not problematical because of the fact that the defendant had the intention to use them to commit terrorist attacks. Thus, objectively harmless objects can become subjectively dangerous.³⁶ Criminalizing these kinds of preparatory acts is only possible if the defendant's intent becomes more important than the acts – that at the time of their discovery objectively could not be considered dangerous – committed.

A more subjective view on endangerment has been observed in literature as well and seems to have become more and more important. Ramsay explains this by referring to a changed attitude concerning issues of security.³⁷ From an objective point of view, it is important to connect the act to harm. There must be, using Dutch terminology, a considerable chance that the act leads to a certain harm. The more considerable that chance, the more acceptable the criminalization of that act. From a certain interpretation of a subjective view on endangerment, a connection between the act and harm is considered less important. The central issue becomes whether the defendant intended to cause harm. Such an intent leads to an increased feeling of insecurity among other citizens and the need for action. Criminalization is then justified on the basis of the subjective fear of harm, whilst objectively, the criminalized act need not be considered dangerous, but only becomes so because of the criminal intent of the defendant. What is emphasised is not an objective danger of harm (*actus reus*), but the criminal intent to create harm (*mens rea*).

Article 421 DPC forms an example of this shift to *mens rea*. Whether there is a considerable chance that a terrorist attack will be committed after the act of donating money is irrelevant for criminal liability. If someone donates money to another person and the former thinks that the latter has an intent to commit terrorist crimes, the donor can still be held criminally liable under Article 421 DPC, even if his thoughts prove to have been false.

act very strong. The fact that Art. 421 DPC is based on rather vague ideas (*Kamerstukken II* 2012/13, 33 478, no. 6, p. 4) contradicts the long-standing ideas on endangerment, and can be seen as proof that the ideas about endangerment offences are changing.

34 Hoge Raad (Dutch Supreme Court) 20 February 2007, *LJN* AZ0213.

35 The Court of Appeal, that acquitted A., decided that while there was no doubt about A.'s intent, the preparatory acts were still at such an early stage and so inert and primitive that there was no real threat of any harm. See Court of Appeal of The Hague, 18 November 2005, *LJN* AU6181.

36 A.'s criminal intent was not the only argument on the basis of which A. was convicted of committing preparatory acts. His acts (the gathering of a variety of materials) were also taken into account, in combination with the defendant's intent. Without proof of his intent, however, the conviction of Samir A. would have been far more difficult.

37 Ramsay, *supra* note 11, pp. 209-214.

3. The standard harm analysis

To understand why and how an act is only subjectively dangerous, we have to take several steps, starting by answering the question why harmful acts can be prohibited. This question can be answered with the help of the so-called *standard harm analysis*. This consists of three steps, namely: the seriousness of harm, the social value of the harm-causing act and the side-effects of criminalization.³⁸ The greater the harm, that is to say, the greater the prospect that someone's life will be (negatively) changed in a physical, material and/or immaterial way, the sooner the prohibition of the harm-causing act will be legitimate. The more valuable the harm-causing act, and the more problematic the side-effects of criminalization, the less acceptable criminalization will be. What counts as valuable depends of what counts as good or as bad. What is considered good or bad depends on a certain context, and is, in our multicultural society, very difficult to describe. Arranging a marriage is considered normal by various ethnic groups (and was considered normal in the higher social classes up to the first half of the twentieth century), but is nowadays considered a serious problem in many Western countries.³⁹ That means, first of all, that a government must take seriously the democratic debate within and outside Parliament to understand which actions are considered valuable and to translate the outcome of this debate into a well-described criminal offence.

Up to a point, the standard harm analysis can be used in case of endangerment offences. The first step of the *standard harm analysis* can be extended to concrete endangerment offences.⁴⁰ The more considerable the chance of an objective danger of harm, the more acceptable prohibiting this act will be. The less considerable the chance of a danger of harm, the less acceptable will be the criminalization of such an act.⁴¹ The legislator has to be aware of the risk of criminalizing innocent acts. That would contradict the starting point that only unjustified acts (based on democratically established agreement) should be criminalized.⁴² The legislator should maintain a certain distance between the criminal law and other areas of the law (such as administrative law).⁴³

The second step of the *standard harm analysis* can be expanded not only by accepting the criminalization of acts that cause harm, but also acts that create a certain danger of harm.⁴⁴ The more valuable the dangerous act, the less reasons to criminalize this act. This would seem contradictory: the fact that the act is dangerous would be enough reason to criminalize the act. But consider this example. The parent who teaches his child to swim with clothes on in the part of the swimming pool where the child cannot reach the bottom of the pool creates a danger for that child (there is a possibility the child will drown). But we agree that the act is justified and can even be recommended, because the child learns how to handle him/herself if he or she should ever fall into water. This does not mean that throwing a

38 Simester & von Hirsch, supra note 14, p. 55.

39 Arranged or forced marriages are even considered a crime against humanity by the Special Court for Sierra Leone. See N. Jain, 'Forced Marriage as a Crime against Humanity. Problems of Definition and Prosecution', 2008 *Journal of International Criminal Justice* 6, pp. 1013-1032.

40 Simester & von Hirsch, supra note 14, pp. 55 et seq.

41 This does not mean that abstract(-concrete) endangerment offences are unacceptable. However, the standard harm analysis is not enough to justify the prohibition of such offences.

42 Duff, supra note 24, pp. 952-953.

43 That does not mean that the same issue cannot be dealt with in criminal law, civil law and administrative law. What is meant here is that the legislator should distinguish different 'tracks' (criminal, civil and administrative) in dealing with the same issues, avoiding that these tracks lead to three different types of sanctioning (the so-called notion of *una via*). The legislator should therefore pay careful attention to the various alternative enforcement tracks and, especially when other enforcement tracks already exist, explain why a new track (i.e. criminal law enforcement) is necessary next to the existing tracks (see P. Minkinen, "'If Taken in Earnest': Criminal Law Doctrine and the Last Resort", 2006 *The Howard Journal* 45, pp. 532-533). In the case of remote harms this is particularly necessary, because it has become quite common to use more than one enforcement track to fight remote harms. In the case of Art. 421 DPC the legislator recognized the existence of more enforcement tracks, and tried to explain the necessity of the prohibition of this offence, but this explanation is really nothing more than a concatenation of generalities. See *Kamerstukken II 2012/13*, 33 478, no. 6, pp. 8-9.

44 Simester and von Hirsch point out that the standard harms analysis can well be used to legitimize the criminalization of concrete endangerment offences (supra note 14, p. 76). It becomes more difficult to decide whether certain behaviour should be criminalized using concrete endangerment offences or using abstract endangerment offences. That choice depends on a balance between the interests of the offender versus the interests of others (the victim but also other citizens). According to Simester and von Hirsch this decision could also be based on the standard harm analysis (pp. 77-79). I would think that this depends on how remote the eventual harm is. The more remote the eventual harm and the more dependent the prohibition of the offence on the intent of the offender, the less the standard harm analysis can be used. In that case the legislator has to use other arguments on which to base the prohibition of abstract endangerment offences.

child with his cloths on into the water can never be prohibited. Doing this with the purpose of killing the child can of course never be allowed. This example makes clear that the legislator should point out as accurately as possible which acts should and which acts should not be criminalized.⁴⁵ Especially in the case of endangerment offences, a careful editing of such a criminal offence is necessary. On the one hand, the legislator must avoid criminal offences becoming *over-inclusive* (an offence is formulated too broadly)⁴⁶ and, on the other hand, becoming *under-inclusive* (an offence is described in such a way that it leads to unjustified discrimination among the addressees of the offence).⁴⁷

The third step of the *standard harm analysis* is even more important in case of endangerment offences as it is in the case of offences that cause harm.⁴⁸ The further we get from harm, the greater the side-effects, and the less the *standard harm analysis* can be used to decide whether certain acts should be criminalized.⁴⁹ For instance, if the harm that could be inflicted is so severe, could that be a sufficient reason for prohibiting an act, even if this prohibition leads to a great loss of liberty? The *standard harm analysis* does not provide an answer to this question. According to Simester and von Hirsch, in the analysis liberty is treated ‘merely as a weighing factor’, not the starting point from which the question whether or not to prohibit a certain act should begin.⁵⁰ I will return to this point in the next section. Second, the *standard harm analysis* does not provide a framework for dealing with offences that put great emphasis on *mens rea*, like present-day abstract endangerment offences. I will deal with this point in Section 5.

4. Extending the standard harm analysis to cases of remote harms

4.1. The *de minimis* principle

On the basis of the *de minimis principle*, the criminalization of endangerment offences is allowed, but only when the harm that could be inflicted by a dangerous act itself is serious enough to be criminalized, and the offence is ‘no more extensive than to achieve its purpose.’⁵¹ In light of this, the legislator should not only be required to provide arguments as to why a certain dangerous act should be criminalized, but also why the harm that could be inflicted by the dangerous act is in itself serious enough (or, so to speak, sufficiently unjustified) to be criminalized. The legislator must also show that the offence does help to achieve its purpose, for example by preventing offences which do cause harm to occur.⁵² The

45 Wörner, *supra* note 6, p. 1046. In the case of remote harms offences, a legislator should take much more time to explain why it wants to prohibit remote harms, and how it has criminalized this behaviour. A certain vagueness surrounding an offence is allowed, as long as what is prohibited is still in accordance with the demands of accessibility and foreseeability. However, remote harms offences, being vague by nature, do not absolve the legislator from trying to explain, in the text of the offence or in the explanatory memorandum, what acts are prohibited, and how the various elements of an offence should be interpreted. This does not only mean the explanation of *mens rea*, but also the explanation of the act, considering in more detail what types of actions are criminalized and why. This is of course not possible in detail, but a more detailed description can sometimes be necessary. That does not only protect citizens against too great an involvement in their lives, but could also help the police and prosecution service to understand what actions to investigate and to prosecute. The less clear a certain offence is, the more difficulties the police and public prosecution service experience in deciding when to use scarce investigative resources. This last point shows that the question of what remote harms should be prohibited, and how, is not just a matter of substantive criminal law, it is also a matter of procedural law, for when to investigate what also depends on how clear an offence is written down.

46 Over-inclusively described criminal offences cannot have a preventive effect, nor could be consonant with the retributive goal of the criminal law. The more vaguely a criminal offence is described, the less deterrent it will be. The more vague a reference to harm, the less retributive a punishment for committing this offence will be. See Duff, *supra* note 24, pp. 958-959. In the case of Art. 421 DPC, the legislator seems to have taken notice of his point. The acts, described in Art. 421 DPC, seem to be more closely linked with the eventual harm that can be caused. See *Kamerstukken II* 2012/13, 33 478, no. 3, pp. 5-7.

47 Husak, *supra* note 24, pp. 211-212.

48 Wallerstein, *supra* note 16, p. 2714. See also A. Ashworth & L. Zedner, ‘Just Prevention: Preventive Rationales and the Limits of the Criminal Law’, in R.A. Duff & S.P. Green (eds.), *Philosophical Foundations of Criminal Law*, 2011, pp. 290, 292.

49 Wallerstein, *supra* note 16, p. 2715; Ashworth & Zedner, *supra* note 48, p. 286; W. Wilson, *Central Issues in Criminal Theory*, 2002, p. 31.

50 Simester & von Hirsch, *supra* note 14, p. 56.

51 Husak, *supra* note 24, p. 160.

52 Husak, *supra* note 24, p. 162. Surely, this is not the only purpose of introducing a criminal offence. In the case of Art. 421 DPC, one of the purposes of criminalization is to show other states and international organizations the Dutch commitment to combat the financing of terrorism, and second making it clear to the police and public prosecution service that more investigation and prosecution is needed. As long as other motivations for criminalization are based on, for example, the standard harm analysis (and are in line with the *de minimis principle*), I cannot say that these motivations are unacceptable. We also have to realize that the question whether criminalization will be effective (preventing people from committing crime), cannot be answered with a firm yes or no. See J.L. van der Leun, ‘Strafbaarstelling en *evidentie* vanuit criminologisch perspectief’, in C.P.M. Cleiren et al. (eds), *Criteria voor strafbaarstelling in een nieuwe dynamiek. Symbolische legitimititeit versus maatschappelijke en sociaalwetenschappelijke realiteit*, 2012, pp. 25-37.

de minimis principle allows the prohibition of remote harms, as long as the harm that could be caused is unjustified from a criminal law perspective.⁵³ That being the case, the *de minimis principle* does not demand that a considerable chance of causing a harm is necessary for prohibiting certain acts. From a preventive point of view, it could very well be necessary to criminalize acts which themselves do not cause (or create a considerable chance of) harm. However, it is not immediately clear what should or should not be criminalized from a preventive point of view.⁵⁴ The *de minimis principle* does not make a distinction between concrete and abstract(-concrete) endangerment offences and therefore misses the important point that the prohibition of abstract(-concrete) endangerment offences leads to criminalizing acts which are in themselves not always unjustified. This means that the legislator should pay careful attention to what is criminalized and whether this offence will achieve its purpose. It must, for example, be clear why the possession of a balaclava and tools for breaking and entering is not a preparatory act under the Dutch Penal Code, whilst the possession of a balaclava and tools for breaking and entering by two or more persons does constitute a criminal act. One explanation could be that in the second example more persons are involved in the act that could cause harm. Does that mean that the *de minimis principle* could be nuanced when two or more persons are involved in committing the dangerous act?

Whether criminalization is justified is less problematic in the second example, because in that case there is a certain co-operation between two or more persons who have (also) agreed to commit crimes. Even in the event that these crimes have not yet been committed, the co-operation itself is dangerous enough and forms a legitimate argument to criminalize the aforementioned behaviour.⁵⁵ But, if such a co-operation is not present, is very loose, or not clear at all, as is the case with the financing of terrorism, is the act of donating money enough for prohibition? Why should we prohibit A's act of donating money whilst we do not know whether the money is going to be used by B to commit terrorist crimes, nor even know whether B is going to commit terrorist crimes in the near or distant future? Could prohibiting A's act solely be based on the argument that this would help to prevent others from committing similar acts? That would fail to appreciate that only a legally autonomous person can be held criminally liable for committing an unjustified act. One cannot be held criminally liable solely on the basis of being part of a group of persons, unless that person performs, for example, a significant and essential contribution to the offence.⁵⁶ At the same time, a more limited view on prevention, for example stating that only the last act before the harm was inflicted should be criminalized (the last effective point of intervention),⁵⁷ does not help us any further, because it does not help us to limit present-day criminal offences that criminalize acts that lay far before the last effective point of intervention. To conclude, the *de minimis principle* does not help us to find a clear justification of why abstract(-concrete) endangerment offences can be prohibited.

4.2. 'Fair imputation'

The above shows that the criminalization of remote harms cannot solely be based on preventative theory. Criminal liability should be based on individual responsibility for acts that the individual offender has committed. In order to prevent criminal liability from being based on arguments other than individual responsibility, we need to consider how to express an individual's liability in a criminal offence for acts that do not cause harm. The principle of 'fair imputation', first developed by von Hirsch,⁵⁸ could be useful in answering this question. The principle of fair imputation deals with the following questions: 'how, and why, can the supposed eventual harm fairly be imputed to the actor?'⁵⁹ The term *imputation* means more than mere intent or negligence. Even if the act was committed intentionally (or with negligence), the legislator needs to ask whether and why the act should be fairly imputed on the actor. Simester and von Hirsch argue that the principle of fair imputation is a matter of obligations. They distinguish social from political obligations. Social obligations are to be found on the level of a certain act and refer to the context

53 Ashworth & Zedner, *supra* note 48, p. 291.

54 Simester & von Hirsch, *supra* note 14, p. 76; Ashworth & Zedner, *supra* note 48, pp. 280-282.

55 In my opinion, committing a crime with another person makes the criminal act at least twice as dangerous compared to the case where the crime was committed by one person.

56 Simester & von Hirsch, *supra* note 14, p. 81.

57 Wallerstein, *supra* note 16.

58 Von Hirsch, *supra* note 7.

59 Simester & von Hirsch, *supra* note 14, p. 63; Von Hirsch, *supra* note 7, p. 269.

within which the act took place. Political obligations can be found on the level of society and refer to duties of citizenship. Simester and von Hirsch have not developed these obligations much further, but seem to recognize that they can be useful in discussing the limits of criminalizing remote harms.⁶⁰

4.3. Obligations

4.3.1. Social obligations

Social obligations are related to the act itself and the context within which the act was committed. They help to make clear how a person should act within a certain situation in the social or economic sphere. The content of social obligations can be found in written texts (protocols, guidelines or legislation), but can also take the form of unwritten obligations (principles of carefulness) and are directed at a person who acts in a certain capacity, such as a civil servant or employee (we could call these types of social obligations functional obligations), or someone who lacks that formal capacity, but who is held to certain social obligations because of the specific context within which he acts (e.g., any person who sells goods via the internet, whether as a professional or not, must act in accordance with certain social obligations). By explicitly referring in the text of a criminal offence to a certain position in society, the legislator can make these social obligations become part of the criminal offence and therewith clarify what is criminalized and to whom the criminalization is directed.⁶¹ A stricter description of the offender's social obligations in the criminal offence can (further) limit the scope of that offence. Limiting the scope is also possible by clarifying principles of carefulness through regulation via (international) protocols, guidelines, etc., that could be mentioned in the legislator's explanatory memorandum.

We have to be aware that clarifying the meaning of the principles of carefulness can not only limit the scope of the criminal offence, but can also extend that scope. The more complex social obligations become (for instance in private regulations), and the more persons are subjected to certain social obligations, the broader the scope of a criminal offence can become.⁶² This leads to the conclusion that fair imputation with the help of social obligations is possible, but it does not necessarily mean that social obligations always lead to fair imputation.

4.3.2. Political obligations

To understand political obligations properly we need to clarify the concept of citizenship in criminal law.⁶³ In this section two visions on citizenship are discussed: a liberal and a republican one. Other visions are left aside for the purposes of brevity.⁶⁴ The use of the concept of citizenship in this article makes clear that the criminal justice system is based on the idea that it deals with citizens, and makes no difference among those who abide and those who do not abide by the law, nor that criminal law makes a difference between normal and abnormal criminal offences, that is offences that are hostile to the polity. This means that *Feindstrafrecht* or *enemy criminal law* as a foundation of some parts of the criminal law is unacceptable, even in the case of terrorist offences.⁶⁵ The justification of every criminal offence should be based on the idea that every offender remains a citizen of the polity.

60 Simester & von Hirsch, *supra* note 14, pp. 64, 68.

61 This means that the criminalization of special preparatory acts, like Art. 421 DPC, next to a general preparatory act, is not problematic at all, but should actually be encouraged. With Art. 421 DPC, a better demarcation of what constitutes the financing of terrorism and who is an offender of such an act could be possible. But only if the legislator is prepared to accept that special preparatory offences are a *specialis* of general preparatory acts and should have priority over general preparatory acts. Unfortunately, in the case of Art. 421 DPC, the legislator refused to take this step (*Kamerstukken II* 2012/13, 33 478, no. 3, pp. 10-11). This means that defining what constitutes the financing of terrorism and who is an offender and who is not, is less easily accomplished.

62 Obligations can also give a justification for criminalization. They can also contradict with one another. The legislator has to take these issues into account as well. See Ashworth & Zedner, *supra* note 48, p. 291.

63 See on the usefulness of using the notion of citizenship to consider issues of criminalization e.g. P. Ramsay, 'The Responsible Subject as Citizen. Criminal Law, Democracy and the Welfare State', 2006 *The Modern Law Review* 69, pp. 29-58; R.A. Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law*, 2007, pp. 166-172; R.A. Duff, 'Responsibility, Citizenship and Criminal Law', in Duff & Green (eds.), *supra* note 48, pp. 125-148. See more critically M.D. Dubber, 'Citizenship and Penal Law', 2010 *The New Criminal Law Review* 13, pp. 190-215.

64 H.R. van Gunsteren, *A Theory of Citizenship. Organizing Plurality in Contemporary Democracies*, 1998.

65 The notion of *Feindstrafrecht* has been debated in German legal doctrine over the past decades. See Heinrich, *supra* note 9; A. Sinn, 'Moderne Verbrechenverfolgung – auf dem Weg zu einem Feindstrafrecht?', 2006 *Zeitschrift für Internationale Strafrechtsdogmatik* 1, pp. 107-117. The term was first used in modern legal doctrine by Jakobs to explain the increase in remote harms offences. See G. Jakobs,

From a *liberal* vision of citizenship, the criminalization of remote harms will only be possible in very few situations. The liberal citizen is proud of his liberty and always concerned about his liberty. He is always looking for political guarantees to prevent government officials threatening his liberty. From a liberal point of view, the main goal of criminal law should be to secure the legal position of citizens against the state. That means not only limitations on what acts to criminalize, but also how to criminalize acts and within what limits. The guarantees the law must give to citizens refer to the security of individual autonomy, personal integrity and the legal competence of citizens against whom the criminal justice system takes action.⁶⁶ Individual autonomy refers to individual liability and being able to answer for crimes the citizen has committed. This does not mean that offences without a reference to intent or negligence, so-called strict-liability offences, are never allowed. As long as courts can take *mens rea* (which is more than just intent or negligence) into account, strict-liability offences are allowed.⁶⁷ Personal integrity refers to the prevention of an all too drastic interference in a citizen's life, for example by connecting drastic penalties to criminal offences. Legal competence means that criminalization should not lead to limiting the rights a citizen (as a defendant) has within a criminal procedure.⁶⁸

In a *republican* vision of citizenship, citizenship is described as 'equal and mutually respectful participation in the civic enterprise'.⁶⁹ A citizen is both an author and an addressee of the law. Unlike a liberal vision of citizenship, a republican vision also focuses on the responsibilities of citizens toward the community. 'Citizenship ties us (...) to the fellow members of a particular polity: (...) it gives us a particular interest, not in every dimension of our fellow's lives, but in those aspects that bear directly on the civic enterprise in which we are collectively engaged.' Central to the republican vision of criminal law is that only 'public wrongs' may be criminalized. Public wrongs are 'wrongs that are the proper business of all citizens in virtue of their membership of the polity's civil life, and the values that structure it.' As in a liberal vision of citizenship, a republican vision leads to a certain restraint on what acts to prohibit. Only those acts that are publicly condemned (after a serious democratic debate in which all views have been taken into account, see Section 3, above) can constitute a public wrong. This makes clear that harm to others in itself is not enough to be considered a public wrong. That harm must generally be accepted to be publicly wrong. This more restricted view of what constitutes a public wrong is associated with a certain vision of the public sphere and the way citizens should interact with each other. According to a republican view, criminal offences should not be the expression of a certain distrust among citizens. A republican polity consists of citizens who respect one another. This respect and mutual trust among citizens must be expressed in the criminal law. However, this does not mean that the criminal law is not to be trusted in principle (as seems to be the starting point from a liberal point of view). According to Duff, the criminal law 'should guide citizens' conduct only by offering them relevant reasons for action,

'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung', 1985 *Zeitschrift für die gesamte Strafrechtswissenschaft* 97, pp. 751-785. Jakobs also uses the term as a foundation of certain parts of the criminal law. See G. Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', 2004 *Onlinezeitschrift für Höchstgerichtliche Rechtsprechung zum Strafrecht* 5, pp. 88-95. The notion of 'Feindstrafrecht' is translated as 'enemy criminal law' in English and was used to define the changes in the criminal justice system after 9/11. See e.g. C. Gómez-Jara Díez, 'Enemy Combatants versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status', 2008 *New Criminal Law Review* 11, pp. 529-562; L. Zedner, 'Security, the State, and the Citizen: The Changing Architecture of Crime Control', 2010 *New Criminal Law Review* 13, pp. 379-403.

66 See A.A.G. Peters, *Het rechtskarakter van het strafrecht*, 1972, pp. 3, 11.

67 See A.P. Simester, 'Is strict liability always wrong?', in A.P. Simester (ed.), *Appraising strict liability*, 2005, pp. 21-50; Ashworth & Zedner, supra note 9, pp. 31-33, 46; *G. v United Kingdom*, [2011] ECHR (appl. no. 37334/08).

68 See on the relation between criminal law and criminal procedure, A. Duff et al., 'Introduction: Towards a normative theory of the criminal trial', in A. Duff et al. (eds.), *The trial on trial*, Volume 1, 2004, pp. 11, 17. We have to realize that many remote harms crimes have not only been introduced to enable a government to punish those who commit these crimes, but have been also introduced in order for the police and public prosecution service to be able to use investigative methods during the pre-trial phase more quickly (See E. van Sliedregt, *Ten to one. A contemporary reflection on the presumption of innocence*, 2009, p. 29). The more abstract and broadly described a remote harms offence is, the sooner a person can be suspected of having committed such a crime, and the sooner investigative methods (including arrest and even pre-trial detention) can be used. Whether such a case will result in a prosecution or even a conviction is not always important. This way of using investigative methods (to prevent harm from occurring) has changed the relationship between substantive criminal law and procedural law in favour of the latter, as establishing criminal liability and punishment is no longer the only purpose of criminal law, with just preventing harms from occurring via the use of investigative methods during the pre-trial phase being sometimes seen as enough. See on the changes of the criminal trial in general Ashworth & Zedner, supra note 9, pp. 22 et seq. See on policing and crime prevention in a risk society, Kemshall, supra note 26, pp. 103 et seq.

69 See for this and the following quotations R.A. Duff, 'A criminal law for citizens', 2010 *Theoretical Criminology* 14, pp. 300-304.

grounded in the polity's good; it should subject them to its coercive actions only when they fail to act in accordance with such reasons, and commit a public wrong.'

4.4. Some comments on obligations

Political obligations refer to the notion that the criminal law should be the *ultimum remedium*.⁷⁰ This could lead to the idea that with the help of the notion of political obligations, the expansion of the prohibition of remote harms could be brought to a halt. Criminalizing remote harms can, from a liberal point of view, be allowed as long as those offences do not interfere too much with the freedom and independence of citizens, or, from a republican point of view, as long as criminalization is not based on or does not lead to distrust amongst citizens within the polity.

When do remote harms offences interfere too much with the freedom and independence of citizens? This is especially the case when the offence prohibits ordinary behaviour, without a clear reference to the harm that could be caused by that behaviour. From this point of view, concrete endangerment offences are not much of a problem, because of the fact that there is a clear relationship between act and harm. Abstract-concrete endangerment offences are more problematic, because the description of harm is more vague and therefore it is less clear which freedoms are at stake. On the other hand, abstract-concrete endangerment offences, like Article 421 DPC, refer to harms and therefore we can at least check what freedoms are generally at stake. Abstract endangerment offences are most problematic from a liberal point of view, because no clear description of harm is given which could make it impossible to understand which freedoms are limited, unless the act itself consists of a 'public wrong' (see Section 5.1, below).

From a republican conception of citizenship, remote harms offences are acceptable as long as they are not based on or lead to distrust among citizens within the polity. This makes it less easy to distinguish between the various forms of endangerment offences. It could be very well possible to use a republican concept of citizenship to endorse even abstract endangerment offences,⁷¹ as long as this type of offence is not based on or leads to distrust among citizens. Simester and von Hirsch seem to embrace a more republican vision of citizenship, referring to the responsibilities of citizens within a polity. As we have seen, from a republican vision of citizenship, criminalization is possible when an act constitutes a public wrong. Without a firm definition of what constitutes a public wrong, the scope of the criminal law is – at least in theory – less limited than it would be from a liberal perspective. Criminalization is justified in the interest of the polity of which each citizen is a member. As a member of the polity, a citizen has agreed to the limitation of one's freedom, because of the mutual interests of criminalizing certain behaviour. A republican vision of citizenship therefore makes a certain disciplining of persons possible. Simester and von Hirsch make clear that the value of political obligations in the discussion on criminalization is relative; citizenship notions can also be used to criminalize more behaviour instead of less.⁷²

Neither social obligations nor political obligations limit the legislator's urge to criminalize more and more remote harms. This can be explained by the fact that neither social obligations nor political obligations have one meaning that could limit the legislator's possibilities to criminalize remote harms, especially abstract endangerment offences. Both types of obligations (also) allow for further criminalization. This does not mean that both types of obligations are without utility in the discussion concerning the criminalization of remote harms. First, referring to social obligations, the legislator should point out more clearly who, exactly, is the addressee of the criminal offence and to which general and special (social) obligations the addressee must adhere. Second, claiming that governments all agree on some vision of liberal citizenship, the legislator should start pointing out in what way the autonomy, integrity and legal competence of citizens are upheld by the criminal offence that is introduced. The legislator has to realise that prohibiting remote harms, mainly justified for the sake of ensuring more security for citizens (especially against terrorist attacks), in the end could lead to the destruction of the same rights (including those that refer to autonomy, integrity and legal competence) that the legislator wants to

70 On the relevance of this notion of criminal law as a last resort in present-day criminal law see Husak, *supra* note 19; Minkinen, *supra* note 43; N. Jareborg, 'Criminalization as Last Resort (*Ultima Ratio*)', 2005, *Ohio State Journal of Criminal Law* 2, pp. 521-534.

71 See Simester & von Hirsch, *supra* note 14, p. 64; Duff 2007, *supra* note 63, pp. 171-172; Ramsay, *supra* note 63, pp. 39 et seq.

72 Simester & von Hirsch, *supra* note 14, p. 68. See also Duff, *supra* note 69, p. 305.

protect in the first place.⁷³ This is especially the case with abstract endangerment offences, because the seriousness of the limitation of civil freedoms is not immediately clear. The legislator does not seem to be aware of this paradox, and even if the legislator is aware of it, the problem is often denied by referring to the importance of the criminal intent in a criminal offence that criminalizes remote harms.⁷⁴ This does not solve the problem of over-inclusive criminal offences.⁷⁵ This is because the legislator seems not to be aware that different kinds of endangerment offences partly need different kinds of justifications. If we look into the Samir A. case once more, one could argue that criminal intent helps to broaden the scope of a criminal offence, instead of limiting it. However, this may be a premature conclusion. We need to go into the meaning of intent in remote harms offences and to search for possibilities to limit criminal liability.

5. The importance of control

5.1. Normative involvement

What criteria for criminalization should be used depends partly on the type of act that is to be criminalized. The acts described in Article 421 DPC only cause harm when others use the money donated by the offender to commit terrorist offences. Merely the act of donating money will not necessarily lead to terrorist crimes. As we have seen above, the question relating to these types of crimes is whether A can be forced not to donate money to another person or organization, because if A does donate money other persons could cause harm later on.⁷⁶ One could claim that the criminalization of A's behaviour is disproportionate because it interferes with A's autonomy.⁷⁷ On the other hand, if A shows a form of *normative involvement* in the acts committed by person other than A, one could argue that A's actions should be criminalized.⁷⁸ Classical examples of normative involvement are being an accessory and solicitation. The latter seems to be the least problematic of the two, not only as a form of participation but also as an independent criminal offence. If A urges B to commit a crime, and B commits the crime as urged by A, it is rather obvious that A's action should be punishable. A has allied herself to the act of B. That means that A's conduct is not only wrongful because of A's intent (A wants the crime to be committed), but also because of A's action of encouraging B to commit the crime A wants to be committed.⁷⁹

We can distinguish two kinds of assistance, assistance during the crime (accessory assistance) and assistance before the crime (consecutive assistance). It is quite understandable to criminalize assistance when the danger of harm becomes more considerable because of the actions of the assistant. If A gives a knife to B, knowing that B wants to commit a murder and subsequently kills C with the knife that A gave, it is unquestionable whether A is an accessory to the murder of C. If A gives a knife to B, knowing that B wants to harm C but B murders C instead, I think it is understandable that A is an assistant to the murder of C. The clearer the criminal destination of what is given by A (in the form of opportunity, means or intelligence), the more understandable the prohibition of A's actions is. The less clear the opportunity, means or intelligence of A's actions are, or the less clear the criminal destination is of what A has given to B, the more difficult the justification of the criminalization of A's actions becomes.⁸⁰ For instance, selling a car that becomes involved in a traffic accident does not mean that the car salesman is an accessory to that traffic accident. Because a car has a so-called 'standard legitimate use',⁸¹ the liability of the car salesman is out of the question. It is not always obvious when the use of an object is standardly legitimate. Under the laws of country A the prohibition of providing a firearm could not be seen as problematic, while under

73 Ramsay, *supra* note 11, p. 228; M. Borgers & E. van Sliedregt, 'The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight Against Terrorism', 2009 *Erasmus Law Review* 2, p. 187.

74 See *Kamerstukken II* 2011/12, 32 842, no. 5, p. 5; *Kamerstukken II* 2011/12, 32 842, no. 6, pp. 2-4.

75 See more optimistically on this point Husak, *supra* note 24, pp. 165 et seq.

76 Simester & von Hirsch, *supra* note 14, p. 81.

77 From a republican model of citizenship, the criminalization this kind of behaviour would show too large a distrust among citizens and should therefore not be criminalized. It is not said that in the case A does something, B will take this further so that C can cause harm to others. See Duff, *supra* note 69, pp. 303-304.

78 See von Hirsch, *supra* note 7, p. 268; Duff, *supra* note 69, p. 304.

79 See Simester & von Hirsch, *supra* note 14, p. 82.

80 Husak, *supra* note 24, p. 164.

81 Simester & von Hirsch, *supra* note 14, p. 83.

the laws of country B such a prohibition might interfere with the constitutional right to bear arms.⁸² As is more often the case with remote harms offences, societal and political ideas will contribute to the question whether the opportunity, means or intelligence A gives to B has a standard legitimate use. The uncertainty about the standard legitimate use could also depend on the nature of the opportunity, means or intelligence: giving a balaclava to another person would in most cases not be unjustifiable, in other cases it would. The question whether this type of conduct should be criminalized can be dependent on the question whether the opportunity, means or intelligence is *generally* used for legitimate purposes. In that case, this type of behaviour does not consist of a public wrong, which make prohibition less obvious.⁸³

The decision to criminalize conduct that itself is not immediately unjustifiable could become easier when introducing a form of intent in the description of the criminal offence.⁸⁴ Because most remote harms actions are themselves not problematic as such, an intent is needed to make the actions problematic and relevant to the criminal law. Intent comes in many forms (from purpose to *dolus eventualis*),⁸⁵ and the legislator could decide to introduce a stricter form of intent if the act (that is the opportunity, means or intelligence) cannot be well defined, or the act is not (really) unjustifiable (meaning: the criminal destination of the act is not immediately evident). One could say that the less unjustifiable an act seems to be in itself, the more important a role that intent comes to play in a criminal offence (and the less obvious it is to accept *dolus eventualis* or even negligence). The more considerable the chance of harm, or the more unjustifiable the act in itself is, the less important the role of intent is in a criminal offence (and the more acceptable the use of negligence). According to me, from this it follows that it is not problematic to use negligence and *dolus eventualis* as proof of intent in concrete endangerment offences, while in general it should be unacceptable to use negligence and *dolus eventualis* in the case of abstract endangerment offences. In the case of the category of abstract-concrete endangerment offences the use of *dolus eventualis* should depend on whether the harm is more abstractly or more concretely described.

A criminal offence that is too heavily based on intent raises questions which are difficult to answer and which could force the courts to make choices which may lead to the exclusion of certain groups within society. Too much focus on intent could lead to the criminalization of one's political, societal or religious background, or the orientation of the offender. From both a liberal and republican vision of citizenship, this would be unacceptable. It is not clear when the criminal law can be too much focussed on intent, the views on this differ, while the question as to whether we can say that too much focus is placed on intent will partly depend on what interests are at stake. In this debate we can accept one general rule: if the act is mainly justifiable and the chance of harm caused by the defendant's action is negligible, while the effects of criminalization are disproportionate compared to the act, then the criminalization of such an act, even if the defendant's intent (i.e. purpose) is aimed at causing harm, should not be self-evident. From this it follows that abstract endangerment offences which prohibit acts that are in themselves not unjustifiable, and rely too heavily on intent, are unacceptable.

5.2. Remote harms offences and voluntary abandonment

The importance of intent in remote harms offences leads to the question whether the defendant should still be punished if, after the offence was committed, he or she does not want her actions to cause harm and tries to prevent harm from occurring. This abandonment of the offence is accepted in both Anglo-American and civil law criminal justice systems, as long as the abandonment was voluntary.⁸⁶

Voluntary abandonment can be described as follows: no attempt and no preparation exists when the offence has not been completed as a consequence of conditions that are dependent on the offender's will.⁸⁷ A point of discussion can be whether an offender can voluntarily abandon a general preparatory

82 Simester & von Hirsch, supra note 14, pp. 84-85; Husak, supra note 24, pp. 172-173.

83 Simester & von Hirsch, supra note 14, p. 84.

84 D.J. Baker, 'The Moral Limits of Criminalizing Remote Harms', 2007 *New Criminal Law Review* 10, pp. 370-391. In the following I will focus on intent, but the same could be argued for negligence and the necessity for the culpability of an offence in general. See Husak, supra note 24, pp. 174 et seq.

85 At least, in Dutch and German criminal law. See on *dolus eventualis* e.g. J. Blomsma, *Mens rea and defences in European criminal law*, 2012, pp. 99-134.

86 Duff, supra note 69, p. 304; Hoffmann-Holland, supra note 23, pp. 272-294.

87 See also e.g. Art. 51 Belgian Penal Code; Art. 121-5 French Penal Code; Art. 46b DPC.

act, but not a specific preparatory act (which can be found in the Special Part of the Penal Code).⁸⁸ The reason not to accept voluntary abandonment in cases of specific preparatory acts can be argued by pointing out that special preparatory acts are in themselves gravely dangerous acts. A danger of harm (whether concrete or abstract) was created and one cannot abandon such an act.

In general, voluntary abandonment in case of (general and special) preparatory acts should not make the prohibition of those offences useless. If everyone who commits a preparatory act can claim that he voluntarily retreated, no conviction for preparatory acts would be possible. But that does not mean that voluntary abandonment should not play a role in the case of preparatory acts at all. Especially in the situation where the offender actively neutralises the effects of his preparatory actions, one could argue that voluntary abandonment in the case of special preparatory offences is acceptable, especially in the case of abstract endangerment offences, because for these offences no great chance of harm is necessary.⁸⁹ The role of voluntary abandonment depends partly on the significance of intent in the preparatory offence. The more criminal liability depends on intent, the more useful voluntary abandonment could become as a tool for compensating the dependence of criminal liability on intent. This also means, on the other hand, that the more grievous the preparatory act in itself is, the less reason there is to accept voluntary abandonment. Voluntary abandonment in the case of illegally possessing firearms is hardly thinkable, at least from a Dutch perspective.⁹⁰ But in the case of donating money that is meant to finance terrorism, it is imaginable that the donor regrets that he donated money and tries to get his money back. The question is then whether the donor can successfully rely on voluntary abandonment and, if so, on what grounds his defence can be successful.

One question is whether it is a good use of scarce resources to prosecute defendants for preparatory actions if they have abandoned the will to cause harm voluntarily. Subsequently, the question is what penal goal prosecution serves in such a situation. Voluntary abandonment has already, so one could argue, had a deterrent effect, while the act of abandonment shows that the offender is no longer dangerous. The same holds true for retribution. In the case of voluntary abandonment, the offender himself realized his mistake and does not want the harm to occur. The fact that he voluntarily abandoned the will to cause harm should, in terms of retribution, not lead to further punishment because the lack of will removes the foundation of retributive punishment.⁹¹ One could argue that it is never clear when or whether someone has voluntarily abandoned the will to cause harm, or simply tries to avoid prosecution by claiming he abandoned voluntarily.⁹² This argument does not appeal to me, because why should we be willing to prove intent with a certain amount of uncertainty whether the defendant really intended to cause harm, but do not accept this uncertainty in the case of voluntary abandonment?

Voluntarily abandoning a crime is thinkable in two cases. First, in cases where the offence was not completed (the elements of the offence have not been fulfilled), and second, in cases where the offence was completed, but the perpetrator wants to prevent the harm from occurring. In the first category of cases, voluntary abandonment does not play a role as a defence. The fact that the offence was not completed itself cannot lead to criminal liability (attempt included). Of greater importance is the second category of cases. Suppose, again, that someone has donated money to an organization that he knows wants to use this to commit terrorist offences. In that case, the donor has fulfilled the elements of Article 421 DPC. He can be held accountable for committing the crime described in Article 421 DPC. Suppose, then, that this person, after he had donated the money, regrets his act, and tries to retrieve the money, because in retrospect he disapproves of terrorist offences. Could this person successfully rely on the defence of voluntary abandonment?

88 On this point Dutch law differs from German criminal law. The Bundesgerichtshof (the German Supreme Court) has decided that voluntary abandonment is possible in case of the preparation of human trafficking (§ 234a German Penal Code). See J. Bülte, 'Der strafbefreiende Rücktritt vom vollendeten Delikt: Partielle Entwertung der strafbefreienden Selbstanzeige gemäß § 371 AO durch § 261 StGB', 2010 *Zeitschrift für die gesamte Strafrechtswissenschaft* 122, p. 571. The Dutch Supreme Court has not accepted a defence of voluntary abandonment in a case concerning a special preparatory act. See Hoge Raad 29 April 1997, *NJ* 1997, 667.

89 Bülte, *supra* note 88, p. 578; G.A.M. Strijards, *Strafbare voorbereidingshandelingen*, 1995, p. 62.

90 See Strijards, *supra* note 89, p. 62.

91 Bülte, *supra* note 88, pp. 567-570. From this it follows that voluntary abandonment must lead to non-punishment, not just to mitigating punishment.

92 R.A. Duff, *Criminal Attempts*, 1996, p. 67.

This depends, first of all, on the reasons for abandonment. Abandoning one's actions under pressure from other persons, whether this be state officials or members of his family or friends, cannot lead to impunity. Second, accepting voluntary abandonment depends on the type of action. Only an action by the defendant that by nature and timing is appropriate to prevent harm from occurring is acceptable as voluntary abandonment.⁹³ This means that the abandoning action should undo the dangerousness of the defendant's act. This can only be an act which shows more than a mere change of intent (recognizing the error the defendant made). It has to be an act with which the defendant shows he does not want the harm to occur. The aim of the abandoning act must be opposed to the result that could be reached by the original act.⁹⁴ Trying to get one's money back could be seen as voluntary abandonment, depending on the way and with what intent one wants to retrieve one's money. I doubt if there would be voluntary abandonment if a person wants his money back only because he has found a better reason for using it. That does not provide sufficient proof of opposing the result that could be reached by the original act.

6. Concluding remarks

At present, it is unrealistic to think that remote harms offences should not be a part of the criminal law. These offences form as much a part of the criminal law as harmful offences. What is needed is a clear framework under which remote harms may be criminalized. This contribution constitutes an attempt to refine existing frameworks.

First, on the basis of the so-called standard harm analysis, remote harms may be criminalized. However, we have seen that the standard harm analysis alone does not suffice. Especially in cases where no considerable chance of harm exists, the so-called abstract-concrete or abstract endangerment offences, the standard harm analysis does not provide enough solid arguments to prohibit these types of offences. We have seen that the so-called *de minimis principle* also does not provide a satisfactory answer, because this principle does not make a difference among the various endangerment offences. More promising seems to be the principle of fair imputation. Regarding this principle, we saw that with regard to the criminalization of remote harm offences, attention should be paid to so-called obligations, which can be divided into social and political obligations. The former can distinguish persons who should and who should not be held criminally liable and can therefore help to restrict the offence. The latter refer to requirements of citizenship. Both forms of obligations do not prevent the criminalization of remote harms (and could still lead to over-inclusive criminalization) but make clear that a more detailed justification as to why the criminalization of these types of offences is in some cases necessary. From a republican point of view, abstract-concrete endangerment offences can be justified. The justification of abstract endangerment offences is, from both a liberal and a republican point of view, problematic. From this it follows that a legislator should opt for an abstract-concrete endangerment offence, as much as possible, instead of an abstract endangerment offence. Finally, the legislator should make more clear the meaning of intent in remote harms offences. There is a great deal of uncertainty concerning the meaning and significance of intent in remote harms offences among scientists and in legal practice alike. The legislator should not make the mistake of presuming that introducing intent in remote harms offences make these offences clearer. Using intent without making clear why the action itself is unjustifiable does not help to make a clear distinction between criminal and non-criminal action. A circular argument seems to appear in cases where intent plays a major role in defining the scope of a criminal offence: the act itself is hardly unjustified, but this is compensated by the intent of the offender, this intent is based on the offender's behaviour, but as we saw this behaviour was hardly unjustified. What will decide why the offender's act was punishable could then be based on the religious, political or societal background of the offender. That is unacceptable in a democratic constitutional state, for we do not punish people for who they are, but for what they do. According to me, this means that abstract endangerment offences that rely too heavily on intent remain problematic both from a liberal and a republican view and should not be prohibited, unless the act itself constitutes a public wrong. Voluntary abandonment could in a way help to

93 Compare Hoge Raad 13 March 2007, *NJ* 2007, 171; Hoge Raad 3 March 2009, *NJ* 2009, 236.

94 E. Sikkema, *Voorbereidingshandelingen*, 2012, p. 60.

prevent the courts from basing criminal liability on other elements than unjustifiable behaviour, but this can only be useful in exceptional circumstances, not as a tool to repair criminal offences that do not make clear what acts constitute a public wrong and what acts do not. In the end it is up to the legislator not to criminalize abstract endangerment offences too easily, taking both a liberal and republican conception of citizenship into account. ¶