CHAPTER III

DUTCH COUNTERTERRORISM: AN EXCEPTIONAL BODY OF LEGISLATION OR JUST AN INEVITABLE PRODUCT OF THE CULTURE OF CONTROL?

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> 'A state which has security as its sole task and source of legitimacy is a fragile organism; it can always be provoked by terrorism to become itself terroristic' [2]

1. INTRODUCTION

Over the past decade, criminological research on risk-management, actuarial justice, pre-emption, prevention and the governance of security risks such as organized crime and terrorism has expanded enormously.[3] While drawing on various theoretical frameworks in order to analyze and explain different developments and new phenomena, the legal-philosophical theory of the 'state of exception' as formulated by Carl Schmitt[4]

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[2] Agamben, G. (2001) 'On Security and Terror', *Frankfurter Allgemeine Zeitung* 20 September 2001.

[3] This development is also noted and analyzed by Ardau. See: Ardau, C. and Van Munster, R. (2009) 'Exceptionalism and the War on Terror: Criminology meets International Relations', *British Journal of Criminology,* 49, pp. 686-701.

[4] Schmitt , C. (1996) *The Concept of the Political* by Tracy B. Strong. Chicago: University of Chicago Press.

A. Ellian, G. Molier (eds.), The State of Exception and Militant Democracy in a Time of Terror, 69–95.

and reformulated by Giorgio Agamben[5], has found little resonance. Whereas the theory could especially provide valuable insights for criminological studies focusing on 'the war on terror', even there it has not attracted much attention.[6] While the rise of security governance has propelled some discussions about mechanisms 'for determining under what conditions and in what degree derogation [from rights] is permissible'[7] , the state of exception is largely absent from such discussions. Instead, counter-terrorism legislation and policies post-9/11 have been mostly explored through the criminological and sociological lens and vocabulary of state crime, moral panic or governmentality.[8]

In a modest attempt to build theoretical bridges, this article combines the criminological perspective of the development of a culture of control, as described by David Garland in *The Culture of Control*[9], with Schmitt's and Agamben's legal philosophical notions on the state of exception as a non-localizable foundation of a political order. The goal is to provide a critical analysis and discussion of the Dutch post-9/11 counterterrorism legislation. With the term *culture of control* Garland refers to the development of a society which revolves around mitigating various safety and security risks by all means possible: besides expanding the scope of the criminal law, administrative measures as well as technological measures and new forms of intervention are implemented in order to widen the net of social control as much as possible.[10] As will be further discussed in the article, the theoretical framework of the culture of control helps to better understand the 'origin' as well as the persistency and the impact of state of exception, not only with regard to counterterrorism policy but with regard to *all* legislation in the field of public order and safety.

After a description of the most important aspects of the culture of control thesis (§2), Garland and Agamben will be brought together (§3), by showing where their theoretical reflections on the government's response to terrorism - and crime in general - meet and complement each other. In the next paragraph (§4) some key results of an extensive case study into the drafting of Dutch counterterrorism legislation will be presented, providing an important yet worrisome insight into the political rhetoric and the decision-making process underlying this body of legislation as well as some of the 'exceptional' choices that have been made along the way. The article will conclude (§5) with a critical reflection upon the question what the emergence of a culture of control and the state of exception that it institutionalizes implies for the way the Dutch formal legislative procedure is currently organized.

[5] Agamben, G. (1998) *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen. Stanford: Stanford University Press; Agamben, G. (2004) *State of Exception*, translated by Kevin Attell. Chicago: Chicago University Press.

[6] Welch, M. (2007) 'Sovereign Impunity in America's War on Terror: Examining Reconfigured Power and the Abscence of Accountability', *Crime, Law and Social Change*, 47, pp. 135-150; Ericson, R.V. (2007) *Crime in an Insecure World*, London: Polity Press.

[7] Zedner, L. (2005) 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', *Journal of Law & Society*, 32, p. 521.

[8] Ardau, C. and Van Munster, R. (2009) 'Exceptionalism and the War on Terror: Criminology meets International Relations', *British Journal of Criminology*, 49, p. 687.

[9] Garland, D. (2001) *The Culture of Control. Crime and Social Order in Contemporary Society*, Oxford: Oxford University Press.

2. THE CULTURE OF CONTROL AND THE STATE OF EXCEPTION

The term *culture of control* was coined and introduced by David Garland in 2001 with his eponymous book. Garland's analysis is intended as an explanation for a radical change in (ideas on) the approach to crime.[11] A multiplicity of develop-

[10] In his work, Garland builds further upon the theoretical insights as presented by Michel Foucault in his *Discipline & Punish* as well as by Stanley Cohen's *"The punitive city: notes on the dispersal of social control"*. Foucault, Michel (1975). *Discipline and Punish: the Birth of the Prison*, New York: Random House; Cohen, S. (1979) "The punitive city: notes on the dispersal of social control", *Contemporary Crises*, 3(4), pp. 341-363.

[11] Garland observes 12 indices of changes within crime control since the seventies that typify the culture of control: the decline of the rehabilitative ideal, the re-emergence of punitive sanctions and expressive justice, changes

ments have contributed to the fact that the focus of criminal justice and criminal law is no longer the resocialization of individuals demonstrating deviant behaviour, but rather the protection of the majority in society who does behave in line with the law. Most of the attention is now paid to controlling crime and the risks of crime. The use of criminal law as an instrument to control safety risks has become part of an all encompassing *culture of control*. Garland is set to explain this movement from penal welfarism which characterized most of the twentieth century with its emphasis on resocialization, correctionalism and reform, to what he terms the 'crime control complex', the culture of control which has emerged in the last thirty years. To do this, he points to two major transformative forces: firstly the social, economic and cultural changes associated with late modernity which became most pronounced from the seventies onwards and secondly the changes within the political and policy context. Before discussing both sets of transformative forces more in detail it should be mentioned that although Garland's analysis focuses on the United States and the United Kingdom, various research has shown that his analysis is equally applicable to the Netherlands.[12] After their extensive and in-depth analysis of penal developments in the Netherlands, Downes and Van Swaaningen for instance reach the following conclusion: "Despite all the differences in time, size and intensity, the Netherlands is following much the same lines as David Garland

in the emotional tone of crime policy, the return of the victim, above all: the public must be protected, politicization and the new populism, the reinvention of the prison, the transformation of criminological thought, the expanding infrastructure of crime prevention and community safety, civil society and the commercialization of crime control, new management styles and working practices, a perceptual sense of crisis. Garland 2001, pp. 6-20.

[12] See for instance: Pakes, F. (2004) 'The politics of discontent: The Emergence of a New Criminal Justice Discourse in the Netherlands', *The Howard Journal*, pp. 284-298; Pieterman, R. (2008) *De voorzorgcultuur: streven naar veiligheid in een wereld vol risico en onzekerheid*, Den Haag: Boom Juridische uitgevers; Swaaningen, R. van (2004) 'Veiligheid in Nederland en Europa; een sociologische beschouwing aan de hand van David Garland', *Justitiële Verkenningen*,7, pp. 9-23; Van der Woude, M.A.H. (2010) *Wetgeving in een Veiligheidscultuur*, Den Haag: Boom Juridische Uitgevers.

(2001) analyzes in his *Culture of Control* for the United State and England. If we follow Garland's analysis and consider punishment to be a cultural agent, the current message is that the Dutch have purged themselves of the misplaced leniency of the past and are no longer afraid to punish".[13]

Radical changes in late-modern society

In order to fully grasp the impact of the culture of control, it is important to understand that the new field of crime control and criminal justice was shaped not by the programs of reformers or by criminological ideas but by the character of late twentieth-century society, its problems, its culture and its technologies of power.[14] According to Garland, the social, economic and cultural changes associated with late modernity are the root cause for the changes within the field of crime control and criminal justice policy that have become visible since the mid-seventies. The postwar period was marked by dramatic changes in several areas: Garland charts the emergence of youth culture, the impact of electronic media, the rise of spatial mobility, individualism, a new hedonism of instant gratification – and behind all of these and, most importantly, the restructuring of the labor market and the changes in the family and the household. These changes in turn had a profound impact on the institutions of the welfare state as well as on the organization of crime prevention and social control. The irony is that the welfare state, once very successful in solving various social problems and one of the driving forces behind the formation of late modern society, was now seen increasingly problematic and 'risky'.[15] Besides bring-

[13] Downes, D. en Swaaningen, R. van (2007) The Road to Dystopia; changes in the penal climate in the Netherlands, in: M. Tonry & C. Bijleveld (eds.) *Crime and Justice in the Netherlands*. Chicago: Chicago University Press, p 66.

[14] Garland 2001, p. 72.

[15] For this part of his theoretical reflection, Garland builds upon the work of Anthony Giddens and Ulrich Beck who describe the transformation of the welfare state into a culture of control. E.g. see: Beck, U. (1986) *Risikogesellshaft: Auf dem Weg in eine andere Moderne*, Frankfurt a. M: Suhrkamp; Beck, U. (1992) 'From industrial society to the risk society: questions of

ing wealth and progress to society, the welfare state now seemed to be 'producing' a problematic side-product in the form of crime.[16] Both the relaxation of informal social and situational controls in all areas of life, the general increase in material wealth and the presence of a large 'population at risk' – teenage males with great affluence and mobility outside the disciplines of work and family and used to instant gratification – have led to an increase in the opportunity to commit crimes and to a more crime prone society in general.[17] Crime had become yet another product of late modern society, a part of everyday lived reality.

This notion of crime as a normal fact of life has lead to the formation of a distinctive culture that has grown up around crime – a culture that changes the conditions in which criminal law and criminal justice policy operate. This cultural formation, which is referred to as the crime control complex of late modernity, is characterized by a distinctive cluster of attitudes, beliefs and practices. High crime rates are regarded as a normal social fact and crime-avoidance becomes an organizing principle of everyday life.[18] Citizens become crime-conscious, attuned to the crime problem, and exhibit high levels of fear and anxiety. Fear

survival, social structure and ecological enlightenment', *Theory, Culture and Society,* (1), pp. 97-123; Giddens, A. (1998) 'Risk Society: the context of British politics', in: J. Franklin (ed.) *The Politics of Risk Society* Oxford: Polity Press in association with the Institute for Public Policy Research, pp. 23-42; Giddens, A. (1999) 'Risk and Responsibility', *Modern Law Review,* 62 (1), pp. 1-10.

[16] Garland 2001, pp. 92-94.

[17] Garland, D. (2000) 'The Culture of High Crime Societies: Some preconditions of recent 'law and order' policies. *British Journal of Criminology,* 40 (3), pp. 347-375. In his book 'Liquid Modernity', Zygmunt Bauman also reflects upon the impact the changes brought by late modernity have had on (in)formal social bonds and (in)formal social control. With the term *Liquid modernity* Bauman describes the present condition of the world as contrasted with the "solid" modernity that preceded it. As Bauman states, this passage from "solid" to "liquid" modernity has created a new and unprecedented setting for individual life pursuits, confronting individuals with a series of challenges never before encountered. Bauman, Z. (2000), *Liquid Modernity,* Cambridge: Polity Press.

[18] Garland 2001, p. 106.

of crime is sufficiently widespread to become a political reference point and crime issues are generally politicized and represented in emotive terms. [19] A high level of 'crime consciousness' comes to be embedded in everyday social life and institutionalized in the media, in popular culture and in the built environment.[20] As Garland states, citizens' engagement with crime and also crime prevention produces an ambivalent reaction. On the one hand a stoical adaptation that prompts new habits of avoidance and crime prevention routines. On the other hand, there is a measure of irritation, frustration and aggravation at the cumulative nuisance that crime represents for daily life. The trauma of powerlessness in the face of fear prompts the demand for action. The feeling that 'something must be done' and 'someone must be blamed' increasingly finds representation and fuels political action, as will be discussed more in depth in the next paragraph.

In the Netherlands, the first signs of the emergence of a crime control complex can be traced back to the mid eighties. Nevertheless, it was not until the beginning of the 21st century that the crime complex reached its full potential. Pakes points at 'three watershed events' that have contributed to the rapid development of the crime complex at the turn of the millennium: the terrorist attacks in New York and Washington in 2001, the impact of the short-lived yet stormy political career of populist politician Pim Fortuyn and the murder of cinematographer Theo van Gogh by a home grown fundamentalist Muslim in 2004.[21] The short time-frame in which these events occurred has significantly contributed to the uprise of a social and political climate in which (in)security and public safety as the central themes of public and political concern are increasingly discussed in a populist tone.[22]

[19] Garland 2001, p. 163.

[20] Altheide, D.L. (2003) 'Notes towards a politics of fear', *Journal of Crime, Conflict and Media,* (1), pp. 37-54.

[21] Pakes, F. (2004) . 'The politics of discontent: The Emergence of a New Criminal Justice Discourse in the Netherlands', *The Howard Journal of Criminal Justice* 43 (3) , pp. 284-298.

[22] The impact of these three watershed events has been also recognized by

Policy responses to the new predicament of late modernity

So how did the social changes of late modernity come to impress themselves upon the field of crime control and criminal justice? According to Garland, the development of a crime complex produces a series of psychological and social effects that exert an influence upon politics and policy.[23] The effects and changes that have taken place within the political and policy context constitute the second set of transformative forces leading to the emergence of a culture of control. As described in the previous paragraph, the crime complex gave rise to a general feeling of anxiety but it also clearly indicated the limitations of the criminal justice state since crime rates as well as fear of crime kept rising despite the state's penal-welfarist based efforts to control crime and provide law and order. Garland claims that this situation puts governments in a difficult position, making them face a new criminological predicament: they had to find an acceptable solution to the unpleasant message that crime rates are and would remain high in open, complex late modern societies whereas the possibilities to effectively cope with crime are limited.[24] To prevent a further decline in public trust in government, politicians and policymakers are forced to somehow respond to this new predicament, since refraining from any action and therewith openly recognizing the government's limitations would result in disastrous political costs.[25] The state's response to all this has been rather ambigu-

other authors, see for instance: Buruma, I. (2006) *Murder in Amsterdam. Liberal Europe, Islam and the Limits of Tolerance,* London: Penguin Books; Boer, M. den (2007) 'Wake-up call for the Lowlands: Dutch counterterrorism from a comparative perspective', *Cambridge Review of International Affairs,* 20 (2), pp. 285-302.

[23] Garland, D. and Sparks, R. (2000) 'Criminology, Social Theory and the Challenge of Our Times', *British Journal of Criminology,* 40, pp. 189-204.

[24] Garland 2001, p. 105.

[25] Garland 2001, pp. 109-111; Garland, D. (1996) 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', *British Journal of Criminology,* 36 (4), p. 499. For a discussion on how both political strategies are visible within Dutch crime control see: Van Swaaningen, R. (2004) 'Veiligheid in Nederland en Europa; een sociologische beschouwing

ous. On the one hand there has been an attempt to face up to the predicament and develop pragmatic new strategies that are adapted to it. On the other hand there is a more politicized response evading the new predicament altogether by either willfully denying it and reasserting the old myth of the sovereign state and its plenary power to punish or even by abandoning reasoned, instrumental action and retreating into an expressive mode that is concerned not so much with controlling crime as with expressing the anger and outrage that crime provokes.[26] Garland states that the denial and the expressive (also: acting out) policy responses are rooted in a politics of fear.[27] Politicians and policy makers are tapping into public concern about crime by advocating harsher and more expressive penalties, public protection, enhanced control, exclusion and more attention for crime victims.[28] Whereas the underlying rationale for this dramatic change in political discourse can be found in the urge to regain the public's trust in the criminal justice system and therefore to prevent further public outrage, Sparks and Garland argue that the electoral consequences of not taking a firm stance on crime and punishment are probably a better explanation. From the point of view of politicians, crime and punishment have become too important to leave to professionals and scholars, leading to a 'getting tough on crime' stance across the whole political spectrum.[29] While conveniently using the media,

aan de hand van David Garland', *Justitiële Verkenningen,* 7, pp. 9-23.

[26] Garland 2001, pp. 109-110.

[27] On the relationship and interplay between crime and fear of crime see: Lee, M. (2007) *Inventing fear of crime. Criminology and the politics of anxiety,* Willan Publishing: Devon; Furedi, F. (2005) *Politics of fear. Beyond Left and Right,* Continuum: London and also Vanderveen, G. (2006) *Interpreting Fear, Crime, Risk and Unsafety,* Boom Juridische Uitgevers: Den Haag.

[28] In his influential essay 'The Philosophy and Politics of Punishment and Sentencing' Tony Bottoms has referred to this as *populist punitiveness*: 'to convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance'. (1995: p. 40) Bottoms, A. (1995), 'The Philosophy and Politics of Punishment and Sentencing'. In C. Clarkson and R. Morgan (eds.), *The Politics of Sentencing Reform,* Oxford: Clarendon Press, pp. 17-49.

[29] Garland & Sparks 2000, p. 200.

politicians seize crime related incidents to reinforce and maintain the message that preventive and forceful measures are necessary since 'danger is lurking everywhere'. In the culture of control and the politics of fear that it encompasses, the actual development of crime rates is no longer relevant.

Actuarial criminal law as an important trait of the legal context of the culture of control

The pursuit of security and (subjective) safety has become the major objective as well as the justification for many new policies and legislation.[30] Despite the fact that many scholars have noted the limited effectiveness of criminal law as a means to increase security, especially this field of law has been 'awarded' an important role in this political pursuit, therewith contributing to the development of what is come to known as actuarial criminal justice. [31] Actuarial criminal justice refers to the development *of a* preventive criminal justice. Actuarial criminal law takes insecurity as the underlying value of security politics, operating on the base of permanent feelings of fear, anxiety and unease. Security discourses and policies in the culture of control, are increasingly dominated by the logic of risk management, a logic which calls for the management and government of risky populations by means of (statistical) calculations and proactive management rather than through the reactive management of real events and threats.[32] Actuarial criminal justice links coercive state actions to suspicion without the need for a charge, prosecution or conviction. It also includes measures that expand the remit of the criminal law to include activities or associations that are deemed to precede the actual substantive offence targeted for prevention. Clearly, the starting point of actuarial justice is prevention rather than the defense against the actual threat. This means that the use and desirability of preventive action is placed in the foreground, also where it concerns criminal law. As Dutch legal scholars Borgers and Van Sliedregt justly note, this development is 'foreign' to the criminal law system in a certain sense.[33] After all, criminal law proceeds from the standard model in which action is taken on the basis of harm that has already occurred. The background of this is both instrumental and based on the legal protection. On the one hand, the repressive approach is based partly on the presumption that people are rational actors and are therefore deterred by the threat of the penalty that can be imposed if they act in conflict with the rules. On the other hand, preventive action entails the risk that – in retrospect – people are wrongfully subjected to far-reaching measures.[34] Despite the problematic nature of actuarial criminal law and the warnings and criticisms as formulated against it by legal (and criminological) scholars, this does not seem to have affected its development in any way. Against the background of a further evolving culture of control, in the Netherlands actuarial criminal law has 'exploded' over the past decades.[35]

[30] Jonathan Simon has also referred to this trend as *governing through crime.* Simon, J. (2007) *Governing through Crime: How the war on Crime Transformed American Democracy and Created a Culture of Fear.* Oxford: Oxford University Press. Also see: Bosworth, M. and Guild, M. (2008) 'Governing Through Migration Control. Security and Citizenship in Britain', *British Journal of Criminology,* 48 (6), pp. 703-719 and Hudson, B. (2003) *Justice in the Risk Society. Challenging and Reaffirming Justice in Late Modernity,* London: Sage.

[31] In this context Boutellier speaks of a 'criminal justice paradox'. Boutellier, H. (2005) *De veiligheidsutopie: Hedendaags onbehagen en verlangen rond misdaad en straf,* Den Haag: Boom Juridische uitgevers, p. 150-151. The term actuarial justice was coined by Malcolm Feeley and Jonathan Simon in various publications discribing the development of a new penology. Feeley, M. en Simon, J. (1992) 'The new penology: notes on the emerging strategy of corrections and its implications', *Criminology,* 30, 4, pp. 449-474; Feeley, M. en Simon J. (1994) 'Actuarial Justice: the Emerging New Criminal Law', in: D. Nelken (eds.) *The Futures of Criminology,* London: Sage, pp. 173-201.

[32] R. van Munster 'The war on Terrorism: When the exception becomes the rule", *International Journal for the Semiotics of Law,* 2004, pp. 141-153.

[33] Borgers, M. and Van Sliedregt, E. (2010) 'The precautionary principle and anti-terrorism legislation' *Erasmus Law Review,* 2 (2), pp. 172-173.

[34] Dershowitz, A.M. (2006) *Preemption: A Knife That Cuts Both Ways,* New York: W.W. Norton & Company, pp. 7 and 19.

[35] In his inaugural lecture, Borgers - besides the Dutch counterterrorism legislation - sums up various examples of Dutch actuarial criminal law that have been introduced over the past couple of decades: the increase of broadly de-

3. THE CONTAMINATED LEGISLATURE: WHERE AGAMBEN AND GARLAND MEET

The *State of Exception* investigates the increase of power structures governments employ in supposed times of crisis. Within these times of crisis, Agamben refers to increased extension of power as states of exception, where questions of citizenship, civil liberties and individual rights can be diminished, superseded and rejected in the process of claiming this extension of power by a government. The state of exception invests one person or a government with the power and voice of authority over others extended well beyond where the law has existed in the past. The development of actuarial justice as a common feature of the culture of control fits this description. Motivated by the objective to pursue absolute safety, governments spend great efforts in detecting criminal and risky behaviour in the earliest stage possible, even if this entails an infringement on certain civil liberties. Actuarial criminal justice is one of the means through which governments expand their grip on *all* possible human behaviour, including potentially risky or criminal behaviour. This expansion of the government's net of social control through actuarial justice in a culture of control is also accompanied by a dispersal of discipline since crime control has been extended to local and non-governmental (private) agencies.[36] Due to this extended capacity for influence and action the government in a culture of control clearly becomes more powerful than before: they are able to fully control all citizens and to

fined criminal offenses, the introduction of criminal participaion, the criminalization of preparatory acts and conspiracy, the erosion of the guilt-principle, the introduction of sanctions specifically targeted at preventing recidivism, the exponential growth of the imposition of life imprisonment, an increase of maximum sentences in order to stimulate the prevention of risky behavioyr, the lowering of the threshold to use investigative (criminal) powers and the greatly increased role of technology and the desire for gathering -often privacy sensitive -information in the criminal procedure. Borgers, M. J. (2007) *De Vlucht naar Voren,* Den Haag: Boom Juridische Uitgevers.

[36] Cohen, S. (1979) 'The punitive city: notes on the dispersal of social control', *Contemporary Crises,* 3(4), pp. 339-363; Cohen, S. (1985) *Visions of Social Control,* Cambridge: Polity Press.

decide who should be excluded from society or at least deprived from his or her civil liberties and rights for being a potential risk or threat.[37] Or, to speak in Agambens terms, to actively separate "political beings" (citizens) from "bare life" (bodies).

The additional value and importance of combining *the State of Exception* with *the Culture of Control* lies in the fact that this combination offers a new perspective to analyze various important legal transformations. The state of exception is no longer a strictly legal category, as it is in the constitutional sense of a 'state of siege', yet it coincides with the emergence of a culture of control. The merging of the culture of control and the state of exception has profound consequences regarding the drafting of new legislation and policies within the field of criminal justice. Whereas Garland's thesis has shown that politicians and policymakers (have to) respond to the new criminological predicament of late modern societies through different types of policies and laws, by focusing mainly on the outcome he does not explicitly address the way in which this new predicament has also affected the policy-making process itself. This dynamics is made clearer in Agamben's work. One of the basic problems of the state of exception is in fact the continued intrusion of the executive power in the legislature.[38] Agamben even argues that politics has "contaminated itself with law" in the state of exception.[39] The political power over others acquired through the state of exception, places the government as all powerful, operating outside of the laws. During such times of extension of power, certain forms of knowledge are privileged and accepted as true and certain voices are heard as valued, while many others are not. This political dynamics might negatively affect the

[37] Hudson, B. (2003) *Justice in the Risk Society,* London: Sage Publications; Kemshall, H.(2003) *Understanding Risk in Criminal Justice,* Berkshire: Open University Press; Garland, D. (1996) 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', *British Journal of Criminology,* 35 (1), pp. 134-137.

[38] Giorgio Agamben, *Etat d'Exception: Homo Sacer II, 1,* Paris, Seuil, 2003, p. 18.

[39] http://www.egs.edu/faculty/giorgio-agamben/videos/the-state-of-exception-der-ausnahmezustand/ (visited October 1st, 2011)

legislature and the legislative procedure in such a way that the outcome of the legislative procedure in a culture of control with regard to new criminal legislation becomes a foregone conclusion. Instead of being the result of a process of carefully weighing and balancing various competing interests and values, new criminal legislation and crime policies are motivated solely by irrational fears, 'underbelly feelings' and incident-oriented political impetus in order to secure future electorate. In moving from a more abstract, theoretical, level towards a more practical level, the following paragraphs will illustrate this perceived 'contamination' by focusing on the Dutch legislative procedure and, more specifically, the drafting of Dutch counterterrorism legislation.

The legislative procedure and its safeguards

The process of drafting criminal legislation, or any other type of legislation, is complicated. Although every description would entail a simplification of reality, at best, it can be seen as a compromise of a complex process during which (potentially conflicting) rationalities and corresponding interests and values are taken into consideration and weighed by the legislature.[40] An ongoing issue in criminal law, or even a dilemma, is to strike a balance between the interest of collective safety and the interest representing civil liberties and individual (human)

[40] Hirsch Ballin, E.M.H. (1989) *Het grondrecht op vrijheid en de wet,* Alphen aan den Rijn, pp. 58-60; Veerman, G.J. (2009) *Over Wetgeving: principes, paradoxen en praktische beschouwingen,* Den Haag: SDU, pp. 153-162. In his inaugural lecture, Snellen distinguishes four different rationalities: the political rationality, the financial- economical rationality, the legal rationality and the technical/ social-scientific rationality. According to Snellen, an act is alsways a compromise between these rationalities.See: Snellen, *Boeiend en geboeid,* Alphen aan den Rijn: Samsom H.D. Tjeenk Willink 1987. Zie ook Van der Heijden & Noordam, *De waarde van het sociaal recht. Over beginselen van sociale rechtsvorming en hun werking,* Preadviezen NJV 2001, Deventer: W.E.J. Tjeenk Willink 2001. Also see: Cleiren, C.P.M. (2003)'De wetgever aan zet', in: Brants, Mevis, Prakken & Reijntjes (eds.), *Op zoek naar grondslagen. Strafvordering 2001 ter discussie,* Den Haag: Boom Juridische uitgevers, pp. 55-79.

rights.[41] Whereas under some circumstances it can be legitimate and necessary to 'trade' some liberty in order to gain more security, but also vice versa, the legislator's decisions on which interest has priority over the other clearly should be made well-advised and motivated. In order to ensure that all interests and rationalities at stake are accounted for and deliberated, the Dutch legislative procedure is designed in such a way that during various stages of the process of drafting, different actors are enabled to review a legislative proposal against the background of legitimacy, accountability, consistency, practicability, as well as its perceived effectiveness. Examples of these, so the speak, safeguards built in the legislative procedure are the consultation stage, the Council of State and perhaps most important the plenary debate in the House of Representatives (the Parliament), also known as the co-legislator.[42] Being part of the legislature,

[41] When referring to or discussing the task of the legislator and in particular the choices that have to be made between the various interests, the term "balancing" or "weighing" is often used. Although these terms are also used in this article, it has to be noted that these terms might give off a wrong idea and therefore have been discussed by various scholars. See for instance Zedner, L. (2005) 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', *Journal of Law and Society,* vol. 32, no. 4, p. 511 and Ashworth, A. (2002) *Human Rights, Serious Crime and Criminal Procedure,* London: Sweet & Maxwell, p. 30.

[42] Before legislative proposals are tabled as bills in Parliament elaborate consultations are held enabling all kinds of semi-public boards consisting of experts or representatives of interest or political groups to critically reflect upon the proposal. Also, according to article 73 of the Dutch Constitution the Council of State needs to be consulted on drafts for Acts of Parliament and draft decrees of government. The Council of State makes comments on the draft and advises the government what to do. Upon the comments and advice of the Council of State, the department first responsible for the draft drafts a reaction which is, together with the comment of the Council discussed in the council of ministers. The council of ministers may then decide to table the bill (the new status of the draft or proposal) with Parliament, notably the House of Representatives. The bill is directed to a relevant Committee by the chair of the house and debated there. Members of the House of Representatives can table amendments. After the committee has concluded its scrutiny with a report the bill is debated in the plenary. For further information on the Dutch legislative procedure, see: Voermans, W. (2009) 'Legislative Processes, Institutions and Safeguards for Legislative Quality in the Netherlands', paper

the House of Representatives has a great responsibility with regard to monitoring the process of drafting new legislation and reflecting upon and choosing between all possibly conflicting interests and values while also keeping in mind the foundations of the Dutch constitutional state.[43] Over the past couple of years, various scholars have questioned whether the Dutch Parliament is still capable to adequately fulfill this responsible.[44] Reasons for concern were found in the fact that (members of) Parliament hardly put any effort in researching the necessity, proportionality and possible negative side-effects of proposed legal measures and policies. Scholars also found the substantive Parliamentary debates, especially concerning criminal legislation and the inherent dilemma between collective safety and civil liberties, to be very unsatisfactory. The debates are often very abstract, not paying much attention to the concrete and more practical implications of new legislation. Individual members of Parliament usually quickly settle for a simple oral promise by the responsible Minister that the - for instance - proposed new investigative powers are simply necessary but will be used reservedly.[45]

These shortcomings with regard to the co-legislative task of the Dutch Parliament seem mostly applicable to the drafting of new criminal law. According to Dutch Professor of Criminal Law Klip this can be explained by the fact that the current po-

presented in workshop on "Different Approaches to Legislative Drafting in the EU Member States" during SIGMA conference. For the complete paper see: http://www.oecd.org/dataoecd/58/5/44577810.pdf

[43] Van Ommeren & Zijlstra (red.), *De rechtsstaat als toetsingskader*, Den Haag: Boom Juridische uitgevers 2003.

[44] Konijnenbelt, 'Het parlement als wetgever', in: *Gegeven de Grondwet* (CZW-bundel), Deventer: Kluwer 1988, p. 184.

[45] De Jong & Kummeling, 'De teloorgang van de Tweede Kamer als medewetgever', in: Bovend'Eert e.a. (red.), *De staat van wetgeving*, Deventer: Kluwer 2009, pp. 67-98, Bovend'Eert & Kummeling, *Het Nederlandse Parlement*, Deventer: Kluwer 2004 (tiende druk), p. 171 e.v., Bovend'Eert, 'Minder controleren, meer en beter wetgeven', *NJB* 2004, afl. 16, pp. 824-831, Janse de Jonge, 'De rol van het parlement in het wetgevingsproces', in: Eijlander e.a. (red.), *Wetgeven en de Maat van de tijd*, Zwolle: W.E.J. Tjeenk Willink 1994, pp. 311-327.

litical discourse with regard to crime and safety seems to be mostly focused on the seriousness of the offense. As a result, all other aspects that also should be taken into consideration during a Parliamentary debate on new criminal law are left out. "Criminal justice issues are used to hedge political and electoral risks. If something happens and the criminal law can be applied, the legislature cannot be accused of failure (in the sense that a criminal cannot be tried or punished for his offense)."[46] In other words, no one wants or dares to bury the burden of being responsible for a mesh in the criminal law. Therefore, instead of critically contemplating the necessity of new actuarial criminal provisions as a rational solution to a specific problem, politicians are eager to express their shared concern about crime and other forms of social nuisance and to promise a legislative response without having sufficient knowledge of facts.[47] Examples of criminal legislation that according to different scholars has been drafted and implemented without being critically debated by the Parliament are the Maximum Sentence Reassessing Act (Wet Herijking Strafmaxima), the Administrative Measures National Security Act (Wet Bestuurlijke maatregelen Nationale Veiligheid), the Temporary Restraining Order Act (Wet Tijdelijk Huisverbod) and, as will be discussed more in depth in the next paragraph, the Dutch counterterrorism legislation.[48]

Clearly, the legislative procedure with regard to criminal legislation has been greatly affected by the dynamics of the culture of control leading to a permanent state of exception when it comes to this type of legislation. Criminal law has become a powerful tool in the hands of the sovereign state and the motto seems to be that the net of social control needs to be tightened at all times and at all costs. Due to the politicization of crime

[46] Klip, A.H. (2010). Totaalstrafrecht, *Delikt en Delinkwent*, pp. 583-592.

[47] Brants, 'Risico's, schandalen en publiciteit. De nieuwswaarde van een falende overheid', *PROCES* 2008, p. 52. ; A. Pechtold, 'Risicoaversie in de politiek', *PROCES* 2007, 6,pp. 227-230.

[48] De Jong & Kummeling 2009, p. 80-91; Schuyt, P.M. (2007) 'Wetgeving in een dramademocratie', *Sancties*, 4, pp. 205-209.

and (in)security, even one of the most important safeguards of the legislative procedure, the plenary debate of proposals in the House of Representatives, seems contaminated since no political party, neither those who are in the government nor those who are part of the opposition dare to take a more penal welfarist take on crime related issues. The political risks of being seen as "Soft on Crime" are just too big.[49]

4. DUTCH COUNTERTERRORISM LEGISLATION

As stated in the previous sections, the institutionalization of a permanent state of exception in the culture of control affects not only the outcome of the legislative procedure in terms of actuarial criminal justice, but also more profoundly, the legislative procedure itself. Whereas this is already the case with regard to 'normal' crime risks and crime threats, this is most certainly the case when it comes to the so-called 'world risks'.[50] World risks are non-localizable, open-ended, uncontrollable risks which can have a devastating impact on all citizens. As Beck states, terrorism, especially the post-9/11 terrorism, is textbook example of a world risk.[51]Terrorism entails a persistent feeling of insecurity that affects people more deeply than everyday crime and the risk of accidents and disasters.[52] Although *The Culture of Control* was written and published before the terrorist attacks on New York and Washington, Garland claims that his analyses has only gathered momentum after 9/11.[53] In this paragraph I

[49] Simon 2007.
[50] Beck, U. (2002) 'The Terrorist Threat. World Risk Society Revisited', *Theory, Culture and Society* (4) 2002-19, p. 39.
[51] U. Beck, 'The Terrorist Threat. World Risk Society Revisited', *a.w.*, p. 39. Also see; Peek, L. en Sutton, J. (2003) 'An Exploratory Comparison of Disasters, Riots, and Terrorist Acts', Disasters, 27, pp. 319-335.
[52] Goldsmith, A. (2008) 'The Governance of Terror: Precautionary Logic and Counterterrorist Law Reform After September 11th', *Law and Policy*, Vol. 30, 3, pp. 141-167. Also see: Mythen, G. & Walklate, S. (2006) 'Communicating the terrorist risk: Harnessing a culture of fear?', *Crime, Media, Culture*, 2, pp. 123-142.
[53] Garland, D. (2008) 'The Culture of Control after 9/11'. Preface to *Kulter der Kontrolle*. Frankfurt am Main: Campus Verlag, p. 3.

will first describe three important legislative 'highlights' of Dutch counterterrorism.[54] After that, I will present some results of a recent extensive discourse analysis of the legislative procedure underlying the various counterterrorism laws. This analysis sheds an important light on the decisions that have been made by the legislature and demonstrates how the government's often ill-founded argument on the necessity of the new counterterrorism measures has not hindered its rather swift implementation. [55]

Dutch post 9/11 counterterrorism in a nutshell

Shortly after the 9/11 attacks in the United States, the then Dutch government announced a comprehensive action plan against Terrorism: *The Action Plan Counter-Terrorism and Security*.[56] The plan contained a sizeable range of (inter)national measures for the intensification of the fight against terrorism. Besides a vast array of policy and institutional measures, also a wide range of legislative measures that criminalize terrorism at a preliminary stage, meaning *before* any harmful acts have taken place were taken. The first response to the new threat of terrorism is the Dutch Terrorism Act (Wet Terroristische Misdrijven)[57], the consequence of the (binding) implementation the EU Framework Decision.[58] As most Dutch counterterrorism legislation, the new law has been inserted as a separate category of crimes in the Criminal Code. The act criminalizes conspiring to commit terrorism, recruiting for "armed conflict" – the *jihad* – and participating in and cooperating in terrorist training

[54] Also see: Den Boer 2007.
[55] Van der Woude 2010. By means of a qualitative content analysis of, among other things, *all* available written governmental documentation on the various Dutch post 9/11 counterterrorism legislation such as proposals, parliamentary papers, reports, etc. Van der Woude has reconstructed the legislative procedure in order to try to uncover the various interests and rationales in play and the motivation of the legislator to choose certain interests and values over others.
[56] Parliamentary papers II 2001/2002, 27 925, nr. 10.
[57] Bulletin of Acts and Decrees 2004, 290 and 373.
[58] Official Journal of the European Communities, L 164/3, 22 June 2002.

camps.[59] Moreover, the Dutch Terrorism Act increased the severity of sentences for certain common crimes committed with a terrorist purpose. By means of the Act Expanding the scope for Investigating and Prosecuting Terrorist Crimes (Wet Verruiming Opsporing en Vervolging Terroristische Misdrijven)[60] the investigatory and prosecutorial powers were expanded by lowering the threshold that triggers special investigative powers: now, authorities may investigate or prosecute suspects if they have "indications" (of a terrorist crime) instead of a "reasonable suspicion" as is required for ordinary, non terrorism crimes. Moreover, the Acts permits pre-trial detention for terrorism charges on the basis of an "ordinary" suspicion instead of the more stringent requirement of "incriminating evidence" as is required for ordinary, non-terrorism crimes. The pre-trial detention can last until the start of the trial, subject to a maximum of 27 months. During that period, the accused and defense can be denied access to the files and may not be informed of the incriminating evidence against them. Thirdly, under the Protected Witnesses Act (Wet Afgeschermde Getuigen)[61] the Intelligence provided by officers and special agencies, heard in a separate procedure by a special magistrate, can be used as evidence in a criminal trial.

It needs no explanation that Dutch counterterrorism legislation and especially the cumulative effect of all measures taken can be regarded as actuarial criminal law *pur sang:* the global nature of the terrorist threat amplifies the characteristics of actuarial justice. While referring to the movie *Minority Report,* McCulloch and Pickering state that counterterrorism advances a pre-crime logic aimed at pre-empting latent threats, 'Justice through the Chrystal Ball'.[62]

[59] Parliamentary papers II 2007-2008, 31 386 nr. 3, p. 5.
[60] Bulletin of Acts and Decrees 2006, 580.
[61] Bulletin of Acts and Decrees 2006, 460.
[62] McCulloch, J. and Pickering, S. (2009) 'Pre-crime and counterterrorism. Imagining future crime in 'the War on Terror', *British Journal of Criminology,* 49, pp. 628-645.

Dutch Counterterrorism: Exceptionally drafted?

As mentioned above, the Dutch Terrorism Act, the Act Expanding the scope for Investigating and Prosecuting Terrorist Crimes and the Protected Witnesses Act are the actuarial 'highlights' of Dutch counterterrorism, introducing an extensive package of measures enabling law enforcement agencies to track down and respond to potential security risks in the earliest stage possible. The preventive nature of the measures, possibly combined with the fact that the Netherlands, despite a history of South Moluccan terrorism in the seventies, had never known counterterrorism legislation before, has led to significant discussions in various forums. Both from within academia as from within the political forum, (parts of) the legislation has been questioned or even criticized. Whereas it would be interesting to extensively go into the criticism as it has been formulated by various legal scholars, it is sufficient to say that the overall tone was a tone of concern: concern for the fundamental principles underlying the criminal law, concern for the Rule of law and concern for civil liberties and human rights.[63] Although since 9/11 dozens of articles have been written underpinning these critiques, the outcome of the discourse analysis are rather discouraging for legal scholars since the articles do not seem to find their way to the legislature. Despite, or perhaps due to, the fact that input from within academia could offer an important counterbalance against populist politics with its biased focus in favor of collective safety, academic publications are rarely cited or referred to. There is one critique from within the academic forum that should be explicitly mentioned considering the central scope of this article. One of the main concerns of Dutch legal academics was that by integrating the counterterrorism measures in the regular Criminal Code and therewith integrating national security and criminal justice, the threshold to use the 'special' counterterrorism powers outside the context of a terrorist threat

[63] The various criticisms have been collected and analyzed by Van der Woude, M.A.H.(2012) 'Tegen Dovenmansoren?', *RegelMaat,*5, pp. xx-xx *(forthcoming)*

would get too low. That way, these exceptional measures threatened to become the norm, possibly with grave consequences for peoples' civil liberties and civil rights. With most counterterrorism legislation implemented in the Criminal Code and Code of Criminal Procedure, clearly this critique has fallen on deaf ears.[64] Besides from within the academic forum, the various institutions functioning as the so-called safeguards during the legislative procedure (the Council of State and the various institutions that can be asked for consultation in the early stages of the procedure) have also been very critical towards the various counterterrorism proposals. These critiques often touched the essence of the proposals, questioning the necessity, legitimacy and the expected effectiveness. Nevertheless, these critiques are also poorly reflected in the parliamentary debates. And, in the cases that they have been brought up by individual Members of Parliament, these – at first glance - critical Members show themselves surprisingly quickly reassured by the Minister of Justice's standard motivation for all counterterrorism legislation that "the proposed measures and powers are necessary in view of the threat that international terrorism poses for the Dutch democratic society".[65] So much for the impact of the safeguards. It should be noted that with regard to the Terrorism Act and the Protected Witnesses Act some of the safeguards were knowingly circumvented. The Council of State has not been able to advise the legislature on the most important and far-reaching changes resulting from the Terrorism Act

[64] The government has chosen to implement the counterterrorism legislation in the regular criminal code.
In trying to prevent the contamination of the regular criminal law by the extraordinary counterterrorism provisions and powers, the majority of these extraordinary powers is connected to a specific set of crimes, the terrorist crimes and the therefore necessary terrorist intent (article 83a Criminal Code). By creating this separate set of terrorist crimes within the context of the regular Criminal Code, these provisions and powers are bound by the Rule of Law. Nevertheless, whilst referring to the necessity of an efficient counterterrorism strategy, the legislator has also made changes to "regular" criminal provisions, which also apply outside the context of (counter)terrorism and therefore potentially affect all citizens, not only those with a terrorist intent.

[65] Van der Woude 2010, paragraph 4.7.6.

(criminalizing conspiracy to commit terrorism and recruiting for "armed conflict". With regard to the Protected Witnesses Act the Minister decided that because of the 'urgency of a matter' in was undesirable to waste time on consultation.[66]

Almost all proposals have been ratified and signed into law without too many alterations made to the original draft. Although the conclusions of a report that was published in 2009 by the Committee on the Evaluation of Antiterrorism Measures (also known as the Suyver Committee) seemed to confirm the image of a too hastily drafted and ill-motivated body of legislation, the report found little to none (political) resonance.[67].In January 2011, in response to the report of the Suyver Committee, the Ministry of Safety and Justice published an evaluation which was titled: *Dutch Counterterrorism in the first decade of the 21st century.*[68] The evaluative study can be seen as a first unsuccessful attempt to meet the 22 recommendation of the Suyver Committee to integrally evaluate the counterterrorism measures: since the study was carried out by the Ministry of Safety and Justice itself not only the objectivity of the study is questionable, the lack of research methodology also contributes to the feeling that the study is not taken seriously. In any case, the study does not reflect the 22 recommendations of the Suyver Committee with regard to the design and focus of an evaluative study at all.[69] This only strengthens the perception that Dutch counterterrorism legislation is not the result of rational

[66] Parliamentary Papers II 2002/03, 28 463, nr. 8, nr. 9, Parliamentary Papers II 2004/05, 29743, nr. 10 and Parliamentary Papers II 2004/05, 29743, nr. 6).

[67] Commissie Evaluatie Antiterrorismemaatregelen, *Naar een integrale evaluatie van Antiterrorismemaatregelen,* Den Haag: SDU Uitgevers 2009..

[68] Ministerie van Veiligheid en Justitie, *Antiterrorismemaatregelen in Nederland in het eerste decennium van de 21e eeuw*, Den Haag: Staatsuitgeverij 2011

[69] . For a critical reflection upon the evaluative study by the Ministry of Safety and Justice see: Woude, M.A.H. van der (2011) 'Is het Nederlandse terrorismebeleid écht zo degelijk vormgegeven? Een kritische beschouwing van recent uitgevoerd evaluatieonderzoek'. *PROCES, Tijdschrift voor strafrechtspleging*, 90 (3), pp. 125-141.

and balanced decision-making, but rather of pragmatism, political pressure and even plain 'panic'.

5. DISCUSSION

Whereas Agamben's *State of Exception* investigates how the suspension of laws within a state of emergency or crisis can become a prolonged state of being, this article has shown that as a result of its emphasis of risk-control and prevention, the culture of control institutionalizes the state of exception as a permanent aspect of the global order. Following Van Munster, in it, "Sovereignty is constituted in a Schmittian sense as much as bare life is subjected to actuarial criminal justice which goes hand in hand with technological processes of risk identification, administration and assessment. The dispersal and expansion of surveillance society implies that heterogeneous factors and events such as place of birth, religion, travel records, reading records, visa applications and immigration all become part of a cybernetics of control in which risk information is intrinsic to all decisions made on these issues. Prevention then is not concerned with the production of something good. Its aim is to repress anxiety and fear. It does not work towards some utopian goal, but is guided by the principle of apocalypse." [70] The culture of control is a catastrophic society. In it the exceptional condition has become the norm.

It cannot be denied that this conclusion is rather depressive. Thinking back of Garland's thesis, the ground cause for the current culture of control can be found in the great structural and cultural changes brought about by late modernity. Since these changes cannot be reversed and time will have to tell whether future cultural and structural changes will change the current social dynamics, it seems as if we are simply stuck with the culture of control and the state of exception. Garland, who warns his readers that "We face the possibility of being locked

[70] Munster, R. van (2004) 'The war on Terrorism: When the exception becomes the rule', *International Journal for the Semiotics of Law*, 17, pp. 152-153.

into "a new 'iron cage'" [71], has been criticized for painting this dark and dystopian image of the development of society and the criminal justice system. Lucia Zedner for instance suggests that one of the dangers of the 'dystopian' elements of his account is that they may serve to reinforce the feeling that the changes described are not only happening, but that they are inevitable and therewith contributing to a sense of pessimism amongst scholars regarding the possibility of a future very different from the circumstances we find ourselves in right now.[72] In a thought-provoking article on the limited impact of legal scholars on the development of counterterrorism legislation in the United States, Magulies and Metcalf state that as scholars, we need to resist an impulse to nihilism as well as the tendency to throw up our hands in despair with the lament that nothing works and all is inevitable.[73] In my opinion, the combination of *The Culture of Control* and *The State of Exception* offers possibilities to at least ponder about how to break through this dystopian spiral by focusing on the common denominator between both "histories of the present": the influence of the state and its political actors.

Although Garland is less outspoken than Agamben when it comes to holding the state and its political actors accountable for the emerging culture of control, by recognizing the changes within the political and policy context as the second set of transformative forces fuelling the culture of control, he also endorses to the impact of politics. Since the radical changes of late modernity cannot be made undone, it therefore seems fair to explore the possibilities for change focusing on the political forum, preferably within already existing structures or procedures such as the legislative procedure. The power of the state in times of terrorism, but also in general when faced with other - less se-

[71] Garland 2001, p. 204.1

[72] Zedner, L. (2002) 'Dangers of Dystopias in Penal Theory. Review of D. Garland, The Culture of Control', *Oxford Journal of Legal Studies*, 22 (2), pp. 341-366.

[73] Margulies, J. and Metcalf, H. (2011) 'Terrorizing Academia', *Journal of Legal Education*, 60, p. 471.

/ere - security threats, must be one of restraint and control. At ıll times the power of the state must be governed by a rule of nverse proportion: the broader the state's power the more ;trictly the state must be restrained by law.[74] As stated in this ırticle, it is necessary for the legislature to effectuate such con-rol, yet the legislature has become too contaminated by popu-ist politics in order to do so. Hence it seems essential to try to 'estructure the legislative procedure to improve the functioning ɔf already existing safeguards or to even build in new safe-guards. Although a full discussion of the various possibilities ranscends the scope of this article, one could for instance think ɔf intensification of the existing consultation and advisory ounds, but also of a mandatory ex-ante and ex-post cost-benefit ınalysis carried out preferably by a non-political body. [75] An ex-ante assessment in which all (competing) interests at stake with egard to a specific proposal are charted could then be used as he starting point of the parliamentary debate. In addition to an ex-ante assessment, the legislature should have the obligation to motivate the choices that are made between conflicting inter-ests. These kinds of measures should prevent the possibility of a veiled decision-making process in which, consciously or uncon-sciously, certain interests are not or hardly seriously taken into consideration. If the urgency of a matter stands in the way of an ex-ante assessment, there is always the possibility of an ex-post assessment. This type of assessment is meant to evaluate both the effectiveness as well as possible (negative or positive) side-effects of the legislation. Based on the outcome, the legislature

[74] E. Van Sliedregt, 'Euopean Approaches to Fighting Terrorism', *Duke Journal of Comparative & International Law* (20) 2010, pp. 413-429.

[75] Santillo, D. en Johnston, P. (1999), "Is there a role for risk assessment in precautionary legislation?", *Human and Ecological Risk Assessment*, 5, pp. 923-932. Also see: Klein Haarhuis, C. & Niemeijer, B. (2008) 'Wetten in werking. Over interventies, werking, effectiviteit en context', *Recht en Werkelijkheid*, 29(2), pp. 29-31; Woude, M.A.H. van der (2010) "Voorzorgsstrafrecht: zorgen voor inzichtelijke keuzes. Een eerste aanzet tot een ex post- en ex ante-evaluatiemodel voor de wetgever". In: Hildebrant, M. & Pieterman, R. (Eds.) *Zorg om Voorzorg* Den Haag: Boom Juridische Uitgevers, pp.77-106.

can decide whether it is necessary and advisable to maintain, to change or even to repeal legislation.[76]

Criminal Law is a powerful tool in the hands of the sovereign state especially considering the ongoing development of a more preventive, actuarial, criminal law. Although some threats might require and justify an preventive response by the legislature, the current tendency seems to be that the general fear of crime and nuisance is too easily used as an excuse for more progressive criminal legislation interfering with everyday life of all citizens. Bearing in mind the opening quote by Agamben, in the culture of control the surge for security has become one of the most important tasks of the state as well as the source for legitimizing an ongoing dispersal and expansion of control. To end this disturbing development of society in which the exception has become the norm and which undermines the foundations of the Dutch constitutional state, it is necessary to somehow guard the legislature against populist politics. Or as 't Hart puts it: "A democratic constitutional state can only flourish on the premise of a certain reluctance of politics, of its willingness – not only in theory but also in daily practice – to be bound by the preconditions of the Rule of Law and therewith the willingness to accept a limitation of its own abilities."[77]

[76] Feldman has proposed four criteria that should always be taken into account when determining the legality of counterterrorism legislation and therefore could be incorporated in an ex-ante analysis: (i) there must be a clear necessity for restrictive measures, (ii) restrictions must go no further than required, (iii) measures must be controlled by law and (iv) law must be cast in such a way to make sure that interference with liberty is clearly and rationally related to the aim of protecting security. Feldman, D. (2006) 'Human Rights, Terrorism and Risk: The Roles of Politicians and Judges', 19 *Public Law*, pp. 364-371.

[77] Hart, A.C.'t (2001) *Hier gelden wetten, over strafrecht, openbaar ministerie en multiculturalisme*, Deventer: Gouda Quint, p. 124.